

Enhancing the level of consumer protection in China: A reform
proposal for the ODR system



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จุฬาลงกรณ์มหาวิทยาลัย

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แนวทางการพัฒนาระบบรับข้อพิพาทออนไลน์เพื่อยกระดับการคุ้มครองผู้บริโภคในประเทศจีน



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วิทยานิพนธ์ฉบับนี้ ศึกษาข้อจำกัดของการระบบรับข้อพิพาทที่เกิดขึ้นระหว่างผู้บริโภค กับผู้ประกอบการธุรกิจแพลตฟอร์มออนไลน์ในปัจจุบัน โดยมีวัตถุประสงค์เพื่อให้ข้อเสนอแนะในการเพิ่มประสิทธิภาพระบบการรับข้อพิพาทออนไลน์(ODR) เพื่อแก้ไขข้อพิพาทดังกล่าว โดยอาศัยการศึกษาเปรียบเทียบกับกฎหมายและประสบการณ์ในต่างประเทศ วิทยานิพนธ์ฉบับนี้มีสมมติฐานว่าการศึกษาเปรียบเทียบกับกฎหมายและประสบการณ์ในต่างประเทศจะช่วยให้ผู้เขียนให้ข้อเสนอเพื่อการปฏิรูประบบการรับข้อพิพาทออนไลน์ (ODR) ซึ่งเป็นไปตามบริบทและแนวทางดั้งเดิมของประเทศจีนในปัจจุบันอันจะนำไปสู่การเพิ่มขึ้นของระดับการคุ้มครองผู้บริโภค โดยผู้เขียนได้เสนอบทวิเคราะห์และให้ข้อเสนอแนะดังนี้(1) อธิบายถึงแนวคิดพื้นฐานที่เกี่ยวข้องกับระบบการรับข้อพิพาทออนไลน์(ODR) เพื่อแสดงลักษณะของระบบการรับข้อพิพาทออนไลน์ (ODR) (2) นำเสนอปัญหาจากกรณีศึกษาและวิเคราะห์กลไกการรับข้อพิพาทในปัจจุบัน เพื่อแก้ไขข้อพิพาทดังกล่าว แสดงถึงข้อบกพร่อง และแสดงคุณลักษณะที่จำเป็นต่อการรับข้อพิพาทพาณิชย์อิเล็กทรอนิกส์(E-disputes) (3) ทำการศึกษาพัฒนาการของระบบการรับข้อพิพาทออนไลน์ (ODR) ในประเทศจีนและแสดงให้เห็นถึงความบกพร่องของระบบการรับข้อพิพาทออนไลน์(ODR) ของประเทศจีนในปัจจุบัน (4) ให้ข้อเสนอแนะเพื่อปฏิรูประบบการรับข้อพิพาทออนไลน์(ODR) ในประเทศจีนเพื่อเพิ่มระดับการคุ้มครองผู้บริโภคโดยอาศัยการเปรียบเทียบกับEU ADR Directive ODR Regulation และ UNCITRAL Technical Notes on ODR

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This thesis examines the limits of current dispute resolutions to resolve disputes between consumers and online platform economics entities to make recommendations to optimize the ODR system to resolve these disputes. Therefore, there is a hypothesis of this thesis that by reference to the legislation and experience abroad, the author should make a proposal on the reformation of the current ODR system based on the context and tradition of the ODR system in China to enhance the level of consumer protection. In the thesis, the author performed analyses and made suggestions as follows: (1) to clarify some basic concepts related to the ODR system to demonstrate the characteristic of ODR; (2) to demonstrate the issues from the case studies and analyze the current disputes resolution mechanism to resolve the disputes aforementioned to represent deficiencies to show which features E-disputes pursue; (3) to make research on the development of ODR system in China and demonstrate the deficiencies of the current ODR system in China; (4) to make recommendations on the reformation of ODR system in China by referencing to EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR to enhance the level of consumer protection in China.

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ABBREVIATIONS

ADR	Alternative Disputes Resolution
ODR	Online Disputes Resolution
SMEs	Small Medium Enterprise
OTA	Online Travel Agency
CNNIC	China Internet Network Information Center
RCEP	Regional Comprehensive Economic Partnership
CAI	Comprehensive Agreement on Investment
CIETAC	China International Economic and Trade Arbitration Commission
CODR	Crowdsourced Online Dispute Resolution
TFEU	The Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law

Chapter 1 Introduction

E-business has been omni-oriented developed in recent years in China, online platform economic entities as whole acquire the stunning development, from the infant industry to the mature economic areas, to promote the economic and social transformation in the era of Internet in China. However, due to the disorderly development and deficiencies of governance in this field, gradually transforming into the oligarch monopoly competition, at this period, these big online platform economic entities start to take advantages of their position to infringe the consumer's rights. One of the aspects that need to be addressed is the field of disputes resolution mechanism. These big online platform economic entities use the loophole of legislation to create an advantageous and privileged condition, as the combination between the standard form clause and "one-click" user service agreements, virtually preclude the consumer to exercise recourse rights. With the trending of domestic and global market circumstances begin to change, disputes resolution mechanism becomes an area that needs to be upgraded and optimized. To resolve the disputes arising out of the daily online consumption, which is low-value and high volume, it's critical to provide the consumers or users with a well-suited resolution. Online dispute resolution (ODR), is designed to provide an efficient, flexible and cost-effective resolution, to complement the drawbacks from the traditional offline alternative disputes resolution mechanism and judicial system. If conducting a brief historical retrospect of China, there is close and long relationship between ODR and Confucianism. Some of essence and core value of Confucianism bring about the consensus of obligation in the whole society's favor could nurture foundation, which create conditions and circumstances for China to adopt substance of ODR to resolve consumer disputes to make the strength of "the art of compromise" of Confucianism having an effect. Nowadays, the function of ODR system generate new values to resolve disputes in the era of E-business.

Therefore, it's one way to consider using and optimizing ODR system to facilitate these consumer disputes.

1.1 Background and Target Issues of the Study

1.1.1 Current Status Analysis

Nowadays, it's in an acceleration model of new-round technological and industries revolution and a deepening evolution of intelligent manufacturing. In addition, the digital economy is booming in continuous innovation and rapid development of the situation. As the scale of e-commerce in China continues to expand, e-commerce began to enter a period of relatively stable development from a period of ultra-high growth in 2016, however, in the first half of 2020, online retail sales of goods still grew 14.3% year-on-year. E-business continues to play an irreplaceable role in the development of the national economy, especially during the outbreak of the Covid-19 pandemic.¹ At the same time, according to statistics from the General Administration of Customs, China's total imports and exports of cross-border e-commerce reached 186.21 billion CNY in 2019, an increase of 38.3% year-on-year, of which 94.4 billion CNY was exported and 91.81 billion CNY was imported, with exports exceeding imports for the first time.² With the digital economy in China enters into a relatively stable period, the circumstance and trend of the domestic market and international market also have begun to change.

From the infrastructure resources' aspect, according to the 46th Statistical Report on Internet Development in China³ released by China Internet Network Information

¹ 2019 - 2020 China E-commerce Development Report, Global E-Commerce Conference, Xiamen, 9.9.2020.

² Ibid. Footnote 1.

³ In 1997, China's competent departments authorized China Internet Network Information Center (CNNIC) to organize relevant Internet entities to jointly carry out the Statistical Survey on Internet

Center (CNNIC)⁴, up to June 2020, China had 940 million netizens, increasing 36.25 million over March 2020, and its Internet penetration had reached 67.0%, up 2.5 percentage points over March 2020. The number of mobile Internet users in China had reached 932 million, up 35.46 million over March 2020. The proportion of China's netizens accessing the Internet via their mobile phones had amounted to 99.2%, roughly unchanged from March 2020. The size of rural Internet users was 285 million or 30.4% of China's total netizen population, up 30.63 million over March 2020, while that of urban netizens had reached 654 million or 69.6% of China's total, up 5.62 million from March 2020.⁵ With the booming of development of E-business in China has been entered into a relevant mature stage, more and more issues arising out of this stage, which much more involved in individual's benefit. In addition, the trend of the whole global economy has gradually changed and there is a trade conflict between China and the USA since 2018⁶, combined with the focus of economic development of the world gradually moves from the West into the East. No matter what changes from the inside or outside China, they all have a great impact on the policies and legislation enacted and to be enacted in recent years. The author will demonstrate the variations in domestic market and international market between the past and the present situation as follows:

1.1.2 Dynamic Trend

Development in China and regularly release the Statistical Report on Internet Development in China at the beginning and middle of each year. Ever since then, CNNIC has published 45 reports.

⁴ China Internet Network Information Center (abbreviated as CNNIC) is an administration and service organization set up on June 3, 1997 upon the approval of the competent authority and undertakes the responsibilities as the national Internet network information center.

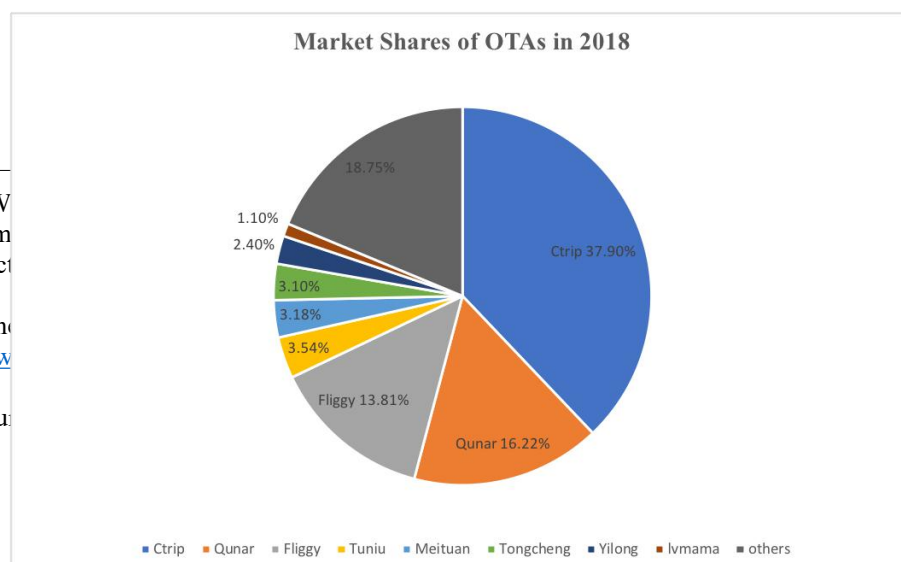
⁵ All data came from the 46th report as mentioned above.

⁶ Swanson, Ana (July 5, 2018). "Trump's Trade War with China Is Officially Underway". The New York Times. Retrieved May 26, 2019. The China–United States trade war (Chinese: 中美贸易战; pinyin: Zhōngměi Màoyìzhàn) is an ongoing economic conflict between China and the United States. President Donald Trump in 2018 began setting tariffs and other trade barriers on China with the goal of forcing it to make changes to what the U.S. says are "unfair trade practices" and "intellectual property theft".

1.1.2.1 Domestic Market

With the growth of E-business, Internet platform economics⁷ as a whole acquire the outburst of development, from the infant industry to the sophisticated economics. While with the advent of the big data era, the Internet platform economics has become a significant driving force for China's economic transformation and social development. Nowadays, the disorderly expansion of capital has led to the formation of oligopoly in the economic field of Internet platforms, and many potential risks have emerged. Those big Internet platform entities take advantage of their position in the market to adopt various ways to sneakily infringe the consumers' rights. However, on the basis of the data released, the big entities have taken up the majority of market shares in the relevant market, taking the OTAs market and Shared bicycle market as examples, in OTA market, the Top 3 corporations of Ctrip, Figgy and Qunar have taken up the 67.9% shares of the total ones⁸. There is a chart demonstrated the market shares of OTAs.⁹

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⁷ See W platform “transact

⁸ See the <https://w>

⁹ Resou

ns. Such non type is

Figure 1 Market Shares of OTAs in 2018

Also, according to the Annual Report on the Development of Shared Mobility in China (2019), on the basis of statistics released by the Ministry of Communications, by the end of August 2019, there were 19.5 million Internet rental bicycles in China, covering 360 cities in China. The number of registered users exceeded 300 million, and the average daily order reached 47 million. Compared with the ups and downs of the previous two years, the growth rate of the industry in 2019 is relatively stable and tends to be rational, and gradually forms the development of the “Tripod” pattern of Helloglobal, Mobike and Didi bike. As of October 2019, Helloglobal, Mobike, and Didi bike together accounted for about 95% shares of the overall shared bicycle market.¹⁰ To consider the status of the relevant market, the consumers are even in a weaker position. Therefore, it becomes an urgent and necessary task to enhance the efficiency and efficacy of tools for protecting consumer rights.

1.1.2.2 International Market

Since 2018, the global economy has emerged some bad signals, like the consumption demand around the world get a decline, the sharp decrease in the cross-border investment, the real economy is sluggish, and the rate of growth is not

¹⁰ See 2020 China shared bicycle market prospect research report-market competition pattern and development potential evaluation. < <http://baogao.chinabaogao.com/qiche/507788507788.html>>.

optimistic, which all shows there are changes in economic development happened in the world market. Moreover, trade conflicts that happened in the various regions are critical risks towards economic and social development. When the world is hit by unexpected pandemic Covid-19, the situation and condition of the world economy get worse. While there are still amounts challenges and difficulties that need to be handled, some achievements have been made in 2020, being a promising picture for all parties related and the whole world like On November 15, 2020, the fourth Regional Comprehensive Economic Partnership (RCEP) Leaders' Meeting was held by video, after which a total of 15 Asia-Pacific countries, including 10 ASEAN countries and China, Japan, South Korea, Australia and New Zealand, officially signed the Regional Comprehensive Economic Partnership Agreement, which marks the launch of free trade zone with the most populous, the largest economic and trade scale, and the most promising development. And the China-EU Comprehensive Agreement on Investment (CAI) has been made on December 30, 2020, which also being treated as the landmark of the relationship between China and the EU. In the meantime, China has promulgated the "The Fourteenth Five-Year Plan"¹¹ and improve the new pattern of development to adapt to this new circumstance. China will form a dual-circulation focus on the domestic market, which means it will shift the past pattern of development based on the export-oriented model to domestic consumption. It also means China should optimize the environment and condition of domestic consumption market to promote and create new growth areas in the economy.

1.1.3 Target Field

¹¹ The Five-Year Plan, known as the Five-Year Plan for National Economic and Social Development of the People's Republic of China, is an important part of China's national economic plan as a long-term plan, which mainly for planning major national construction projects, productivity distribution and important proportional relationships of the national economy, etc., and stipulates the goals and directions for the vision of national economic development.

E-business is a traditional transaction based on internet technology, to expand the transaction scale of commodities and services in an unprecedented status. The stakeholders in E-business often involve online platform economic entity, trader and customer. In the service transaction market, these online platform economic entities also could be direct provider like the shared bike, shared portable charger and so forth. Like Taobao and eBay, these online platform economic entities will often build the internal disputes resolution mechanism to resolve the disputes between the trader and customer, for instance, Crowdsourced online dispute resolution (CODR) of Taobao. According to the statistic released by Alibaba Public Jury, the number of success to exercise the cases is 1.6 billion in a relatively efficient and efficacy way and the charge is free. Besides, according to Article 25 of the Law of the PRC on the Protection of the Rights and Interests of Consumers, consumers have the right to refund the goods without reason in seven days.¹² However, if disputes happen between the customers or users and these big online platform economic entities, it seems there isn't convenient and easy access for consumers or users to exercise their rights. In this thesis, author attempt to balance the power between customer and these online platform economics entities based on the public interest to reach substantial equality. Therefore, the discussion in the research of the ODR system in China only focuses on the resolution of disputes between customers or users and these online platform economic entities.

Based on the documentary research and statistical analysis, there is a hypothesis proposed by the author, through the reformation of the ODR system in China by reference to the EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR, will enhance the efficiency and efficacy of consumer protection in disputes resolution field.

¹² Article 25 of the Law of the PRC on the Protection of the Rights and Interests of Consumers, traders using the network, television, telephone, mail order and other ways to sell goods, consumers have the right to return the goods within seven days from the date of receipt, and without stating the reason, except for the following goods.

1.2 Statement of the Problem

With these big online platform economic entities taking up the status of near monopoly, they often take advantage of legal gaps or loopholes to create an advantageous position over consumer or even deprive of consumers' recourse rights by setting up obstacles and troublesome. In Chapter 3, first of all, the author will analyze two typical cases that happened recently in "OTAs" industries and "shared bike" industries, which both exposes the issue of deficiency of current disputes resolution mechanism for consumer protection. One of the most critical issues that should be paid attention to is resolving disputes between consumers and these big online platform economic entities. For instance, these corporations usually use standard form clauses, combined with the principle of autonomy of will in contract, result in unreasonably increase the economic burden on the consumer, which is much higher than the amount in dispute. And then, the author attempts to analyze the effect of resolving consumer disputes arising out of online business, which are low-value, high volume, by the current disputes resolution mechanism including in-court system and out of court system, to illustrate the existing deficiencies. Through the relative comprehensive analysis, the exposure of the problem is the current dispute resolution mechanism in China couldn't well suit to resolve consumer disputes. In addition, the ODR system as a disputes resolution mechanism, being deemed as efficient and cost-effective for dispute resolution, could be the most suitable system to resolve this type of dispute. Based on the rules and practices in China and EU, by reference to the EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR, therefore, the author attempts to make recommendations on the modification for current ODR system in China, to resolve the consumer disputes against online platform economic entities in a better way.

1.3 Review of Previous Studies

On the basis of analyzing the previous studies which have proposed some recommendations to optimize the ODR system in China from different aspects. Mainly, they are could be categorized in ODR mechanism apply for the specific institution to resolve disputes from specific industry or ODR mechanism as innovative disputes mechanism could be applied for all kinds of industries like litigation. Besides, there are many researches and studies focusing on the application of ODR system in cross-border transaction, the ODR system often is used for resolving the disputes between the consumers and SMEs. Although ODR system can be used to resolve the disputes arising out of the domestic market transaction or cross-border transactions, we could still realize the demands are slightly different when the ODR system is applied. In the international market, people more focus on the demand from consumers and merchants. Due to the barricades from cross-border transactions, the parties who involved in this transaction expect there is a mechanism they can trust and sharply cut the cost and risk they should bear if resorting to other disputes resolution mechanisms to resolve cross-border disputes. What the slight differences between the domestic market and cross-border market when the same transaction happened? Taking China as an example, if there are consumer disputes arising out of consumers and merchants in the domestic market, in particular online consumption, according to the law of China on the Protection of Consumer Rights and Interests, consumers have the right to return the goods purchased online without reasons in seven days from the date they receive goods unless the qualities of goods are not suitable to withdraw. In addition, there are internal ODR systems provided by these online intermediary platforms which successfully resolve the disputes from the consumers and merchants acquiring relatively remarkable achievements. Besides, consumers could remark the rate of goods or services provided by merchants on Websites completely available to the mass, which could be a driven forcing the

merchants intent to resolve the disputes with consumers in a fair and just way. Therefore, although the current mechanism to protect the consumers' interests against online SMEs is not in an impeccable way, it's enough to cover the majority of people and disputes happening in the role of consumers and merchants. It's a status of disputes resolution mechanism that could not exist in cross-border markets which there are no unification rules for consumers protection and internal mechanism couldn't be applied to resolve the disputes from cross-border transactions. Based on these differences, therefore, we should shift our attention to different shareholders of E-business when referring ODR system to resolve the consumer disputes happen in the domestic market. Through making research on the previous studies, it could be noticed there is lack of studies to make discussion on the possibilities of ODR system to resolve consumer disputes against these big online platform economic entities in domestic market. Therefore, in this thesis, based on the impediments faced by consumers to exercise their recourse rights against these big online platform economic entities, the author makes a proposal only focusing on reforming the ODR system in China to adapt to resolve this sort of consumer disputes.

1.4 Research Questions and Research Hypothesis

The research question sought to be answered is: How should make reformations for the current ODR system in China that make more suitable to resolve the disputes between consumers or users and these big online platform economic entities so that improve the level of consumer protection?

To answer this key question, the very first question that should be answered is analyzing the effectiveness of the current dispute resolution mechanisms to resolve disputes between consumers or users and these big online platform economic entities. In a nutshell, the first question should be answered in this thesis: Could the consumers or users resort to the current dispute resolution mechanism in China to smoothly exercise recourse rights? On the basis of the previous studies, the characteristic of the

ODR system could be an effective tool to resolve the disputes which are low-value, high volume and the disputes also could be conducted in a long distance. Therefore, the second question should be answered in this thesis: What kind of deficiencies of the current ODR system in China as impediments to prevent it suitably resolving the dispute between consumers or users and these big online platform economic entities? After analyzing the status of the current dispute resolution mechanism to resolve the disputes between consumers or users and these big online platform economic entities and the issues that exist in the current ODR system in China for resolving these disputes, this research will look into the EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR and practice and experience of Member States in EU. Through the comprehensive analysis of the legislations mentioned above with the study of the experience and practice of Member States in EU, to discuss the advantages and disadvantages among these legislations. Then, the author will make a proposal as an answer to the research question.

The tentative answer to this research question is as follows: EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR combined with the experience from the EU Member States could be as references, but there exists different context and tradition between China and other States, hence, it is not sensible to completely transplant the legislation abroad. Therefore, in this research, by reference to the legislations and experience abroad, the author should make a proposal on the reformation of the current ODR system based on the context and tradition of the ODR system in China to enhance the level of consumer protection.

1.5 Research Objectives

By the virtue of the transformation in the domestic and international market, the level of protection of consumer rights should be improved. However, based on the case studies and statistical analysis, in the author's view, the current dispute resolution systems including the judicial system and extrajudicial system designed to protect

consumers' rights to defend their interests are far below the level of satisfaction. While there are many issues or aspects could be addressed and optimized to strengthen the level of consumer protection, in this thesis, the author will attempt to make suggestions in the field of disputes resolution mechanism to reduce the barricades for consumers to exercise their recourse rights, to some extent, ultimately, may enhance the degree of consumer protection in the whole society especially consumption market. By means of the cases researching and analyzing, it demonstrates the deficiencies and inefficiencies of the system of consumer protection, in particular, when these big online economic entities are in an advantageous position over consumers, it will cause virtual inequities if the courts incline to adjudicate disputes based on the voluntary principle of contract law over the consumer protection law, for instance, standard form contract and "one-click" user services agreement are used to make privilege position for these big platform economic entities to unconscionably augment the cost burden on consumers to exercise their recourse rights. Because of the lack of government department supervision, consumers have no choice but acceptance when these big entities all adopt the same way. To investigate the efficiency and efficacy of the current disputes resolution mechanism to resolve the disputes arising out of daily online consumption, the author makes a thorough analysis on the litigation, arbitration, traditional conciliation/mediation and so forth. However, after the analysis and comparison, the current offline dispute resolution mechanisms are all not well-suited to resolve disputes with the quality of low-value and high volume. Therefore, Online disputes resolution (ODR) is a mechanism which could be conducted based on the application of technology and could make the whole process of resolving dispute online, which may become a better tool to resolve the disputes aforementioned. The objective of the thesis is to upgrade the current ODR system in China through the comparative analysis of EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR and on the basis of practice

and traditions in China and EU, to improve the level of consumer protection from the field of disputes resolution mechanism.

1.6 Scope of the Research

Because of the change of position of the E-business industry in the economic structure of the whole society, these big online platform economic entities gradually take sheer predominant position facing the transaction with consumers or users. However, amounts of issues arise from the abuse of power by these big online platform economic entities which make the protection of consumer's interest couldn't be satisfied. One of these issues that should be focused on is dispute resolution mechanisms, it is a final weapon for consumers to exercise their recourse rights and defend their interest, therefore, dispute resolution mechanism should provide at least actual fair and efficient conditions for disputants to resolve their disputes. In the era of the Internet, there is no limitation for the distance of transaction of goods or services, which means any consumer or user could conduct a transaction with any company that operates their business based on Internet technologies. While the transaction between consumer or user and merchant or online platform economic entities could be conducted online, once a dispute arises, these big online platform economic entities will take advantage of the loophole or blank of legislation to create the advantageous position over jurisdiction, which make the consumers or users bear the unreasonable cost in the pre-stage compared to the value in dispute. Due to there are different features if the transaction happens different shareholders, in this thesis, the updating and optimizing dispute resolution mechanism only focus on the dispute between consumers or users and these big online platform economic entities. First of all, in this research, the author will attempt to analyze if the current disputes resolution mechanism could suitably resolve the dispute between consumers or users and these big online platform economic entities in a just, efficient and cost-effective way. At the same time, in this research, the author will study the strengths and shortcomings of the

EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR as references to make recommendations on the reformation of the ODR system in China. Due to the different traditions between China and the West, except for the study abroad, the study of the development of the current ODR system in China will also be in this research. Ultimately, based on the tradition and practice of China combined with referring to legislations and experience abroad, there are some recommendations on reformation of the ODR system in China to make it more suitable to resolve the disputes between consumers or users and these big online platform economic entities.

1.7 Research Methodology

In this research, the author will search and organize the relevant domestic and international kinds of literature to outline the research paradigms and methods and determine the ideas and methods suitable for this study by analyzing the theoretical basis, research paradigms, research methods, and research results. The author will apply for the quantitative and qualitative analysis to make discussion on this issue. The quantitative analysis will be applied to the cases studies and statistical collection, to demonstrate the issues that happened in China. The qualitative and documentary research will be applied to the previous studies and the comparative analysis of EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR to analyze the advantages and disadvantages when it is applied for reformation of ODR system in China. In this research, the author will go through the details of two types of cases that happened recently in OTAs industries and “shared mobilities” industries, to analyze the facts and effect and search the court precedents for similar cases to construct the statistical graphs. At the end of this thesis, there will be a full comparison including practices between China and the EU, to make the rules and practice abroad well-tailored to fit in resolving the issues in China’s society.

1.8 Significance and Contributions

The development of internet technology not only propels the online economy market forward, and also brings new issues from the industries. Technology is neutral, which could be executed to result in the harmful effect, and even more important is resolving these new problems through the application of technology like ODR, an innovative outcome of ADR based on the internet technology. As the author mentioned above, the ODR may become the most suitable mechanism to address consumer disputes. Therefore, in this thesis, the author will, on the basis of analyzing the issues that happened in China via some cases, demonstrate the deficiencies of consumer protection in the aspects of disputes resolution, to make a proposal to optimize the current ODR system based on the comparative analysis of EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on Online Dispute Resolution, to enhancing the level of consumer protection to fully exercise consumer's rights and, also, as an important part of operation the society, to achieve the goal have been constituted in the latest policies and program "The Fourteenth Five-Year Plan" in China. There are several contributions in the thesis as follows:

1. make discussion on how to develop dispute resolution mechanism further in China in order to well-suit the internet era.
2. enhance the efficiency of consumer protection from the aspect of dispute resolution mechanism
3. make some suggestions on the reformation of the ODR system in China
4. make discussion on the issue of cohesion between the domestic dispute resolution mechanism and cross-border dispute resolution mechanism.

Chapter 2 Basic Concepts related to Online Disputes Resolution Mechanism

2.1 Introduction

With the development of innovative technologies, to adapt the unconventional demands of people to resolve the disputes, especially E-disputes, disputes resolution mechanisms not only include in the judicial system, but also extrajudicial systems such as ADR methods and ODR methods. Online dispute resolution mechanism (ODR) is designed for resolving disputes based on the application of innovative technologies, it is especially suitable to resolve disputes which are low-value and high volume. To facilitate disputes under the ODR mechanism not limit by distance, it is treated suitably to resolve E-disputes that arise out of transactions based on the Internet technologies. Therefore, to make it more suitable to resolve the dispute between consumers or users and these big online platform economic entities, the author believes this research should begin with the discussion of what ODR is.

This chapter mainly discusses the definition of ODR, to explore what characteristics of ODR make it different from other dispute resolution mechanisms. Due to the history of the development of the ODR, there is a special connection between ADR and ODR, hence, to discuss what connection between ADR and ODR as another aspect to understanding the features and qualities of ODR. In the final part, this research will focus on the expected purpose and effect of design ODR, because it will reflect the reason why ODR should be an innovative disputes resolution mechanism to resolve disputes related to E-business, which will make us more comprehend the characteristics of ODR.

2.2 The Definition of ODR

Online dispute resolution is disputes resolution originating from the electronic technologies, which represent the facts about the growth and development of ODR is the outcome alongside the rapid iteration of technologies and the dramatic change of individual lifestyle based on the Internet era. In 1996, David Johnson and Henry H. Perritt Jr. build the Virtual Magistrate to provide an efficient method to facilitate the disputes between Internet service providers and subscribe, although it was designed to only resolve one certain dispute, it still huge progress at that time. In 1999, the Online Ombuds Office operate another ODR project providing mediation service for beyond 200 cases, it could be deemed as the first beginning of the spread of the ODR system to resolve disputes by Internet and Web. With the progress made step by step, in 2005, there are more than 1 million disputes related to the Internet that could be facilitated by SquareTrade.¹³ Giving a brief historical retrospect of the development of ODR, there is a fact that could be noticeably pinned down, the revolution of a new generation of technologies spawn the demands for change in dispute resolution mechanisms. To fully understand the concepts and values of ODR, the ADR should be analyzed in the first place. Alternative disputes resolution is designed for supplementing the shortcomings of the traditional court system which includes negotiation, mediation, arbitration and other ways, as an extrajudicial system to provide more efficient, friendly models to facilitate disputes. In fact, there is no official definition of ODR which could accurately describe it, the ODR system has a different meaning for different people. However, based on the history of the development of the ODR system, the ODR system often mirrors the method adopted by ADR but the usage of Information and communications technology (ICT). Therefore, in general, the definition of ODR is an extrajudicial system based on

¹³ Ethan Katsh, *The Nus and Bolts of ODR*, 23 GPSolo 35 (2006).

Information and communications technology with ADR methods, providing a more efficient, cost-effective, and simple process to resolve disputes.¹⁴ Because of the inaccuracy of the definition of ODR, in literature and other academic studies, there are other synonymous terms, for instance, electronic ADR (eADR), online ADR (oADR), Electronic Dispute Resolution (eDR) and Internet dispute resolution (iDR).¹⁵ ODR includes different technologies, mainly could be categorized into two classifications. One is the participation of third parties (arbitrator or mediator) which means the facilitation process involves the third parties handling the procedures of disputes resolution through these new technologies, make the disputes resolution process simpler and more efficient. Another part is the pure adoption of technologies to resolve disputes. On the basis of the complexity of cases, the different model of the ODR process will be applied or mixed, for instance, various technologies like information explorer, auto-resolver solution, dynamic case management system and distance collaboration, which could be applied in different stages of the dispute resolution process.¹⁶ To sum up, the ODR process could designed for different issues through the application of ODR technologies. Therefore, when it comes to optimize the ODR system, one of essential part is making comprehensive analysis of the issues need to be resolved, which will be fully discussed in Chapter 3.

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2.3 The Connection between ADR and ODR

As discussed above, there is an inseparable relationship between ADR and ODR. In general, many authors consider the ODR is mainly the application of technologies with ADR methods, which means the main disparity between ADR and ODR is ODR

¹⁴ Nwandem, Osinachi, Online Dispute Resolution: Scope and Matters Arising (December 24, 2014).

¹⁵ Karolina Mania, Online dispute resolution: The future of justice, *International Comparative Jurisprudence*, Volume 1, Issue 1, 2015, Pages 76-86.

¹⁶ Lucinda Case, *the Impact of ODR Technology on Dispute Resolution in the UK*, Thomson Reuters, Spring 2016.

process could be operated at a long distance. Therefore, for some type of ODR, making overall analysis about ADR is in the first place, which will make it easier to understand the values and function of ODR. If parties concerned both agree to seek out of court system to resolve disputes, on the basis of methods of dichotomy, it could be called alternative disputes resolution which is different from litigation system mainly including negotiation, mediation, conciliation and arbitration. Among them, the development and application of arbitration and mediation are increasingly booming. If disputants choose the arbitration to resolve disputes, whose main process shall be the submission of disputes to the arbitration tribunal and there is a neutral third party called arbitrator will make an arbitral award based on the evidence and material, in particular, an arbitral award is final and binding. Due to the flexibility and simplicity of procedures of ADR, in a comparison with the court system, it represents more efficient and cost-effective. Conciliation/ Mediation as another popular alternative dispute resolution is an informal way to resolve disputes by themselves, although there is a third party called mediator/conciliator involved, not like an arbitrator, they don't have the right to make a final decision on their own. The most significant function of mediation is providing assistance and advice for disputants to reach an agreement in favor of their benefit. Hence, to analyze the effect of conciliation/mediation, the disparity compared with arbitration and litigation is that it often keeps good relationship and cooperation between disputants. In order to design a more suitable way to resolve the disputes related to Internet Age (especially E-disputes), ODR system tends to exploit the advantages of efficiency and simplicity to the full which offer an arena make the disputes could be facilitated at long distance, for instance, online settlement, online arbitration online mediation, and intermediary platform.¹⁷ Based on the brief research, the development of ODR system depends on the broad application of Internet technologies mainly aiming at E-disputes. Hence,

¹⁷ Heuvel, E. V. D. "Online dispute resolution as a solution to cross-border e-disputes: an introduction to ODR." (2000).

there are lots of compatibilities and similarities between ADR and ODR, but more and more variations of ODR process are designed to correspond to the demands of Internet Era, including some of them purely depends on the innovative technologies.

2.4 The Expected Purpose and Effect of Design of ODR

On the basis of the strong connection between ADR and ODR, therefore, some of the assumptions and values of ODR is similar to ADR. ADR as an extrajudicial system enhance the opportunity of access to dispute settlement and provide a more flexible, efficient dispute resolution channel correspond to the business environment.¹⁸ Due to the main types of ODR process adopt Internet technologies with ADR methods, which means one of the significant qualities of ODR is improving the efficiency of ADR methods by means of new technologies, at the same time, using Internet technologies could achieve the operation of the ODR process in a long-distance, making ODR process is a more cost-effective than ADR like the reduction of unnecessary travel expenditure. Because of the quality of unlimited distance, the research of application of ODR often focuses on the cross-border business to consumer transactions which are hard for a consumer to take legal action against a merchant. Meanwhile, the E-disputes are often involved in resolving disputes which are low value and high volume. Therefore, the purpose of the design of ODR is to provide more flexible, efficient and cost-effective ways to resolve disputes which are low value and high volume, especially happened in a long distance. It is precisely because the expectation of design of ODR mechanism which makes ODR procedures adaptive to the demands of disputes resolution related to E-business.

¹⁸ RABINOVICH-EINY, Orna and Katsh, Ethan, Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment (2014). 1 International Journal of Online Dispute Resolution 5 (2014).

2.5 Concluding Remarks

ODR mechanism is an extrajudicial system to resolve disputes which most of which are related to E-business based on information and communication technologies. Until now, there is no accurate official definition of ODR, for different issues, it will have a different process to resolve them. Although there is no exact definition about ODR, through making classification, it is known that ODR system could be classified into two types, one type is involved with participation of the third party to facilitate the process through information and communication technologies, another one is the application of pure technologies, which demonstrate ODR system is dispute resolution mechanism based on the application of innovative technologies. And through analyzing the connection between ADR and ODR, there are amounts of similarities between the two of them, for instance, most of the designs of ODR systems adopt ADR methods with the application of technologies. With regard to the values and function of ADR, it is designed to provide the chances of an extrajudicial system for people who are reluctant to submit their disputes to the court and also would like to resolve disputes in a more efficient and flexible way or to keep a good relationship with the other party by resolving disputes under the process of conciliation or mediation. Due to the similarities between ADR and ODR, some values of ODR mirrors the values of ADR when it applies to resolve disputes. Therefore, it is a goal for ODR to achieve that provide a more efficient and flexible way to resolve disputes. However, although there are lots of similarities between ADR and ODR, there exist disparities between two of them, for instance, due to the application of innovative technologies on ODR process, most of them pursue to resolve the dispute at a long distance, hence, it is often applied to resolving disputes happen in a cross-border transaction. Therefore, compared to ADR, the ODR system tends to reduce unnecessary costs which should be borne by a plaintiff in the pre-stage process such as travel expenditure, which provides a more cost-effective way to

resolve disputes. From the study about the expected purpose and effect of the design of the ODR system, the ODR system is designed to resolve disputes which are low-value, high volume and could be conducted in a long distance, in a more efficient, flexible and cost-effective way.



Chapter 3 Cases Analysis: Comprehensive Analysis of Exercising Recourse

Rights under Current Disputes Resolution Mechanism

3.1 Introduction

The E-business industry gradually develops from the infant stage to the mature stage, with the big online platform economic entities take up the majority shares of the relevant market, the position between consumers or users and these big online platform economic entities has dramatically changed. These big online platform economic entities have a predominance position over consumers in the relevant market that make them take advantage of superiority conditions to damage the interest of consumers, disputes resolution mechanism is one of the fields that should be optimized and updated to protect the consumer's interest against these big online platform economic entities. Recently, there are many cases that reflect this issue, according to the legislation and the current practice of these big online platform economic entities, they often use "standard form contract" and "one-click" model to manipulate the location of the jurisdiction of disputes, which is extremely unfavorable for consumers or users to exercise their recourse rights.

This chapter mainly discusses what issue has been happened between consumers or users and these big online platform economic entities in the dispute resolution field. In this chapter, the author will elaborate on two typical cases that happened recently in China, Online Ticketing Consumers v. OTAs and Users of "Sharing Bicycle" v. Ofo, to illustrate the impediments for consumers or users to exercise their recourse rights if the disputes arising out of a transaction between consumers or users and these big online platform economic entities. And then there is a discussion to comprehensively analyze if the current disputes resolution mechanism including litigation, arbitration, conciliation or mediation and reformation of litigation could

suitably resolve disputes between consumers or users and these big online platform economic entities.

3.2 The Research of Cases

3.2.1 Online Ticketing Consumers v. OTAs

Trip.com Group Limited (formerly Ctrip.com international) provides travel services including accommodation reservation, transportation ticketing, packaged tours and corporate travel management. Founded in 1999, the company owns and operates Trip.com, Skyscanner, Qunar and Ctrip, all of which are online travel agencies.¹⁹ During this pandemic of Covid-19, due to the current situation and policies, many orders have to be cancelled. According to the statistics from the XIAOFEIBAO²⁰, there are some analysis could be as a reflection from the charts as below.

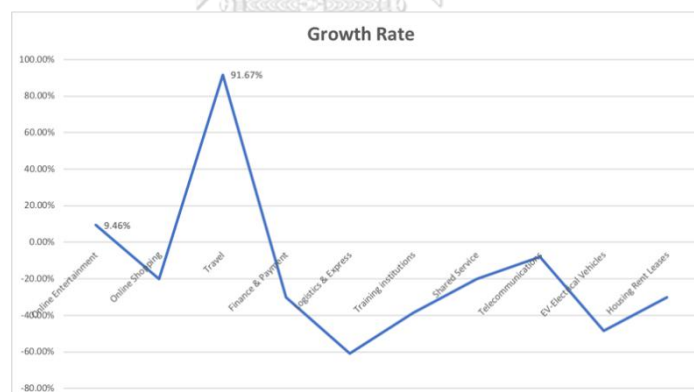


Figure 2 Growth rate of disputes during Covid-19

(sources: XIAOFEIBAO)

¹⁹ See Website of Ctrip < <https://us.trip.com/pages/about-us/>>.

²⁰ A website provides for the service of handling and analyzing consumer complaints. <https://www.xfb315.com/article/34158>.

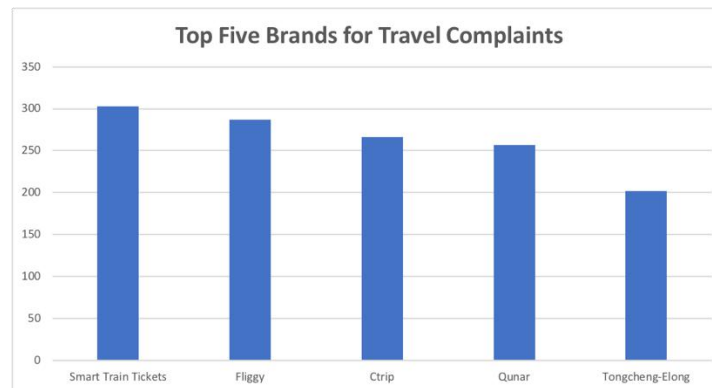


Figure 3 Top Five Brands for Travel Complaints

(sources: XIAOFEIBAO)

We can see there is increasingly trending of complaint about travelling, compared to the month before the pandemic, the number of complaints has increased by 91.67% in travel industry. And the top five brands for the travel complaints, including Smart Train Tickets, Fliggy, Ctrip, Qunar, Tongcheng-Elong²¹ are all big companies that operate online travel agency and have quantities of consumers/users.

Based on a rough survey from the experience of individuals who go through this whole complaint process with these big companies, it shows this is a tough battle safeguarding their rights. The reasons for complaints are various, mainly like the tickets surprisingly be “used”, keeping a line in the waiting stage for a unreasonable long time, ignorance about government policies towards pandemic in charging service fees, and availability for a refund of travel voucher but the money back, etc.²² In fact, due to the author’s own experience, the way these companies adopt is frequently trying to shift the responsibilities into the airline companies, and make the user stay in the waiting line for a long period of time and change the rules at online travel

²¹ The websites of these companies. Smart Train Tickets < <https://www.suanya.cn>> Fliggy
<https://www.fliggy.com/?ttid=seo.000000574&seoType=origin> Ctrip
<https://www.ctrip.com/?sid=155952&allianceid=4897&ouid=index> Qunar
http://www.qunar.com/?kwid=46189966&cooperate=baidu50&bd_vid=8721075977144320597
Tongcheng-Elong < <http://www.ly.com/?refid=4140683>>

²² Qingzi Chen. the Difficulty of Refund, High Service Charge ----the Handbook of Refund of Ctrip, Fliggy, Qunar [J]. China Consumer Reports, 2020(02):56-58.

agencies' own discretion. Besides, forcing to face these hurdles to defend the rights, we can find out there are further obstacles set up by these online platform economic entities.

On the basis of the analysis of the User Service Agreement of these top brands, almost every corporate set up the clause of the jurisdiction in their favor with the illusion of “negotiated” by contracts which are all standardized is to some degree preventing consumers or users to defend their rights. As examples of the User Service Agreements of Ctrip, Figgy, Qunar, Tongcheng-Elong,¹⁾ the User Service Agreement of Ctrip: article 19, ... The user will agree to accept the jurisdiction of the People's Court of Changning District of Shanghai because of the dispute caused by the interpretation of this service agreement or the reservation of any product through Ctrip Network.²³2) the User Service Agreement of Figgy: article10 ...If the negotiation fails, either party may bring a lawsuit to the people's court with jurisdiction where the defendant has his domicile.²⁴3) the User Service Agreement of Qunar: article 6.2, ... If the negotiation fails, either party can bring a lawsuit to the people's court where Beijing Qunar Information Technology Co., Ltd. is domiciled.²⁵4) the User Service Agreement of Tongcheng-Elong: article19, ...disputes arising from the user's interpretation of this service agreement or the subscription of any product through Tongcheng network will agree to accept the jurisdiction of the People's Court of Suzhou Industrial Park, where the operator of the Tongcheng network is domiciled.²⁶ From the information mentioned above, due to the imbalance power between these online big platform economic entities and consumers, it is in fact

²³ From the Website of Ctrip < <https://contents.ctrip.com/huodong/privacypolicy/index?type=0>>

²⁴ From the Website of Taobao, Alibaba. < <https://rule.taobao.com/detail-11000666.htm?spm=a2177.7231193.0.0.351117eaAbs0lx&tag=self>>

²⁵ From the Website of Qunar <http://www.qunar.com/site/zh/Rules.shtml>

²⁶ From the Website of Tongcheng-Elong <https://www.ly.com/public/Lawprotocols>

forming a disadvantage condition to consumers²⁷. There are existing many previous cases that happened, we can make some analysis in the following paragraph.

Based on the analysis and arrangement of the relevant cases of disputes arising from the jurisdiction clause of standard form contract from China Judgments Online²⁸, we could gain such data as the following charts:

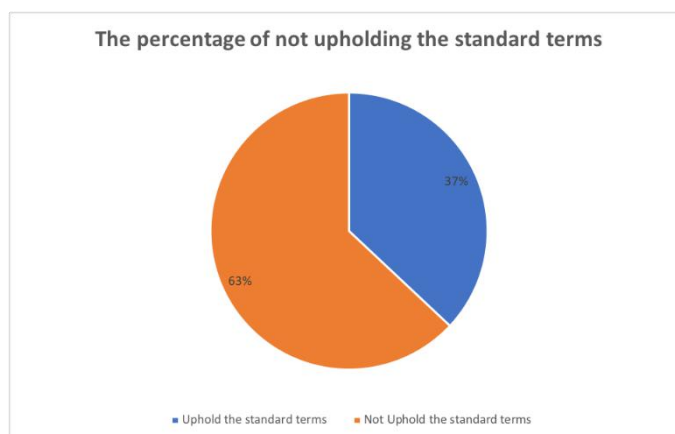


Figure 4 The percentage of not upholding the standard terms from Court

The author uses the standard form contracts, consumer, and OTA of these four top brands (Ctrip, Figgy, Qunar, Tongcheng-Elon) as a keyword to make retrieval of the ruling released on the China Judgements Online. There are 35 cases related to these elements, including 13 cases the courts uphold the standard terms, and 22 cases the courts don't uphold. The judicial reasons could be mainly categorized into two aspects: strict scrutiny mode and pay attention to the obviousness of the jurisdiction clause. It means if the court adopts the way of strict scrutiny mode to judge the clause in a standard form contract, the judge will incline to take the weak position of consumers into consideration; reversely, if the court is only focusing on the obviousness of jurisdiction clause in a standard form contract, the judge only decides if this special clause is differentiating from the other ordinary clause.²⁹ In fact, there

²⁷ Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. Colo. L. Rev. 139 (2005).

²⁸ This is official website released the final judgments in China. < <https://wenshu.court.gov.cn>>.

²⁹ Mengna Ni. *Study on the effectiveness of the standard terms of jurisdiction* [D]. Suzhou University, 2019.

are few rulings that make fully judgment reasoning but Intermediate People's Court of Hangzhou, Zhejiang Province and Intermediate People's Court of Guangzhou, Guangdong Province, the eminent common point of judicatory ground from these two courts consider evaluating the cost of judicial relief and the value of disputes, and reckon these online platform economic entities taking advantage of the preponderant position to unconsciously increase the burden of consumer to substantially deprive their recourse rights.

3.2.2 Users of "Sharing Bicycle" v. Ofo

Ofo (company), is a Beijing-based bicycle sharing company founded in 2014. The lockless system uses its smartphone app to unlock and locate nearby bicycles, charging an hourly rate for use.³⁰ The aim of ofo is to solve the issue of urban travelling mode at the beginning of its initiation. Since 2019, there has been a crisis happened in ofo resulting in the refund epic³¹ which seems hard to achieve from consumer's perspective, according to the revelation of a person who based on the rank of a line waiting for a refund, it will be taken at least 988 years³². During the process of consumer striving for their rights, the issue from one of the most essential procedures have been exposed as hurdle preventing consumer safeguard rights—it's jurisdiction. We can see a subtly revelation from a recent civil verdict adjudicated by Beijing No. 4 Intermediate People's Court, which involves the plaintiff, a user of ofo, applying for court confirmation of invalidity of arbitration agreement³³

³⁰ from Wikipedia

³¹ from Baidu Baike

³² from China Consumer Journal

³³ According to the Arbitration Law of the People's Republic of China, If the parties object to the validity of the arbitration agreement, they may apply to the arbitration commission for a decision or to a people's court for a ruling. If one of the parties submits to the arbitration commission for a decision, but the other party applies to a people's court for a ruling, the people's court shall give the ruling.

reached by both parties through Ofo Users Service Agreement including the clause 14.2[Jurisdiction] ofo shall negotiate with you to solve the disputes caused by using ofo shared bike platform services and concerned with the ofo shared bike platforms services. When the negotiation fails, any party shall have the right to submit arbitration to the China International Economic and Trade Arbitration Commission in Beijing (CIETAC); the arbitration award shall be final and binding upon both parties³⁴. Due to the clause mentioned above, both parties shall be binding to submit a complaint through arbitration subject to the user service agreement. In the light of the action adopted by this consumer who is trying to find a breaking point to invalidate this clause of jurisdiction, the reasons are submitted to the court as follows: (1) it doesn't use the reasonable way to inform the user to notice the clause of standard contract provided by defendant; (2) the conclusion of User Service Agreement is online "click" model; (3) the clause of agreeable jurisdiction shall be deemed as unjust and unreasonable to the user. (4) the clause is a violation of public order and moral. The appeals haven't been supported by the recently released ruling adjudicated by the court. Given the reasons that the court primarily believes there is a reasonable way to call attention to the user to notice the relevant clause and it is not completely deprived of the rights of the consumer to initiate a claim, moreover, the fees of initiating a claim shall be undertaken by the losing party or allocated the final fees by arbitral tribunal based on the obligation of each party.³⁵

We can see there is the focus of dispute of this case is if the clause of jurisdiction stipulated in this agreement satisfying the requirements of the legislation of standard form contract.

³⁴ Original ofo user service agreement from official website < <http://www.ofo.so/#/>>, the version of translation see Yao Weiwei, A Report on Chinese-English Translation of ofo Users Service Agreement[D]. China University of Geosciences, 2018.

³⁵ from China Judgement Online <https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXS4/index.html?docId=d7953d3b6bf4495995ddac94000a4457>.

Compared to the similar situation that happened in the United States, based on the unconscionability doctrine, which is upheld by the United States Supreme Court the court may consider challenging the arbitration clause due to unconscionability, etc.³⁶ In the comparison of the legislation in China, there are some stipulations also related to, such as in the light of the Civil Code of China, the article 497, under any of the following circumstances, the standard terms shall be invalid: ... (2) A party unreasonably exempts or reduces its liabilities, increase the liabilities of the other Party and limits the major rights of the other Party.³⁷ In addition, according to the law of China on the Protection of Consumer Rights and Interests, clause 26, Business operators may not, through standard-form terms, notices, announcements, shop bulletins, etc., impose unfair or unreasonable conditions on consumers that exclude or restrict the rights of consumers, reduce or waive the liabilities of business operators or aggravate the liabilities of consumers, and shall not compel consumers into transactions by using standard-form terms and with the help of technological means and standard-form terms, notices, announcements, shop bulletins, etc. that contain contents mentioned in the preceding paragraph shall be invalid.³⁸ In the United States, the court generally support the clause of arbitration³⁹, but there are exceptions, i.e. the court is the sympathy of the plaintiff facing the fee of initiating arbitration is over exceedingly over the value of claim⁴⁰. As for the case mentioned above, the court

³⁶ See *Doctor's Associates, Inc v Casarotto*, 517 US 681, 687 (1996).

³⁷ Twelfth National People's Congress Standing Committee of the twenty-eighth meeting; Decision on Amending the Civil Procedure Law of the People's Republic of China, 6.27.2017.

³⁸ Standing Committee of the Twelfth National People's Congress of the People's Republic of China, the Law of the People's Republic of China on the Protection of Consumer Rights and Interests, 3.15.2014.

³⁹ See, for instance, *Munoz v Green Tree Financial Corp*, 343 SC 531, 542 SE2d 360 (2001); *In re H.E. Butt Grocery*, 17 SW3d 360 (Tex App 2000).

⁴⁰ See, for instance, *Leonard*, 2002 Ala LEXIS 316 at *25.

considers that the fee of initiating an arbitration claim to CIETAC⁴¹ is not prohibitively expensive so that the decision doesn't in favor of the plaintiff. In fact, when we make a comparison with these cases, it could be found out it includes an issue about what kind of situation could be counted as prohibitively expensive. The method of the circuit of the United States primarily compare the cost of arbitration and the cost of court litigation.⁴² However, due to the judicatory ground, the court considers the agreement of arbitration as a dispute mechanism is not necessarily result in the fee of safeguarding the legal rights is clearly over exceed the value of goods.⁴³ To some extent, the author doesn't think the court takes the position of the role of the consumer into consideration. It means it will not have a big difference if there will a much huger gap between the arbitration fee and the value of the goods based on the given judicatory ground.⁴⁴

Except for the substantial law of Civil Code and the law of China on the Protection of Consumer Rights and Interests, there is some stipulation of procedural law like The Supreme People's Court issued a judicial interpretation to implement the Civil Procedure Law of the PRC, clause 20, for a sales contract concluded through the information network, if the subject matter is delivered through the information network, the place of the buyer's domicile shall be the place of performance of the contract; if the subject matter is delivered through other means, the place of receipt shall be the place of performance of the contract. If the contract has an agreement on the place of performance, the agreement shall prevail.⁴⁵ From the perspective of

⁴¹ See, the fee shall be borne by the plaintiff in the first place is 6100 CNY (944.89USD) as the plaintiff submit a dispute worthy of 99 CNY (15.3351USD).

⁴² See generally Michael H. LeRoy and Peter Feuille, When Is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever-Green Tree of Mandatory Employment Arbitration, 50 UCLA L Rev 143 (2002).

⁴³ See supra note 6.

⁴⁴ Judgement of case only can be a reference in the future in China.

⁴⁵ People's Court News, February 5, 2015 Issue
03http://rmfyb.chinacourt.org/paper/html/2015-02/05/content_93637.htm?div=-1.

legislation, the legislators grant consumer/user a priority in the first place, but due to proviso clause hereof, it gives room for these corporations to take advantage of combining with the standard form contract, to some extent, it deprives the rights of consumer/user to negotiate the jurisdiction clause to put them in an inferior position. Moreover, this special clause is just applying for a sales contract, not including the services contract, which means these big online platform economic entities based on the information to provide services even can exploit users/consumers legitimately.⁴⁶

To be analyzed the legislation further, whether is the case of ofo, or the cases of OTA, they are both deemed as online service agreements just governed by the common clause like the Civil Procedure Law, article 23, a lawsuit brought on a contract dispute shall be under the jurisdiction of the people's court of the place the defendant has his domicile, or the contract is performed.⁴⁷ And the Supreme People's Court issued a judicial interpretation to implement the Civil Procedure Law of the PRC, article 18, where the contract provides for the place of performance, the agreed place of performance shall be the place of performance of the contract. Where the contract has no agreement on the place of performance or the agreement is not clear and the subject of the dispute is the currency of payment, the place of performance of the contract shall be the place where the recipient currency is located; Where the immovable property is delivered, the immovable property shall be the place of performance of the contract; For other subjects, the place where the party performing the obligation is domiciled is the place where the contract is performed. The immediate settlement of the contract, the transaction for the performance of the contract. If the contract is not actually performed and neither party's domicile is in the place of performance agreed upon in the contract, the people's court of the

⁴⁶ According to the Civil Procedure Law, article 23, a lawsuit brought on a contract dispute shall be under the jurisdiction of the people's court of the place the defendant has his domicile, or the contract is performed.

⁴⁷ Ibid., Footnote 37.

defendant's domicile shall have jurisdiction.⁴⁸ According to this article, it means even if the court upholds the invalidity of the standard terms of jurisdiction, there are still existing giant barricades in legislation preventing the consumer to defend their rights, especially for online services transactions.

In conclusion, the barricades for consumers to exercise their recourse rights could be categorized into two main aspects including the practices adopted by these online platform economic entities and the stipulated legislation. Summarization for these disputes mentioned above, the common practice of standard form contract and "one-click" user agreement to reach the "negotiated" agreement for choice of jurisdiction in the favor of provider of standard form contract between consumers and these online platform economic entities is, in fact, depriving the consumer of exercising their recourse rights in the most of time, in particular, when the court adjudicate the disputes depend on the principle of liberty of contract over the consumer tilt protection. At the same time, the tilt protection is applied to service consumption is not as same as the sales contract in the current legislation to the decision of jurisdiction, which means it will cause, to some extent, virtual inequalities when emphasizing the nominal equalities to service consumers. Therefore, the author will make a thorough analysis of the current disputes resolution mechanism in China to resolve the disputes aforementioned in the following paragraphs, to demonstrate the dimensions of efficiency, efficacy and cost-effectiveness.

⁴⁸ the Supreme People's Court issued a judicial interpretation to implement the Civil Procedure Law of the PRC, The 1636th meeting of the Judicial Committee of the Supreme People's Court, 2.4.2015.

3.3 Channels for Recourse Rights

3.3.1 Litigation

3.3.1.1 Common Litigation

When it comes to the disputes arising out of daily consumption online, one of the methods is resorting to traditional litigation to solve this issue, compared to the counterparts, the fees of initiating a lawsuit are 50CNY (7.72USD) if the amount in dispute is less than 10000 CNY (1544USD)⁴⁹, moreover, the theory of the establishment of Civil Procedure in China is established according to the theory of the continental law system, which the judge has more positive actions⁵⁰ making litigants choose to self-litigate if the case is not complex. And there are still existing intrinsic problems such as long period of time, jurisdiction, sophistication and etc. In the past decades, people get started to construct alternative dispute resolution as a supplementation, for instance, arbitration, mediation, conciliation and negotiation. The barricades of traditional litigation for consumers to defend their interests against these online platform economic entities are the complex of procedures and knowledge of litigation proceedings and the less control of the connection of jurisdiction of disputes.

3.3.1.2 Class Action

Class action as special litigation, allowing consumers to make individual disputes to collective one against the same manufacturer or corporation. In practice, the reason for a class action-initiated base on the inefficiencies of government

⁴⁹ the Rules of Paying to the Litigation Costs released by the State Council of PRC.

⁵⁰ C.H. (Remco) van Rhee & Fu Yulin, *Civil Litigation in China and Europe: Essays on the Role of the Judge and the Parties*, 362 pages, Springer Science & Business Media, 2013.

agencies or private litigation, therefore, to resolve the disputes from consumption in a better way some countries adopt the class action, in particular the United States. The purpose of a class action is to aggregate together these small consumer disputes into a big case to make this suit economically feasible and also could be an effective method to deter these private corporations to practice unlawfully behaviors to make maximum profit.⁵¹ According to Article 53 and Article 54, When one party or both parties consist of two more two persons their object of an action is the same of the same category the people's court considers that with the consent of the parties the action can be tried combined it is a joint action, and If the persons comprising a party to a joint action is large in number the party may elect representatives among themselves to act for them in the litigation. The acts of such representatives in the litigation shall be valid for the party they represent.⁵² In 2016, the Supreme People's Court promulgated the Interpretation of the Supreme People's Court on Several Issues of Applicable Law for Hearing Consumer Civil Public Interest Litigation Cases for public interest litigation on consumer protection, based on Article 1 of this documents, China Consumers Association and consumer associations established in provinces, autonomous regions and municipalities directly under the Central Government, the interpretation shall apply to civil public interest litigation against operators who infringe the legitimate rights and interests of a large number of unspecified consumers or have the danger of endangering the personal and property safety of consumers and other acts that harm the public interest.⁵³ However, because of the qualification of organizations is limited, which it makes less effective to resolve disputes that happened these days. In practice, there are few consumer disputes cases could be initiated as class action to be resolved. More cases in consumer dispute mainly will be

⁵¹ Arthur H. Travers Jr. & Jonathan M. Landers, *The Consumer Class Action*, 18 U. KAN. L. REV. 811 (1970).

⁵² Procedure Law of P.R.C.

⁵³ Interpretation of the Supreme People's Court on Several Issues of Applicable Law for Hearing Consumer Civil Public Interest Litigation Cases, the Supreme People's Court, May 5, 2016.

resolved as individual cases, which means pre-burden and cost have to be afforded by consumers.

3.3.2 Arbitration

China entered into the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and it came into effect in 1987, since then, the Arbitration Law of the People's Republic of China⁵⁴ is enacted and promulgated in China, providing an innovative method to handle disputes, which application has an inclination in business and trade industries. Although arbitration is more flexible to optimize the issue arising out of litigation. However, referring to the characteristic of consumer disputes, the fee of arbitration is too high. There is a chart to show as below, the statistic from the top trending of arbitration commissions from www.china-arbitration.com.⁵⁵

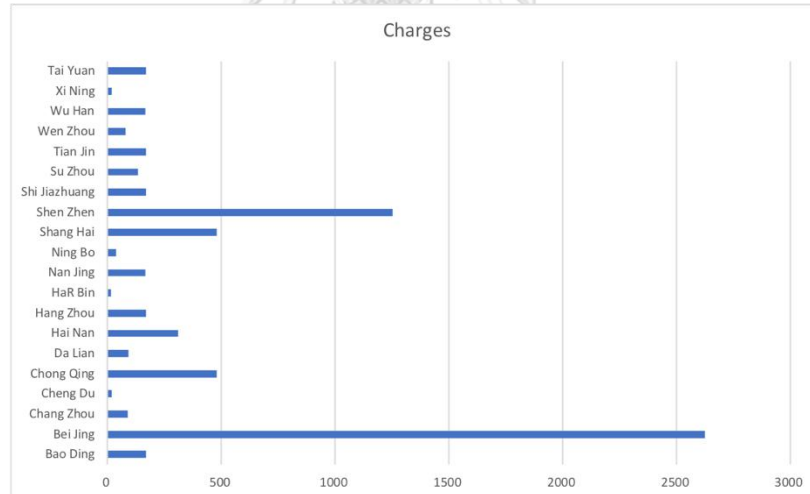


Figure 5 The charges of Arbitration

⁵⁶disputed amount: 1000 CNY (154 USD)

⁵⁴ Standing Committee of the Eighth National People's Congress of the People's Republic of China, the Arbitration Law of People's Republic of China, 8.31.1194.

⁵⁵ A website organizes all information on arbitration in China, including the inventory of arbitration commission. <http://www.china-arbitration.com/index/institution/index.html?page=2>.

⁵⁶ Note: the currency of the amount in this chart has been transferred into USD dollar

Even though, some local governments have promulgated legal documents to decrease the fee of arbitration of consumer disputes like Shenzhen Consumer Dispute Arbitration Office, releasing a document which a waiver of arbitration fee for small consumption disputes with a subject of less than 50000 CNY (7720 USD).⁵⁷ HARBIN Arbitration Commission charges 100 CNY (15 USD) at the minimum level. In fact, the power to make the decision of arbitration commission is at the corporate's own discretion, which means often intentionally manipulate the condition causing the consumers to have to waive their remedial rights based on the analysis of cost-effectiveness. Also, in fact, arbitration is often chosen to resolve complicated facts and large quantities of the amount in dispute like commercial and trade industries. Therefore, the expense and procedures of arbitration in China's model is less suitable for the resolution of consumer disputes.

3.3.3 Conciliation/Mediation

The culture of conciliation in China has a long period of time since the reign of the sage-kings Yao and Shun. After that, the ideal and system of conciliation would be amended by each dynasty, until Ming and Qing dynasties became developed and matured.⁵⁸ Confucianism is one of the most essential philosophies shaping the qualities of society in China in the pursuit of "harmony" advocating "litigation-free" (xi song) to govern the society.⁵⁹ The modern era of conciliation in China is built upon the ancient Chinese thoughts of mediation having a huge impact on the whole development of the process and system of revamped conciliation. Due to the function of conciliation, deescalating the tensions of conflicts, restoring the rule of society in a quicker way, maintaining the relationship between disputants, and decreasing judicial

⁵⁷ Southern Metropolis Daily.

⁵⁸ Zeng Xianyi, *Mediation in China - Past and Present*, 17 *Asia PAC. L. REV.* 1 (2009).

⁵⁹ *The Analects*, 'Yan Yuan'.

costs, etc.⁶⁰, conciliation is utilizing as a tool to supplement other dispute resolution mechanism. Referring to the different conciliation organization, conciliation could be mainly categorized as court conciliation, administrative conciliation, institutional conciliation and people conciliation, which could trace back to the ancient times of conciliation categorized as official conciliation, semi conciliation and local conciliation.⁶ In fact, it is noticeable that conciliation based on the culture in China is inconsistent with the ADR movement and restorative justice in the West. In China, the word “mediation” and “conciliation” are used interchangeably, there is no distinction between two of them, in reality, the role of mediator in China is more likely to the role of conciliator in the UNCITRAL Model, playing an active way to propose the settlement of disputes⁶¹.

For the sake of clarity of discussing the substance of conciliation or mediation in China, the author only uses conciliation to substitute mediation unless there should be a focus on disparities. China promulgated the legislation of the People’s Conciliation Law of the People’s Republic of China in 2011,⁶² aiming at resolving the civil disputes and maintain the order of society. Nowadays, conciliation is used in various industries like family, marriage, finance, housing, and insurance, etc. According to the report of Xinhua News Agency, the journalist made interview the Ministry of Justice acquiring more than 9 million disputes are resolved by people’s conciliation. Until 2017, there are nearly 4 million people’s conciliators and 800,000 people’s conciliation organizations nationwide, with a success rate of over 97 percent.⁶³

⁶⁰ Ren Jianxin, *Mediation, Conciliation, Arbitration and Litigation in the People’s Republic of China*, 15 INT’l Bus. LAW. 395 (1987).

⁶¹ Justice M. Jagannadha Rao, *Concepts of Conciliation and Mediation and Their Differences* <<https://www.yumpu.com/en/document/view/28820761/concepts-of-conciliation-and-mediation-and-their-differences-law->>.

⁶² Standing Committee of the Eleventh National People’s Congress of the People’s Republic of China, *People’s Mediation Law of the People’s Republic of China*, 1.1.2011. http://www.gov.cn/flfg/2010-08/29/content_1691209.htm.

⁶³ News sources: Xinhua News Agency. <<http://xinhuanet.com>>.

However, because the principle of voluntary, legality and protection of the parties' rights to litigation have been formulated in legislation⁶⁴, which means these big online platform economic entities still can take advantage of loopholes to virtually inhabit the consumers or users to exercise their rights like not accepting conciliation, to delay the proceedings of conciliation result in increasing the unnecessary cost on consumers or user.

3.3.4 Reformation of litigation

With the conflicts of society becoming more and more intricate, there are some innovative methods designed to solve these new problems coming from the era of the Internet. In particular, modern information technologies are applied in the judicial field like Internet Court, Intelligent Implementation, Court Mediation Platform, AI guidance of litigation, 5G plus Litigation Service Platform, China Mobile Micro Court and Smart Court, etc.⁶⁵ and the combination with innovative technology like big data, cloud computing, blockchain and artificial intelligence and so forth. According to the report released by China Justice Big Data Service Platform, it shows the number of online shopping contract disputes fluctuated, increasing around 30% over 2019. The first instance of the court at all levels nationwide has accepted the online shopping contract disputes which are a totally of 49000 pieces from January 1, 2017, to June 30, 2020. In addition, it also suggests the amount these cases are mostly low-value, including 67.16% of them is less than 10000 CNY (1544 USD), and the average of amount is approximately 49100 CNY (7581.04 USD).⁶⁶ We can see the online transaction disputes surge as E-commerce has been booming, for consumption

⁶⁴ Ibid., Footnote 43.

⁶⁵ News of Supreme People's Court of the People's Republic of China. <http://www.court.gov.cn/zixun-gengduo-24.html?page=3>.

⁶⁶ statistic from China Justice Big Data Service Platform. [http://data.court.gov.cn/pages/uploadDetails.html?keyword=司法大数据专题报告之网络购物合同纠纷案件特点和趋势\(2017.1-2020.6\).pdf](http://data.court.gov.cn/pages/uploadDetails.html?keyword=司法大数据专题报告之网络购物合同纠纷案件特点和趋势(2017.1-2020.6).pdf).

disputes, which is low-value, high volume, it is one of the most significant issues to be resolved in an effective and efficacious way. There is an introduction of two attempts to optimize this issue. One is Internet Court, another is Smart Court, or called Cyber Court. The author will discuss details as below:

3.3.4.1 Internet Court

As E-commerce in China developing rapidly, moreover, innovative technologies are booming, there are disputes arising out of this new field. Due to the partial information is beyond the traditional court, resorting to the specialists who are mastering new technologies, to some extent, the demand of the internet court is like the intellectual court in China.⁶⁷ The judicial system is attempting to separate the online infringement disputes and other cybercrimes and so forth from the common court, be constructing the Internet Court to adjudicate exclusively. Internet Court is basic people's court as focusing on the adjudication of online disputes cases, mainly operating the new trial mechanism of "Online Case, Online Trial", handling eleven sorts of Internet disputes in their jurisdiction, in article 2 of Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts:

No.2 Bei Jing Court, Guang Zhou Court and Hang Zhou Court shall have jurisdiction as the court of the first instance in their municipal administrative district over the following cases:

- (1) *Disputes arising from signing or performing online shopping contracts through e-commerce platforms;*
- (2) *Disputes arising from signing and performing online service contracts are all conducted online;*
- (3) *Disputes arising from signing and performing e-finance loan contracts and small loan contracts are all conducted online;*

⁶⁷ Chen Guomeng & Yu Zhiqiang, Practical Exploration and System Construction on the Court of Internet in China, 5 CHINA LEGAL Sci. 3 (2017).

- (4) *Disputes over copyright or neighboring rights of the first publication on the Internet;*
- (5) *Disputes arising from infringement of copyright or neighboring right of online publication or dissemination of works on the Internet;*
- (6) *Disputes arising from the Internet domain name related to ownership, torts and contracts;*
- (7) *Disputes arising from infringement of personal and property rights of others on the Internet;*
- (8) *Product liability disputes arising from products purchased through e-commerce platforms due to product defects that infringe on the personal and property rights of others;*
- (9) *Internet public interest litigation cases filed by procuratorial organs;*
- (10) *Administrative disputes arising from administrative actions by administrative agencies on Internet information service management, Internet commodity trading and related service management;*
- (11) *Other Internet civil and administrative cases designated by the people's court at a higher level.*⁶⁸

On the basis of the report, to explore the innovative trial system “Online Disputes, Online Trial”, there are three typical internet courts being constructed. Hang Zhou Internet Court⁶⁹ has established on August 18, 2017, Bei Jing Internet Court⁷⁰

⁶⁸ Supreme People's Court of P.R.C., the Article 2 of Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts, adopted at the 1747th meeting of the Judicial Committee of the Supreme People's Court on September 3, 2018, and effective as of September 7, 2018.

⁶⁹ Official Website of Hang Zhou Internet Court <http://hztl.zjcourt.cn>.

⁷⁰ Official Website of Bei Jing Internet Court <https://www.bjinternetcourt.gov.cn>.

has established on September 9, 2018, and Guang Zhou Internet Court⁷¹ has established on September 28, 2018. The development of Internet court provides abundant information and practices at the advanced level in all kinds of achievements, including case trial, platform construction, litigation rules, technology application, network governance and others. According to the data from Supreme People's Court, as of October 31, 2019, the Internet courts have accepted nearly 120,000 cases in Hangzhou, Beijing, Guangzhou and other places, shortening the processing time by nearly 50%, affirming the healthier sign of Internet Court in the improvement of trial efficiency.⁷² In addition, there are more judicature related organs set up, for instance, Internet tribunals were set up in Changning Primary People's Court of Shanghai, Binhai New District People's Court of Tianjin, Shenzhen Futian Primary People's Court of Guangdong Province, Wuhan Jiangxia Primary People's Court of Hubei Province, Chengdu Pidu Primary People's Court of Sichuan Province etc. Moreover, there are Internet Trial Committees established in Zhenjiang Economic and Technological Development Zone People's Court of Jiangsu Province, Ningbo Yuyao Primary People's Court of Zhejiang Province, Xiamen Siming Primary People's Court of Fujian Province and so forth. To fully demonstrate the distribution of Internet Court and related Internet Trial Organ, the author will show a caricature as follows to make it clear:

⁷¹ Official Website of Guang Zhou Internet Court <https://www.gzinternetcourt.gov.cn/#/Home>.

⁷² Supreme People's Court of P.R.C., Chinese Courts and Internet Judiciary, People's Court Press, 2019.12.

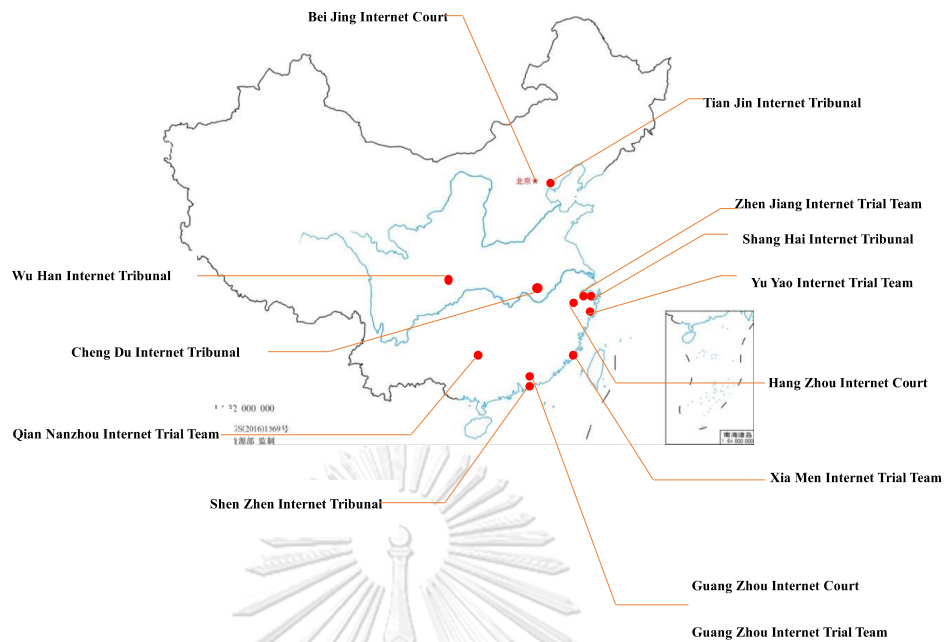


Figure 6 The Distribution of Internet Court in China

To sum up, the attempts to construct new model “Online Cases, Online Trial” based on Internet gradually spreading throughout the whole counties, the volume practices in Internet cases form the reproducible and propagable experience in case trial, platform construction, litigation rules, technology application, network governance and other multiple areas. Indeed, it has been gained some remarkable achievements to prepare substantial knowledge and practices to make the traditional court could be upgraded to the next level to adapt to the Information and Data Age.

3.2.4.2 Smart Court/ Cyber Court

Smart Court/Cyber Court, normally refers to the court inserts online technologies in the judicial process, including online file filling, online evidence exchange, online trail and so forth, that is to say, the Smart Court/ Cyber Court is the reconstruction of judicial process based on the internet technologies¹⁴. The attempts of the building of Smart Court /Cyber Court in China could be traced back to 2007, an international

divorce case via QQ, conducted by the Shaxian County People's Court in Sanming City of Fujian Province.⁷³ Since then, there are several courts adopting internet-related technologies to optimize the judicial process. In order to convenience and simplicity, the author will only use the Smart Court to indicate two of them to make an introduction, in particular, during this pandemic of Covid-19, the model of Smart Court plays an unprecedented role to make the judicial system more functional. According to the interview journal for the Supreme Court, in the middle of this pandemic, China Mobile's Micro Court provide the mass with various litigation services, including one-stop the online filing, remote hearings, the conclusion of mediation agreement conducted on online process, the evidence exchange and so forth, which result in the drastic increase of the user number and activity. As of 31 March, this year, the number of real-name users of China Mobile's Micro Court reached more than 139 million, with cumulative visits exceeding 270 million. Based on the statistics of online filing, in March 2020, the National Mobile's Micro Court has accepted 4370,000 online filings, increasing 287% over the previous month. There are 32 Higher People's Courts equipped with the Mobile Micro Court for online filings and execute the online identification of litigants to ensure the authenticity, which basically through automatic face recognition, the comparison between the ID card and uploading photo, the mobile phone number correlated to the real-name of user and others. The data shows that the cross-region filings by China Mobile Micro Court continue to grow, the efficiency of resolving cases increase significantly. Until March 31, 2020, the courts across the country initiated more than 34,000 cross-region filings. Among them, about 80 % of the cross-regional filing service can be completed within 30 minutes, and 72.63 % of the cross-regional filing takes less than 15 minutes, which effectively reduces the burden of litigation of the parties.⁷⁴ According to the Director

⁷³ Resources from www. LawXP.com <https://www.lawxp.com/case/?q=跨国婚姻&t=2>

⁷⁴ Xuguang Han, the 'Palm' judicial service, satisfying the demand of litigation in the pandemic, people's court daily, 07 May 2020. <http://www.court.gov.cn/zixun-xiangqing-228161.html>.

of Information Center of the Supreme People's Court, Jianfeng Xu, As of May 20, 2020, the cumulative number of real-name users of the "China Mobile Micro Court" reached 1.75 million, the average daily visits exceeded 1.62 million, 1.59 million cases were filed online, and more than 5.5 million documents delivered online.⁷⁵ Meanwhile, there almost every province has been reporting their stage of the process of construction of Smart Court and achievement. On the basis of Annual Report on Informatization of Chinese Courts, it shows the construction of China Smart Court is taking the place in the front ranks of the world, having own path of the informatization of court by the major Smart Court system has been completed, including intellectual trials, intellectual enforcement, intellectual services, intellectual management and so forth. In 2019, Courts at all levels continue to promote the simultaneous generation and in-depth application of electronic files along with the case, at the same time, intellectual trial auxiliaries continue majorizing like Case-filing risk automatic interception system, Automatic identification warning system for sensitive cases, Court trial speech recognition, Intelligent Correction of Documents, Compulsory retrieval of class cases, and others to ensure quality, efficiency and efficacy. Besides, research and development on AI technology working on the legal consultant field and related intelligent auxiliary software provide the mass with various legal services like litigation risk assessment, legal inquiry consultation, pre-litigation mediation recommendations, business net-service and process openness and so forth.⁷⁶ That is to say, the reformation of the traditional court into Smart Court is on the way in China in a positive prospect.

As mentioned above, the Internet Court has jurisdiction over certain cases while the Smart Court to be upgraded by traditional courts is related to the application of online technology. According to the law, the Internet Court trial cases online, the

⁷⁵ Resources: The Supreme People's Court held the third live interview of the Report on the Work of the Supreme People's Court of the National Two Sessions in 2020.

⁷⁶ Chen Su, Tian He, Annual Report on Informatization of Chinese Court No. 4(2020), Social Science Academic Press (China),10.2020.

acceptance, service, mediation, evidence exchange, pre-trial preparation, court hearing and adjudication of cases are generally completed online. According to the application of the parties or the needs of the case, the Internet court may decide to complete part of the proceedings offline.⁷⁷ Based on this Article, the Internet Court adjudicate cases that could be conducted online or offline. To some extent, there are differences between the Internet Court and Smart Court, there are certain sorts of cases stipulated undertaken by the Internet Court but Smart Court, at the same time, the Smart Court means the offline model upgrade into the online model, which means the maturity of Smart Court should be fully completed online, but the Internet Court has right to adjust themselves to choose the better way.⁷⁸ Nowadays, with the Internet technology booming and the emergence of the whole new Internet service, there are issues that have been exposed, like the author takes the model of “shared bike” and online travel agency as an example, due to the limited description of the jurisdiction of the Internet Court, the dispute arising out of the “shared bike” service could only be deemed as the lease agreement rather than online service agreement,⁷⁹ which means even let aside the standard form contract clause, the business like “shared bike” could be named as semi-online service wouldn’t be trialed by Internet Court under the law. And furthermore, faith is essential, because the scandal of these big online platform economic entities did before, may cause people to think there is a special connection between these big corporation and local court, especially, judicial adjudication is final binding. If people think there is a systematic bias in the favor of these online platform

⁷⁷ Supreme People’s Court of P.R.C., the Article 1 of Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Cases by Internet Courts, adopted at the 1747th meeting of the Judicial Committee of the Supreme People’s Court on September 3, 2018, and effective as of September 7, 2018.

⁷⁸ Ibid. Footnote 51.

⁷⁹ Jian Li v. Tianjin Luding Technology Co., Ltd, Guibang Wang v. Tianjin Luding Technology Co., Ltd and Alipay (China) Network Technology Co., Ltd. (disputes arising out of the deposit for using a sharing bike). <
<https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXS4/index.html?docId=c01e32665c114c4cb57daa3400a31688>>.

economic entities, people usually are reluctant to exercise their rights.⁸⁰ However, whatever the Internet Court or Smart Court, the procedures should be conformity with the judicial system, and based on the interviews of some judge and staff in the judicial system, the comprehensive upgrade of application of new technology based on the traditional judicial proceedings is to some extent increasing the workload of the whole judicial system especially the judges in China have already overworked. Therefore, optimizing the judicial system to adapt to the Internet era may be one of the ways to resolve the dispute arising out of the online living style of society, However, the workload and cost of an upgrade of the judicial system could be underestimated in recent researches for some scholars who are completely support the upgrade of judicial system to online model. Especially, considering the whole judicial system couldn't be just facilitated to resolve these low-value cases, some of complex cases have to be resolved conforming the traditional offline way, which means there are some unnecessary resources waste for judicial system when it wouldn't be fully operated in the future. Extrajudicial dispute resolution mechanism may become a much better channel to resolve consumer disputes based on the quality and effect of the ODR system and also, the traditions and practice of ODR system in China make it more suitable to resolve these consumer disputes.

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3.4 Deficiencies of Current Disputes Resolution Mechanisms

In the light of the comprehensive analysis for consumers to exercise recourse rights under current disputes resolution mechanism including litigation, arbitration, conciliation or mediation and the Internet Court or Smart Court, there still exist some deficiencies in these current disputes resolution when applying them to resolve disputes that happen between consumers and these big online platform economic entities. First of all, the pre-cost from current disputes resolution couldn't match the

⁸⁰ Michael Ferrence, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, 11 (2019).

needs related to E-business, which mainly force a consumer to give up exercising recourse right in the consideration of the expenditure. Hence, the design and update disputes resolution mechanism should take cost-effectiveness into account to satisfy the consumption lifestyle without distance limitation. Secondly, the imbalance power between consumers and these big online corporates when involved in the dispute resolution process should be taken into consideration, because there are some legal loopholes and advantageous position could be taken advantage by these big online platform economic entities. Therefore, some of the values and principles should be taken a weak position of consumers into account that enhances the level of consumer protection from the aspect of the dispute resolution system. Last but not least, when it comes to reforming the current mechanism, constitutor should take thorough analysis and evaluation about the social cost, to reduce the burden from the current disputes resolution system reform at the same time accomplish the aim of reform.

3.5 Concluding Remarks

Through the study of these two typical cases happened in China, no matter what type of big online platform economic entities, they will take advantage of loopholes and blank of legislation to create a superior condition of the jurisdiction in their favor, which often make consumers or users undertake an unreasonable cost in the pre-stage including legal claim costs, travel expenditure and other costs. In comparison with the value in a dispute, these costs that happen in the pre-stage often become barricades for consumers to give up exercising their recourse rights. Therefore, in the practice of China, these big online platform economic entities will use the standard form contract and “one-click” model of acceptance of service to reduce the possibilities of consumers or users bring a claim against them. Therefore, according to the practice of these big online platform economic entities, it is found that consumers or users are forced to waive the recourse rights.

Under the current dispute resolution mechanism to resolve disputes between consumers or users and these big online platform economic entities, through the comprehensive analysis to discuss the effectiveness of the current disputes resolution mechanism to resolve the disputes aforementioned, there are some deficiencies that have been exposed such as the complex procedures and knowledge of litigation, the varied requirements and cost from institutional arbitration, the voluntary principle of traditional conciliation or mediation for resolving consumer E-disputes and the social cost and resource waste have to be borne by the reformation of the judicial system. All of the deficiencies that have been listed shows that there are characteristics and features of the current dispute resolution mechanism that are not well-suit to resolve disputes between consumers or users and these big online platform economic entities. Therefore, to make the current disputes resolution mechanism more suitable to resolve these disputes, it should be optimized and updated by changing some of the characteristics and values to adapt to the consumers or users' demands to resolve disputes arising out of transactions with these big online platform economic entities.

Chapter 4 Development of ODR Mechanism in China: The Connection Between the Traditional Philosophical Ideas and Modern Functional Values

4.1 Introduction

The establishment of the ODR mechanism in China is in its initial phase, there are several ODR processes that have been designed to resolve disputes which are often low-value and high volume, or the disputes should be resolved at a long distance. Giving a brief history retrospect of the development of the ODR mechanism in China, it is found that the basic values and principles of the ODR mechanism in China could be originated from ancient China. There exists a strong connection between the traditional philosophical ideas and modern function values about the development of the ODR mechanism in China. Therefore, to explore the function and value of the ODR mechanism should not only focus on the modern era, the wisdom of traditional philosophical ideas from ancient China like Confucianism should also be discussed.

This chapter mainly discusses the interaction between the ODR mechanism and Confucianism, to illustrate how traditional philosophical ideas play an important role in the development of ODR mechanism in China, in particular, there is a special connection between mediation and Confucianism, which demonstrates how the traditional mediation mechanism in China is established based on the values and wisdom of Confucianism. After the discussion of ancient values and wisdom from Confucianism will be inherited by the ODR mechanism in China, the modern functional values provided by the ODR mechanism should be discussed as well. On the basis of the traditional philosophical ideas and the modern functional values of ODR mechanism in China, there is a rounded analysis about the current ODR process in China, to reflect the shortcomings and problems needed to optimize and update

when it applies to resolve the disputes between consumers or users and these big online platform economic entities.

4.2 ODR and Confucianism

4.2.1 The Core Principle of Confucianism

4.2.1.1 Confucianism in Ancient China

Confucius as one of the well-known thinkers and sage of ancient China play a significant role in the history of ancient China, also modern China. His students collected and wrote the analects of Confucius finally form the philosophy of Confucianism to adjust and affect the norm of society. Confucianism is one of the greatest ideologies having a huge effect on the way of thinking of Chinese and society. After the Han dynasty, Confucianism has profoundly influenced ancient China, since 206 BC until the beginning of the twentieth century, the ancient dynasties of China are all basically established on the same ideas and philosophy⁸¹, until now, it still constructs the thought of Chinese in basic daily life. The core principles of Confucianism include “benevolence, righteousness, courtesy, wisdom and trust”. Based on the affirmative thinking of humanity, Confucianism develops a philosophy of morality, emphasis on the interaction between “benevolence” and “courtesy”. Through self-development, improving and making progress on their own, to transcend oneself.⁸² Compared to Western thoughts, there are lots of disparities based on the different philosophies. In general, there are basically three disparities between Confucianism and western naturalism. First of all, Confucianism is constructed based on ethical and moral theories. Secondly, making a comparison with western

⁸¹ PM Chen Law and Justice: The Legal System in China 2400 BC to AD 1960 (1973) 7.

⁸² Pines Yuri. Foundations of Confucian Thought: Intellectual Life in the Chunqiu Period, 722-453 B.C.E.[M]. University of Hawaii Press:2017-12-18.

naturalism, Confucianism doesn't emphasize the law and individual propriety which causing all of them to become an integration of subject adjusted by way of thinking from Confucianism. Thirdly, western naturalism tries to search and seek the unchanging code of society, Confucianism rather inclines to believe the society is in a constant change status.⁸³ For instance, the modern values and thoughts of the West are established on the accountability of person could control objective existences, that form the modern theory of "instrumental rationality". From the positive sight, this theory indeed prompts the magnificent progress of the development of human beings, however, it also has the quality of one-sidedness and incompleteness. At the same time, with the disorder and uncontrolled development of economy, there are amounts of problems and troubles exposed in the current society such as environment pollution, Scarcity of resources and nuclear threat and so forth, resulting in many and many scholars get started to think the advantages and disadvantages of modernization based on technology. One of the thoughts of Confucianism is advocating the harmony between nature and human, that makes Confucianism show the greatest wisdom when the world focus on not only the development of economy but also the sustainability of development.⁸⁴



4.2.1.2 The Development of Values and Ideas of Confucianism in Modern Society

When it comes to the relationship between tradition and modernity, some people argue there is a line existing between the two of them. The modern things represent progress, the traditional things represent decadence, which means society should discard old traditional ideas and pursue whole new modern ideas. However, the advance of history is continuity, to some perspectives, tradition is a burden that could

⁸³ Steven Greer; Tiong Piow Lim, "Confucianism: Natural Law Chinese Style," *Ratio Juris* 11, no. 1 (March 1998): 80-89.

⁸⁴ Li Zhu. Research on the connotative role of pre-Qin Confucianism on socialist core values [D]. Shandong University, 2015.

be conservative power to impede the development of innovative and original things, but the tradition is also the basis of the development of modern, which means human beings could transform the tradition things to suitably adapt to the modern time make them rejuvenated. The social function of Chinese traditional culture plays a part in construction and orientation, interaction and integration, education and nurturance, inheritance and innovation, self-identity and affiliation. With the arduous and tortuous social transition, thousands of excellent and ambitious people took hundreds of years of endeavors to seek the most suitable way from these various paths, also, during these periods of time, the Chinese nationality is in a vast and hazy position from time to time to face the challenge and renaissance. In the modern generation, to make the most of the essence of traditional culture, in particular, achieving innovative transformation in cultivating cultural inventions. For instance, people can adopt the way of culture comparison to optimize the vision of splendid culture, because culture comparison is a method for self-improvement, which is decided by the quality of diversity and openness of culture. Meanwhile, continually enriching the core of traditional culture through culture borrowing. Culture borrowing is an act of selecting cultural materials which means a community will consciously or unconsciously compare and choose the other ideas or action from other cultures based on own value and standards. Truly, it's not purely an act of transplantation, it could be rather treated as communication among various cultures. In addition, through this complex process and journey, it will ultimately achieve the effect of cultural integration, which means a cultural system will establish based on these fractions of cultural materials to optimize the function of cultural ideas and philosophy in the whole society. Last but not least, to promote the explanation and rectification of culture to make it much more accommodative for the own characteristic of nationality and current generation such as the wisdom of harmony comes from traditional philosophy still is a vital factor that should be emphasized these years to achieve a stable order of society to promote the

well-being of humanity.⁸⁵ To sum up, the variation of traditional ideas for modern society make them become more suitable for the demands arising out of daily life, in particular, some of the philosophy rejuvenate its value. At the International Symposium on the 2565th Anniversary of the Birth of Confucius and the 5th General Assembly of the International Confucian Federation, to discuss the function and effect of Confucianism for world peace and development. Although the civilization of human beings has reached the achievements and progress no matter in material or mental aspects, there are new issues human beings facing today, such as the continuous expansion of the gap between the rich and the poor, untampered luxury expenditure of materialistic pursuits, vicious expansion of individualism, the continuous reduction of social integrity, the deterioration of social ethics and morals, the intense relationship between human beings and nature and so forth. To resolve these challenges and obstacles, it not only shall fully execute the wisdom and advantages of discoveries and developments today, but also the accumulations and inventories of wisdom and advantages needed to be executed in history. Therefore, the core principle of Confucianism today should be involved and understood to protect the diversity of civilization in the world, respect various national civilization, study the essence of other civilization in the right way to resolve these new challenges human beings have to face.⁸⁶ In conclusion, Confucianism has been evolved and updated to adapt to the modern society and demands of the resolution of issues arising out of the modern generation.

⁸⁵ Chengxiong Dong. Systematic Interpretation and Heritage Construction of Excellent Chinese Traditional Culture [D]. Huaqiao University, 2016.

⁸⁶ Jinping Xi. From the continuation of national culture in the blood of the pioneering-in commemoration of the 2565th anniversary of the birth of Confucius International Symposium and the opening session of the fifth session of the International Federation of Confucian Members Conference speech [J]. Confucius research, 2014 (05): 4-8.

4.2.2 Mediation and Confucianism

Human history is always in a continuous evolving situation, for a specific community, the specific culture has huge impact on the construction of structure of society. For these developing and developed things, the ideas, values and spirits of culture could be reflected from every aspect, in particular, the way and meaning of expression of this society are all reflecting the values and ideas of culture, which express thousands continuous practices and habits in common.⁸⁷ Although the effect of culture would be as a holistic value on the society, the specific method design loaded with the wisdom and spirit of culture will have extremely realistic value. There is one of the essences of Confucianism emphasizing “harmony” to maintain the hierarchical structure to pursue the order of society as in the thoughts of Confucianism, there are five cardinal relationships further emphasizing the ritual and hierarchy of society.⁸⁸ Based on the ideas and thinking above, law, to some extent, is treated as a shameless method to resolve disputes, in particular, when it cause detriments to the interests and benefits of society.⁸⁹ In the society, family, clan, villages or tribes as a whole is a single unit of communities rather than an individual, that makes the rights and interests of individual should be identified and analyzed from the family, clan, villages or tribes he or she belong to.⁹⁰ On the basis of the pursuit of harmony of society, it makes the model of “mediation” or “conciliation” dispute resolution which the third party as a mediator to resolve the disputes that happened in private individuals, mainly it applies to civil cases, having far-reaching and profound developed. This model of mediation attempts to create a compromise between disputing parties to keep a good relationship between them and maintain the

⁸⁷ James, Paul; Magee, Liam; Scerri, Andy; Steger, Manfred (2015). *Urban Sustainability in Theory and Practice: Circles of Sustainability*. London: Routledge, 2015. p. 53.

⁸⁸ M B Hooker *A Concise Legal History of South-East Asia* (1978) 98.

⁸⁹ Jerome Alan Cohen “Chinese Mediation on the Eve of Modernization” (1966) 54 *California LR* 1201 at 1207.

⁹⁰ J. G. Mowatt, “Mediation and Chinese Legal Theory”, 106 *S. AFRICAN L.J.* 349 (1989).

order of society.⁹¹ When the West attempts to picture a way to reduce the burden and obstacles of judicial procedures, scholars started to make research on the model of mediation in China to seek and establish alternative dispute resolution.⁹² To meticulously consider the connection between mediation and Confucianism, in ancient times, the way of legislation adopted by administrators like a punishment of flogging, finger clipping and incarceration and other tortuous methods could be one of the reasons that make people choose rather resolve disputes through mediation. Another reason is involved in the reputation and shame, in order to deescalate the effect of disputes happened in the small areas to expand to the next scale, the mediation in the ancient time of China attempt to make a compromise between parties in a various way to dissolve conflicts.⁹³ When society is based on morality rather than law, mediation would be a better way to keep society functional. In the contrast, the mediation in western countries, the purpose of mediation is to supplement the deficiency of the judicial system, attempting to seek an extrajudicial system to resolve the disputes which are not sensible to be concluded under the traditional judicial process. The expectation of mediation is to reach the flexibility and informality which could make disputant parties resolve their conflicts in a less intense environment and reach a satisfying agreement through a third party to maintain a long relationship to cooperate and develop, comparing to judicial process, the mediation could reduce the cost of the disputes resolution process for disputant parties.⁹⁴ To some extent, there indeed exist a similar reason for China and western countries to select mediation to resolve the disputes, however, there are still existing two main disparities in two of them. Firstly, comparing to the West, the mediation in China is facilitated upon the comprehensive

⁹¹ Stanley Lubman “Mao and Meditation: Politics and Dispute Resolution in Communist China” (1967) 55 California LR 1284 at 1291.

⁹² Robert F Utter “Dispute Resolution in China” (1987) 62 Washington LR 383.

⁹³ Ibid., Footnote 9.

⁹⁴ Robert S Banks “Alternative Dispute Resolution: A Return to Basics” (1987) 61 Australian LU 569 at 571.

uniform moral code of society, the process and result of mediation shall be subjected to the rule of law, which means the effect of agreements by parties could be avoided if there are not conform to the substantive law in the West.⁹⁵ Secondly, the procedures of dispute resolution mechanism play a different role in the West and China, the mediation in China is based on the frame of the moral norm of society, emphasizing the actual yield of mediation to maintain the order and harmony of society. In the West, the value of justice from law, especially, the procedural justice should be obeyed to achieve the value and purpose of society, so that makes the process of mediation should subject to the stipulation of law, otherwise it will be treated as an erosion of the values of society.⁹⁶ In modern time, with the gradual increase of the gap between the poor and the rich, the situation of confrontation and conflict of society become more intense, the whole world should advocate more comprehend and compromise. As the appraise from CF Cohen for Confucianism, “it’s the art of compromise”. For society, compromise includes a sense of obligation and responsibility for the group people, not just focus on an individual’s gains and losings. To execute the mediation to resolve the dispute could reach a long relationship between disputant parties in a rather amicable aura, could also be cooperated upon understandings and reciprocity.

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4.2.3 The Effect of Confucianism on ODR

With the modernization of society in China is further developed, in particular, the internet of lifestyle and application is booming, the traditional judicial system couldn’t satisfy the demand of dispute resolution in daily basis. More and more countries in the world get crack on exploring the extrajudicial system to provide more

⁹⁵ F S C Northrop “The Comparative Philosophy of Comparative Law” (1960) 45 Cornell LQ 617 at 619.

⁹⁶ Edward Brunet “Questioning the Quality of Alternative Dispute Resolution” (1987) 62 Tulane LR 1 at 27-8.

flexible, cost-effective and amicable dispute resolution mechanism. In the past, mediation as tradition way exist in the long history of China, providing a dispute resolution different from judicial system in the West. The advantageous qualities of mediation could be supplement for judicial system for people to select the most suitable dispute resolution mechanism to resolve their disputes. In the era of Internet, online dispute resolution mechanism gradually become a variation of alternative dispute resolution to adapt to the electronic interactive way between parties. Among them, online arbitration and online mediation becomes comparatively popular to get further developed, especially, based on the interaction and self-control of online mediation, it becomes even more suitable way to satisfy the demand of society to resolve disputes in China. It is obviousness of challenge that the demand of channels or methods to resolve disputes happened in internet era is not matching to the current model of judicial system like jurisdiction of cases that couldn't balance the power between the disputant parties, which basically means give too much free zone for the corporation to customize the clause of jurisdiction in their favor. The application of online mediation to e-commerce disputes is a better way to resolve this issue that reduce the cost burden the offline judicial process make the plaintiff, usually consumer, undertake in the first place.⁹⁷ Although the goal and value of doctrine of Confucianism to pursue the status of "no litigation" to maintain the harmony of society,⁹⁸ to providing the modern society to develop ODR has disadvantageous aspects, for instance, to some extent, there are risks which could be detriment to the justice of procedures of law, it indeed becomes worries for some scholars to not favor the development of mediation or online mediation to resolve disputes based on values of Confucianism, however, there is noticeable advantage that it emphasizes on the obligation and responsibility from individual to the benefit and interest of society to create a sense of consensus of compromise, which make it could exactly fit to the

⁹⁷ Xue Hong, Online Dispute Resolution for E-Commerce in China: Present Practices and Future Developments, 34 HONG KONG L.J. 377 (2004).

⁹⁸ Roxana Matefi, Mediation - In National and International Context, 2 Jus eT Civitas 11 (2015).

development of mediation or online mediation. The consensus of compromise of society will be foundation to develop ODR system in the contemporary age.

4.3 ODR and E-business

4.3.1 The Development of E-business in China

In recent years, there are burgeoning Internet technology of Web of Things, Cloud Computing, Web-connected Technology and etc. which mostly apply to daily life in a large area. The users of Internet booming increase in the past years, the interaction between consume demand and the development of technology make E-business as a whole industry prosperous. According to the Statistics from China Electronic Commerce Research Center, from the scale of transactions, E-business keep a rapid pace of development since 2009, the annual growth rate is 2 to 3 times of GDP of 7% to 9%. China Entry-Exist Inspection and Quarantine Association Special Committee on Digital Economy and Cross-border E-commerce held Global Conference on Electronic Commerce 2020 at international meeting and exhibition center of Xiamen in Sep 9, 2020, with the collaboration with China Quality Magazine, New Era Health Industry (Group) Co. Huashangjiankang Co. In this colloquium, China E-commerce Development Report 2019-2020 has been released, which is written by many well-known institutions and experts based on the data collection and analysis, to analyze present scale, development characteristics, development tendency and so forth. There are sections as follows containing: overview of E-commerce development in China from 2019 to 2020; development of rural E-commerce and new business model of E-commerce for poverty alleviation; the buying and selling of cross-border E-commerce in China; E-commerce innovation business model; overview of global E-commerce development; development of digital economy in China; industrial Internet and intelligent manufacturing in China; cloud computing

and big data enabling economic development; intelligent+ and intelligent economy driven by artificial intelligence; development of blockchain technology and application of electronic commerce in China, which mostly cover the comprehensive information of development of E-commerce in China. According to the report, in the current situation, a new round of scientific and industrial revolution has been accelerated, the revolution of intellectual manufacturing is constantly deepening, digital economy is booming to keep up with the trending of innovation. With the continuous expansion of E-commerce in China, E-commerce began to enter a relatively stable development period from a very high growth period in 2016, but online retail sales continued to grow by 14.3 percent year-on-year in the first half of 2020. E-commerce still plays a significant role on economic development as a robust driving force, in particular, as an irreplaceable role to revitalize our economy. On the basis of the Report, in 2019, China's E-commerce transactions totaled 34.81 trillion CNY, an increase of 6.7% year-on-year. China's online retail trading volume has increased at more than 40% in recent years and has gradually entered a stable development period since 2016. In 2019, the annual online retail sales reached 10.63 trillion CNY, up 16.5% year-on-year. Online retail sales of physical goods amounted to 8.52 trillion CNY, an increase of 19.5%, accounting for 20.7% of total retail sales of consumer goods, an increase of 2.3 percentage points over the previous year. In the first half of 2020, the online retail sales of physical goods amounted to 4.3481 trillion CNY, an increase of 14.3%, accounting for 25.2% of the total retail sales, an increase of 5.6 percentage points compared with the same period last year. By March 2020, the Internet penetration rate in rural areas was 46.2 %, which was 7.8 % higher than that at the end of 2018. Internet penetration gap between urban and rural areas narrowed by 5.9%. The size of rural Internet users was 255 million, accounting for 28.2% of the overall number of Internet users, an increase of 33.08 million from the end of 2018. The added value of size of China's digital economy in 2019 was 35.8402 trillion CNY, up 14.53% year-on-year, accounting for 36.2% of GDP, an increase of 1.4 percentage

points year-on-year. Among them, the added value of digital industrialization is 7.0878 trillion CNY, an increase of 10.54 %, accounting for 7.2 % of GDP. The added value of industrial digitization is 28.7524 trillion CNY, an increase of 15.56 %, accounting for 29.0 % of GDP.⁹⁹ To analyze the status of E-business in China, there are several features could be noticed, E-business has been indispensable part of national economy as driving force to promote economy revived and developed. The market shares of E-business constantly expand with the application of innovative technologies in daily life, the online retail sales are rapidly developing and gradually concentrate the transactions on several platforms. The cross-border transactions of E-business will continue to develop in a high speed and cloud computing of data of E-business will be further collected and integrated for application.¹⁰⁰ However, although the development of E-business in China gradually tends to be mature on every side, there are several deficiencies need to be repaired and optimized for instance, there lack of efficiencies of dispute resolution mechanisms to resolve disputes based on Internet Web. To some extent, how to make reformation of current dispute resolution mechanism to satisfy the methods demands for consumers or users to resolve disputes related to E-business has become a great challenge we should discuss.



4.3.2 The Transformation of Demands of disputes resolution related to E-business

With the portions of E-business is constantly expanding, there are new demands continuously emerge, for instance, dispute resolution mechanism, as for traditional dispute resolution mechanism, is not a suitable way to resolve the disputes from E-business. In the Internet era, because more and more activities could be operated

⁹⁹ See from Developing the Digital Economy Global Electronic Commerce Conference 2020, China Entry-Exist Inspection and Quarantine Association Special Committee on Digital Economy and Cross-border E-commerce.

¹⁰⁰ Boqun Li. Research on the development status and prospect of e-commerce in China [J]. Research world, 2015 (01): 15-18.

fully online, which to some extent greatly lessen the limitation of distance. However, the traditional clause of jurisdiction, on the contrary, to limit disputants in a fixed place, to impose these unnecessary burdens or cost on disputants. Hence, in the internet era, the expectation from disputants to resolve the disputes arising out of E-business is the dispute resolution mechanism, which is flexible, cost-effective and fair. Why should find out a new method to resolve disputes, one of the significant factors is the characteristic of traditional litigation has its negative sides. The strict procedure of litigation makes the whole process, even rather small cases, really complicated. The mode of litigation put disputants in a completely confronted position, which make the disputants hardly still keep a good relationship between them after a specific dispute. At the same time, on account of the complexity of litigation process, there exist lots of expense should be borne by disputants, at least at the first place, like attorney fee, travelling expenses, accommodation expenses, etc. of which seems like obstacles for a consumer to submit a consumer dispute based on the values in disputes. At the very beginning of exploration, an alternative dispute resolution mechanism as an extrajudicial system supplement the deficiencies of traditional litigation to satisfy the needs of disputants, to find a more flexible way to resolve disputes and keep a good relationship. Whereas, offline ADR still couldn't meet the needs of disputant to resolve disputes related to E-business, that make more and more ADR institution start to resort to the Internet technology, but this attempt related to Internet technology to make the process of dispute resolution mechanism only just in the budding stage. After this, countries get started to explore the more suitable methods to resolve disputes related to E-business. Hence, the United Nations Commission on International Trade Law finally releases the Technical Notes on Online Dispute Resolution and also European Union continuously discuss and promulgate the new recommendation on ODR for consumer protection. The most common of these two series of documents, both of them are attempted to enact an ODR system for consumer and merchant to resolve disputes in the lowest and most

efficient way. Therefore, many rectifications of the ODR system subsequent to these typical documents try to make it optimal to resolve consumer disputes. The exploration and design of application of ODR become one of most demands related to the E-business era.

4.3.3 The Function of ODR in Internet Era

The profound and considerably change is the application of Internet technology, it makes the interaction between peoples much easier, together with the construction and maturity of the infrastructure of the society, the E-business is increasingly booming in a high paced way. In fact, E-business could be deemed as a traditional offline trade based on the Interconnected network to provide more affluent goods or services for consumers, like the traditional trade, disputes from the whole process of the transaction still will appear in E-business. The biggest disparity of dispute between E-business and traditional trade is there is no limitation of distance for transaction correspond to the characteristic of E-business.¹⁰¹ Hence, a dispute resolution mechanism for disputes arising out of E-business should take consideration of effectively facilitating dispute settlement and build and maintain trust and confidence for the trade of interconnected network.¹⁰² Facing the special demand of E-business, to make it better to facilitate this type of disputes, the online disputes resolution mechanism could be deemed as the most fitting method. On account of the ODR system could be conducted online without considering the cost from the distance, in the comparison with traditional litigation, it virtually decreases the cost.¹⁰³

¹⁰¹ G Kauffman-Kohler and T Schultz, "Online dispute resolution: Challenges for Contemporary Justice", Kluwer Publishing, 2004, hlm 85.

¹⁰² E Katsh "Online dispute resolution: some implications for the emergence of law in cyberspace", Lex Electronica Vol 10, No 3, 2006.

¹⁰³ Lynch, J. "ADR and Beyond: A Systems Approach to Conflict Management", Negotiation Journal, Volume 17, Number 3, July 200 1, hlm 213.

After the manner of evolution and development of ODR system, the functions could be offered by ODR system to facilitate the disputes from E-business gradually meet the demands of specialties of E-business including, time and cost-saving, the convenience of the procedure, having right to make a decision on the selection of the third party and etc.¹⁰⁴ Although there are amounts of obstacles to optimize the ODR system, on the basis of the function of ODR could be offered for dispute resolution related to E-business, ODR still could be as a significant role to facilitate it.

4.4 Current ODR Mechanism

ODR mechanism is innovative disputes resolution to resolve the disputes in an electronic environment to make use of digital information, mainly adapting to the development of society which disputes comes from the interaction through information and communication technology (ICT). The progress of ODR mechanism to resolve the disputes in Internet era, which is demand of good governance of government, it could provide consumers with an innovative channel to resolve their disputes related to E-business to supplement the inadequate judicial system to respond the demand of public legal services of society.¹⁰⁵ ODR system is gradually applied to resolve disputes in recent years, there are several common types that are often operated as an extrajudicial system to resolve disputes including online arbitration, online conciliation or mediation and Internal Service of Intermediary Platforms. In the following paragraphs, the author will demonstrate the characteristics of these common

¹⁰⁴ Patricia Audrey Ruslijanto, "Transforming Landscapes: How ODR Reshaping the Prospect of Dispute Settlement in a Connected World," *Indonesian Journal of International Law* 16, no. 1 (2018): 84-99.

¹⁰⁵ Ursa Jeretina, "Consumer Online Dispute Resolution (ODR) - A Mechanism for Innovative E-Governance in EU," *Central European Public Administration Review (CEPAR)* 16, no. 2 (November 2018): 45-68.

ODR mechanisms and at the same time, analyze the exposures of deficiencies of current ODR mechanisms to resolve disputes happening between consumers or users and these big online platform economic entities.

4.4.1 Online Arbitration

With the development of application of technology in the Internet era, arbitration institution promulgates the processing of arbitration online. For instance, the China International Economic and Trade Arbitration Commission (CIETAC), as an independent arbitration institution, fairly resolving the disputes from trade transaction and investment from inside and cross-border market, which enacted their own version of online arbitration on May 1, 2009. Based on the voluntary principle of arbitration, if the parties prefer to apply for the online arbitration rules in their disputes, it's essential for them to clearly stipulate the clause in the contract like the sample officially released by CIETAC.¹⁰⁶ According to the rules of Article 33 of the hearing of cases, the arbitral tribunal shall use network video conferencing and other electronic or computer communication; according to the specific circumstances of the case, the arbitral tribunal may also decide to adopt the offline on-site hearing.¹⁰⁷ According to the report of work summary 2020 published by CIETAC, cases filed online is 819, an increase of 628 compared to last year and cases heard is 347. There is a significant increase in the rate of online case filing and online hearings. There are only a few institutions that promote the online system, and most of them are inactive and couldn't find the latest data. In fact, based on the views of some experts that the effect of online conciliation is way beyond the effect of online arbitration to resolve

¹⁰⁶ See the website of CIETAC, any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's online arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.

¹⁰⁷ China International Economic and Trade Arbitration Commission, Online Arbitration Rules, 1.1.2015.

the consumer dispute. To make a comparison on practice and tradition between arbitration and conciliation, the arbitration in China is often institutional arbitration applying for the commercial trade and investment field while the conciliation is dependent on cultural tradition applying for small civil cases including loan dispute, family dispute and employment disputes and so forth. Therefore, from the author's perspective, online conciliation can play a greater role than online arbitration to resolve consumer disputes relied on the qualities and features.

4.4.2 Online Conciliation/Mediation

Conciliation/Mediation is the habitual practice in China to resolve the disputes combined with the other dispute resolution mechanism in broad scope, including judicial process and extrajudicial process.¹⁰⁸ For judicial proceedings, according to China Civil Procedure Law Article 9, in trying civil cases the people's courts shall conduct conciliation for the parties on a voluntary lawful basis; if conciliation fails judgments shall be rendered without delay. The conciliation could be conducted at the beginning of judicial proceedings, in the course of the stage and before the end of adjudication.¹⁰⁹ Due to the cultural background, conciliation is an effective way to resolve disputes for all sorts of fields for a long period of time in China. In the Internet era, online conciliation is naturally an essential part to integrate into the Internet Court and Smart Court. For extrajudicial proceedings, there are two different models including the online conciliation as a part proceeding of online arbitration and online conciliation mechanism adopted by the independent institution, taking CIETAC as an example, based on the online arbitration rules of Article 37 The

¹⁰⁸ Y. Bu & X. Huo, "The Revival of ADR in China: The Path to Rule of Law or the Turn Against Law", in C. Esplugues & L. Marquis (Eds.), *New Developments in Civil and Commercial Mediation*, Springer International Publishing, Switzerland, 2015, pp. 196-198.

¹⁰⁹ Jie Zheng, *The Role of ODR in Resolving Electronic Commerce Disputes in China*, 3 *IJODR* 41 (2016).

arbitral tribunal may, at the request of both parties or with the consent of both parties, use network video conference and other electronic or computer communication methods to mediate the cases heard in the process of arbitration proceedings. The arbitral tribunal may also decide, depending on the specific circumstances of the case, to adopt a regular on-site approach to conciliation.¹¹⁰ Conciliation can be conducted separately or combined with the hearing of the case. At the same time, CIETAC established the conciliation center on May 18, 2018, to mediate the disputes submitted in a just, efficient, harmonious and cost-effective way. However, the fees of application and conciliation from institutions are way beyond the common consumer disputes.¹¹¹ Nowadays, most of arbitration and conciliation institutions have been established for the disputes from transactions and trades of corporations, which means to some extent, the current rules and procedures wouldn't suitably for resolving the consumers disputes related to E-business. Moreover, People' conciliation in offline version has indeed achieved great results in the past time, but it hasn't had the main role in the Internet era, which the author think maybe overly underestimated.

4.4.3 Internal Service of Intermediary Platform

Crowdsourced online dispute resolution (CODR) is a combination of the crowdsourcing and ODR system, which mean adopt ODR system instead of using the designated person, to outsource the work to a large group of people in the form of open call (which means there are some standards are publicly made).¹¹² Taobao, as one of the big trade transaction in China, adopted the CODR to resolve disputes. According to the rules published on the Website of Alibaba Public Jury, the scope of

¹¹⁰ Ibid., Footnote 66.

¹¹¹ The list of application fee is from the website of CIETAC.
<http://www.cietac.org.cn/index.php?m=Article&a=show&id=2747>.

¹¹² Jaap Van Den Herik & Daniel Dimov, Towards Crowdsourced Online Dispute Resolution, 7 J. INT'L COM. L. & TECH. 99 (2012).

branches included: 1) Defend recourse rights from the transaction, which is disputes between buyers and sellers over the ownership of transaction amounts or financial compensation; 2) Rules crowdsourced comments, through public participation in rule review, group wisdom is involved in the discussion of industry rules and social policies to promote the optimization of the rule system; 3) Penalty appeals, to fairly protect the seller's rights via accepting the complaint from them; 4) Commodity purification, which means to remove the spamming of information on problem goods and themselves, to ensure the environment of consumption to operate in a good way; 5) the inspection of malicious reviews, to examine and remove the malicious comment to protect seller's rights.¹¹³ Due to most disputes is pretty simple, basically involve in the inconsistency between the real goods and descriptive picture, the quality of goods and the goods are not received, which result in a consumer is willing to make a compromise on the due process and substantive legislation of judicial system, mostly based on the Taobao rules and consumer practice.¹¹⁴ According to the latest Taobao crowdsourced rules, the number of the crowdsourced adjudicator is seven, the period of adjudication is extending to 168 hours and set up the limitation of maximum quantities per day.¹¹⁵ However, because the adjudicators are all from the consumers or merchant, which is lacking professional knowledge, and even are treated to have a natural preference based on their roles. In addition, the ODR platform provided by the Taobao just attempt to resolve the disputes between the consumers and the merchants/retailers, when the claim rights against the Taobao

¹¹³ Taobao.com, the rules of Alibaba Public Jury. <
https://pan.taobao.com/?spm=a21bo.2017.201876-4.3.5af911d9kl1mnO&acm=lb-zebra-634493-8610545.1003.4.8191561&scm=1003.4.lb-zebra-634493-8610545.OTHER_15917334404143_8191561#n2>

¹¹⁴ Wei Gao. Crowdsourcing online dispute resolution-how group wisdom can resolve online disputes[J]. Peking University Law Review,2018,19(02):194-216.

¹¹⁵ Tao.com, Taobao Platform Dispute Resolution Rules, 5.1.2019.

platform from the consumer, it shall be adjudicated by the Hangzhou Internet Court based on the user service agreements.¹¹⁶

4.4.4 Deficiencies of Current ODR Mechanisms

On the basis of the analysis above, there are several problems have been exposed. First of all, in the most application scenarios, the current ODR system just a complementary process or mechanism for the judicial system and extrajudicial system. In the traditions and practices of China, People's conciliation or mediation has achieved achievements that can't be ignored in the dispute's resolution areas, but until now it doesn't play a significant role in the internet era for resolution of E-disputes. Besides, even it appears in an independent conciliation institution, the applicable conditions and rules stipulated by institutions don't suit the features of consumer disputes related to E-business. Moreover, the internal ODR mechanism established by online economics platform takes rather huge quantities of E-disputes between consumers and merchants, but it doesn't apply to the disputes between consumers or users and these big online platform economic entities, which means there is still blank area of the current ODR system to resolve the disputes between consumers or users and these online platform economic entities in a more cost-effective, efficient and just way. To address the deficiencies exposed from the analysis above and optimize the current ODR system to become more suitable dispute resolution mechanisms to resolve these E-disputes, for the micro-perspective view, the author thinks the current ODR system in China should be revamped in at least aspects as follows: (1) Landscape of ODR; (2) The scope of application; (3) Principle; (4) Model system; (5) Standard Procedure of ODR. This list isn't inclusive, there should be more modifications for the ODR system based on the practice and statistic when it is applied. Therefore, in chapter 5, the author will make recommendations for the

¹¹⁶ Ibid., Footnote 72.

modifications of the current ODR system to make it more suitable to resolve E-disputes between consumers or users and these big online platform economic entities, mainly based on the analysis and comparisons on the EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR. In the following, the comprehensive analysis of these important documents and research on the actual result of practices will be discussed first.



4.5 Concluding Remarks

The values and ideas of Confucianism including benevolence, righteousness, courtesy, wisdom and trust have been gradually emphasized when the development of society transforms the priority of economic development to the sustainability of development. In particular, one of the essences of Confucianism pursues harmony and maintain the order of society, it is rejuvenated in the modern generations applied to resolve new issues arising from modern times. Traditional mediation in China was established on the values of Confucianism, which make it incline to make a compromise to dissolve disputes to restore the broken social order, which is not as same as its counterpart, the mediation in the West. Not like the mediation in the west which is a supplement tool to cover the deficiencies of the judicial system, hence, mediation in the West should be conformity with the rules of procedures and substance of stipulation, otherwise, it will be treated as a detriment to basic values of the society. The mediation based on the values of Confucianism emphasizes the morals of society, which pursue to maintain the integrated interest of the communities not individual, hence, it tries to create more room for disputants to make a compromise to achieve the harmony of society. In the modern generation, although there are some disadvantages of Confucianism to develop the ODR mechanism in China, for instance, some scholars think it will cause damage to the rules of procedures of ODR mechanism in China, the advantages of Confucianism provide a basic foundation of consensus of compromise for a society to develop ODR mechanism by emphasizing on the obligation and responsibility from the individual to the benefit and interest of society.

The demands of the ODR mechanism is originated from the change of mode of transaction which is from the traditional offline to trade based on interconnected net, based on the characteristics of online transaction, disputes resolution mechanism should provide disputant with the process of resolution of disputes could be conducted over a long distance. ODR mechanism is an extrajudicial mechanism based on the application of innovative technologies, the ultimate goal and expectation to ODR mechanism, no matter EU or the United Nations Commission, hopes that the process of ODR mechanism could be completely online. Therefore, due to the function of ODR, it could be the most suitable disputes resolution mechanism to resolve a dispute related to E-business. Therefore, in the Internet era, the ODR mechanism will play an undeniable role in resolving the disputes between consumers or users and these big online platform economic entities.

After the analysis of basic values including philosophical ideas and modern functional values are rooted in the development of the ODR mechanism in China, there are some deficiencies exposed by studying the current ODR mechanism in China. Most types of the current ODR mechanism are online arbitration, online mediation and Internal Service of Intermediary Platform and so forth, which could be applied to resolve some consumers related to E-business, but it's not enough to the other E-disputes for instance, the dispute between consumers or users and these big online platform economic entities. Like online arbitration is operated by an institution, the rules and expenses are stipulated by the institution couldn't be applied to resolve these small values in dispute. Online mediation hasn't been fully designed and operated not like traditional mediation which has achieved huge success in the dispute resolution field, until now, most online mediation is just a supplement process to the other dispute resolution mechanism. Internal Service of Intermediary Platform established by these big corporates will focus on resolving disputes between consumers and merchants, it couldn't be applied to resolve the dispute between consumers or users and these big online platform economic entities. Therefore, there

are lots of points of the current ODR mechanism that could be optimized for suitably resolving the dispute between consumers or users and these big online platform economic entities.



Chapter 5 Recommendations: Modification of ODR Mechanism based on the Comparative Analysis of ODR Rules

5.1 Introduction

Through the study of the current dispute resolution mechanism in China, it is found that the ODR mechanism could be the most suitable way to resolve the dispute between consumers or users and these big online platform economic entities. In the light of the outcome from the analysis of the current ODR mechanism in China, it is shown that there are some deficiencies in the current ODR mechanism which make it not suitably resolve the dispute between consumers or users and these big online platform economic entities. Therefore, to optimize the current ODR mechanism in China could well-suitably resolve the disputes aforementioned, there should be several recommendations on the reformation of the ODR mechanism in China.

This chapter begins with the study about EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR, combine with the practice and experience of EU Member States, to analyze what contents and characteristics of these influential legislations and also what effect of stipulations execute in reality. Based on the analytical result by studying EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR as a reference, at the same time, according to the tradition and practice in China, the author will make a proposal on reformation of the ODR mechanism so that makes it more suitable to resolve disputes between consumers or users and these big online platform economic entities.

5.2 Regulations and Rules on ODR Mechanism

5.2.1 EU ADR Directive and ODR Regulation

The initiative and beginning of establishment of ODR in EU could be date back to early 1975. According to article 114 and article 169 of the Treaty on the Functioning of the European Union (TFEU), there is requirement for EU competence to establish an internal market from the relevant laws' aspects and also require them to make stipulation or policies to ensure a high level of consumer protection by promoting the benefit and interest of consumers.¹¹⁷ The TFEU is indirective publicity to advocate the ideas and principles. In fact, the very first beginning of action should be date back to ADR schemes in two EC Recommendations.¹¹⁸ With the development and optimization of ADR and ODR schemes in EU. The most significant legal instrument of soft law is EU parliament has enacted two important pieces of legislation on the development of consumer ODR, being the European Directive on Alternative Dispute Resolution for Consumer Disputes¹¹⁹ and the Associated Regulation on Online Dispute Resolution.¹²⁰ In these legislations, the EU parliament emphasis on the Union provides a high level of consumer protection, to ensure the consumer resolve disputes arising from the goods or service contract in an efficient, low-cost, simple way.

When it comes to Directive ADR, under this legislation, the Member States of Union need to offer the lists of ADR entities and facilitate the accessible procedures for a consumer to get into the ADR, there is analysis for this legislation as follows:

¹¹⁷ TFEU, OJ L EU, No. 83/2010, pp. 47-199.

¹¹⁸ The first Recommendation 98/257/EC of 20 March 1998, OJ L 115, 17.

¹¹⁹ Directive 2013/11/EU of The European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and amending Regulation (EC) 2006/2004 and Directive 2009/22/EC, available at: <http://tinyurl.com/kcgfruo>.

¹²⁰ Regulation (EU) No 524/2013 Of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes, available at: <http://tinyurl.com/lqyfqb6>.

In the framework of ADR in the EU, Member States should designate the national competent authorities and report the lists and information of ADR entities to the Commission.¹²¹ Through this model, EU Commission can acquire thorough information and make coordinate with the different ADR entities in different States. At the same time, for some aspects, there are no specific requirements in Directive, to leave them with the State's own decision, for instance, the quality of ADR entities, the specific procedures of ADR, the participation is mandatory or voluntary and the outcome of ADR is binding or not. Like the nature of the outcome of ADR, the Directive doesn't stipulate the specific requirement, only making emphasis on the liberty of both parties, in particular, the consumer. According to Article 10, the agreement is reached before the disputes are materialized or deprive the consumer's rights of submitting a complaint to the court is not binding to the consumer.¹²² For the Member States, they can make requirements beyond the ones in the Directive and stipulate the specific rules in a more flexible way. It indicates the center of the EU Commission is responsible for the collection of information and the coordination of cooperation between ADR entities instead of the specific unification code to resolve consumer disputes. According to Article 15, Member States shall ensure and encourage the official department, relevant consumer organizations and business associations to disseminate the information to make the consumer access.¹²³ To improve the efficiency of ADR, according to the Directive on ADR, Article 8(c), the ADR procedure is free of charge or available at a nominal fee for consumers, which also could satisfy the demand of low-value disputes to reduce consumer's burden of defending the rights.¹²⁴ Due to the most consumer disputes are involved in small

¹²¹ Ibid., Footnote 119.

¹²² Ibid., Footnote 119.

¹²³ Ibid., Footnote 119.

¹²⁴ Ibid., Footnote 119.

amount, it's virtually established barricades if the fee of dispute resolution mechanism is way beyond the amount in dispute. And also, according to Article 13, there is an obligation for traders to inform the consumer about the entities ADR which can be used to resolve the disputes.¹²⁵ to reduce the burden of information collection undertaken by consumers. Under Article 1, at the EU level, the participation is voluntary, emphasizing the national level could go beyond this requirement. Meanwhile, it doesn't stipulate the binding effect of outcome from the ADR mechanism.¹²⁶ Therefore, Member States could decide if the participation is voluntary or not based on own tradition and practice.

Through the application of EU ADR Directive these years, there is report from the commission to the European Parliament, the Council and the European Economic and Social Committee to represent the effect and trending in Member States since EU ADR Directive has been executed. In practices of the EU ADR Directive, Member State certify the ADR entities in different ways, some Member State makes an open list for ADR entities with the requirement to satisfy the standards and the Directive, some of them make a close list only include the ADR entities have been certified. Poland implements an open list with the public bodies as ADR entities. Most Member States have recognized all sorts of ADR procedures, except France exclude the solution imposed on the consumer or a wavier for consumer bring the complaint to the courts.¹²⁷ Also, there is a special clause in ADR Directive, Article 2.2. (a), this Directive shall not apply to (a) procedures before dispute resolution entities where the natural persons in charge of dispute resolution are employed or remunerated

¹²⁵ Ibid., Footnote 119.

¹²⁶ Ibid., Footnote 119.

¹²⁷ European Commission, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the application of Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, COM (2019) 425 final, Brussels, 25.9.2019.

exclusively by the individual trader, unless Member States decide to allow such procedures as ADR procedures under this Directive and the requirements set out in Chapter II, including the specific requirements of independence and transparency set out in Article 6(3),¹²⁸ which adopted by a few States. On the basis of the report, some States have made additional and more stringent requirements compared to the Directive. For instance, under Article 6(a) Member States shall ensure that the natural persons in charge of ADR possess the necessary expertise and are independent and impartial.¹²⁹ This shall be guaranteed by ensuring that such persons who possess the necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes, as well as a general understanding of the law, some of Member States make legislation to raise the standards, like German requires these people must be qualified lawyers and mediators, Czech requires a university or master's degree in law.¹³⁰ The management of the standard of qualification of conciliator or mediator is a way to ensure the expertise and due process of dispute resolution. For the fees under the ADR Directive, most States adopt either is free or small amounts for the consumer.¹³¹ As the Article 8, Member States shall ensure that ADR procedures are effective and fulfil the following requirements: (e) the outcome of the ADR procedure is made available within a period of 90 calendar days from the date on which the ADR entity has received the complete complaint file. In the case of highly complex disputes, the ADR entity in charge may, at its own discretion, extend the 90 calendar days' time periods. The parties shall be informed of any extension of that period and of the expected length of time that will be needed for the conclusion of the dispute.¹³² Some of the Member States set up the strict limitation of expansion for the time

¹²⁸ Ibid., Footnote 119.

¹²⁹ Ibid., Footnote 119.

¹³⁰ Ibid., Footnote 127.

¹³¹ Ibid., Footnote 127.

¹³² Ibid., Footnote 119.

aforementioned like Belgian and Portuguese.¹³³ Meanwhile, according to the report, the ADR landscapes in the Member States is in various ways, including model, coverage, funding and procedures and so forth. The funding of ADR could be non-profit or making a profit, the coverage of ADR could be in all retail sectors or in limited sectors, and the model of ADR could be run by private entities or public entities. Moreover, the establishment and functions (certification procedures and monitoring practices) of the national competent authority vary from State to State, most of them is designated to one national competent authority and assigned the duty to the relevant consumer policies entities.¹³⁴ Based on the report of the practices in Member States, the requirement of transparency of ADR entities and national authorities is a significant step to optimize the system through the exchange of information and communication of the successful experience on annual meeting and report. To observe the new framework in macro view, in mature developed ADR culture of Member State, there is no obvious increase of new ADR system, in less developed ADR system of Member States, where is an upward trend, and the trending is really slow in the no tradition of ADR in the Member States.¹³⁵ According to the report, the traders' participation in ADR procedures is relevantly slow, and it demonstrates the Member States have high participation in ADR adopting the models either is mandated by national legislation or trade association or is voluntary but establish "naming and shaming" mechanism or the free of charge for trade.¹³⁶

About EU ODR Regulation, it is based on the ADR Directive, to promote the online Single Market. According to the ODR Regulation, there is an ODR platform established. And the EU ODR platform is built and operated by the Commission.

¹³³ Ibid., Footnote 127.

¹³⁴ Ibid., Footnote 127.

¹³⁵ Ibid., Footnote 127.

¹³⁶ Ibid., Footnote 127.

Consumers could submit the disputes to the ODR platform no matter in domestic and cross-border trades over online purchases. Once the consumer's disputes come to the ODR platform, there is an indication for the consumer to resolving their disputes through certified ADR entities or ADR entities the parties agreed on an online management system with a certain limited time, which without prejudice to the other methods consumer could adopt to exercise their rights. In addition, according to Regulation, there should establish ODR contact points in each Member State to provide consumers with related information and assistance in cross border purchases. Under Article 14 of EU ODR Regulation, online traders and online markets are required to insert links to the ODR platform in their Websites and the link shall be easily accessible for consumers.¹³⁷ which reduce the cost undertaken by consumer to get access to ODR mechanism as far as possible.

On the basis of the report from the commission to the European Parliament, the Council and the European Economic and Social Committee on the application of EU ODR Regulation, since the ODP platform established, 460 ADR entities from all Member States, Liechtenstein and Norway are registered in the platform, which attracts more than 8.5 million visitors and 120 000 consumer-to-business disputes. However, 80% of disputes couldn't take a further step since the trader is inactive to reflect and propose the ADR entities to the consumer.¹³⁸ It exposes some shortcoming of this ODR platform from the disparities between the demand of consumer and the effectiveness and efficacy of this ODR platform. There are shortcomings in this ODR system including it should make an agreement by the parties to move forward and this ODR system haven't been operating to its full potential. About the ODR contact points, they are designated by the Member States, it could receive amounts of queries related to the function of the platform and real obstacles that happened to them. The main duties of ODR contact points are providing

¹³⁷ Ibid., Footnote 120.

¹³⁸ Ibid., Footnote 127.

the consultant center, distribution information and holding meetings and so forth. And in accordance with Article 14 of EU ODR Regulation¹³⁹, there is a salient achievement in raise public awareness of the ODR system.

Through analysis on rules and contents of EU ADR Directive and EU ODR Regulation, and also, to make research on the practices of EU Member States, there are some strengths and shortcomings that could be demonstrated under these two legislations. Except for the rules and practice from the EU, UNCITRAL Technical Notes on ODR released by the United Nations is essential pieces that should be analyzed as a reference.

5.2.2 UNCITRAL Technical Notes on ODR

Since 2009, the United Nations Commission on International Trade Law (UNCITRAL) has been started to pay attention to disputes resolution mechanism for cross-border e-business transactions. There is working group has been designated to make research on constructing a set of rules to resolve consumer disputes which are low value, high volume cases in cross-border transaction from a global perspective.¹⁴⁰ With the progress of making research on ODR system, in order to respond to the demand of disputes resolution mechanism for cross-border transaction, there is a colloquium would be held by the UNCITRAL Secretariat in March 2010, and it also collaborated with the Pace Law School Institute of International Commercial Law and the Penn State Dickinson School of Law.¹⁴¹ In this colloquium, most scholars reached agreement on the view of the traditional dispute resolution couldn't suitably resolve consumer disputes happened in cross-border transaction and the cost of execution of

¹³⁹ Ibid., Footnote 120.

¹⁴⁰ See the excellent summary of the issues at stake in C. Rule, V. Rogers & L.F. Del Duca, 'Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-border Small Value - High Volume Claims - OAS Developments', Uniform Commercial Code Law Journal, Vol. 42, 2010, p. 221, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635463

¹⁴¹ See details in Reports A/CN.9/706 and A/CN.9/WG.III/WP.111, www.uncitral.org/uncitral/en/commission/sessions/43rd.html.

ODR system couldn't increase the burden taken upon consumers. The most significant substance is ODR system should match the quality of disputes needed to be resolve.¹⁴² Because ODR system is invented to resolve the disputes arising out of online cross-border transaction, it is differentiate from traditional offline transaction which could be submitted to arbitration and conciliation or mediation, in particular, in reality, the application of arbitration is far away matching the quality of consumer disputes happened in cross-border transaction. So that setting up ODR system to matching the quality of disputes, the normative standards of ODR system mainly emphasize on the protection of interest and benefit of consumers. To satisfy the demand of cross-border transaction to resolve disputes from such transaction, UNCITRAL finalized and adopted the Technical Notes on Online Dispute Resolution at its forty-ninth session in 2016, which is non-binding and illustrate the basic elements of ODR process.¹⁴³ Due to this Technical Notes on ODR is discussed and made by the top professions and expertise around the world, attempt to address this issue in a unified and clear way, which means it tries to bridge the gaps among the different legal system. Therefore, it could be a reference to assist to construct and reform the ODR system in the domestic market. The author will attempt to demonstrate and illuminate the UNCITRAL Technical Notes on ODR as follows:

The goals of UNCITRAL Technical Notes on ODR are to attempt to handle the sharply increased needs to resolve the disputes from the cross-border market in a simple, efficient and cost-effective way particularly there shouldn't have to present physically in the hearing place and to resolve the low-value and high-volume disputes from a cross-border transaction conducted on online.¹⁴⁴ In the Technical Notes, the principle of ODR including transparency, which requires the ODR administer to the

¹⁴² Ibid., Footnote 128.

¹⁴³ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL Technical Notes on Online Dispute Resolution, New York, April 2017.

¹⁴⁴ Ibid., Footnote 143.

public the relevant information of the ODR system for consumer easily acquire and special bond between traders and ODR administrators, In addition, emphasizing the balance between the transparency and confidentiality; independency, which requires the stipulation of ethic code for a natural person in charge of the whole process to standardize their behavior and stay in the neutral position to address the conflicting interest; expertise, which requires ODR administrators must adopt the series of policies and training lessons to make neutrals are conformity with the standards; consent, which requires voluntariness should be applied for parties, whenever the disputes arise, there is confirmed agreement must be reached.¹⁴⁵

In UNCITRAL Technical Notes on ODR, there is a three-tiered structure to resolve the disputes including negotiation as the first stage; facilitated settlement as the second stage and the binding stage as the third stage. In the stage of negotiation, there may be a negotiation on the online platform for a reasonable period of time; if it fails, the system is automatically moving towards the next stage. In the stage of facilitated settlement, there is a neutral will be appointed by the ODR platform or ODR administrator to communicate with both parties to reach a settlement when the first stage of negotiation fails; if the neutral couldn't assist the parties to have a settlement through a period of time, the system will continually move towards the last stage. In the final stage, there isn't a specific format proposed in the Technical Notes on ODR instead suggest the ODR administrator should notify the parties of what nature of the final stage is and what kind of format will be taken.¹⁴⁶ And the limitation of the scope to disputes from cross-border, low-value e-commerce transactions and expands the system in business-to-business transactions or business-to-consumer transactions, as well as the ODR system could be applied for both goods and services.¹⁴⁷ To further enhance the efficiency of the ODR process, the beginning and the end of time is

¹⁴⁵ Ibid., Footnote 143.

¹⁴⁶ Ibid., Footnote 143.

¹⁴⁷ Ibid., Footnote 143.

required under Article Section V 32¹⁴⁸, and it also suggests the administration should have the right to extend the time to leave some flexible room to handle the unusual situation. For commencement of proceedings, it suggests claimant and respondent are submitting the information and materials like name, electronic address, representatives (if any), grounds, the solution to be proposed, counterclaim and the signature or other means of identification and authentication of the person involved and so forth.¹⁴⁹

Besides, under Section X, Section XI, Section XII of this Technical Notes on ODR, there are some recommendations of appointment, powers and functions of the neutral, language and governance.¹⁵⁰ For the neutral, it suggests there is only one neutral will be appointed by the ODR platform or ODR administer to reduce the cost and enhance the efficiency and promptly notify the parties with the information of neutral at the commencement of the facilitated stage. And also, it proposes the requirements of standards of neutrals¹⁵¹ and specific ethic codes under Article 48. In the last part of this Section X, the proposal of due process of the appointment of neutral should be simpler and easier than the offline version to achieve of the goal of efficiency and cost-effectiveness.¹⁵² Under Section XII, it suggests the guideline and minimum requirements should be applied to the ODR platform and ODR administer

¹⁴⁸ In order to avoid loss of time, it is desirable that a communication be deemed to be received by a party when the administrator notifies that party of its availability on the platform; deadlines in the proceedings would run from the time the administrator has made that notification.

¹⁴⁹ Ibid., Footnote 143.

¹⁵⁰ Ibid., Footnote 143.

¹⁵¹ Article 47 of Section X — Appointment, powers and functions of the neutral, it is desirable that neutrals have the relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question. However, subject to any professional regulation, ODR neutrals need not necessarily be qualified lawyers.

¹⁵² Ibid., Footnote 143.

and to conformity with the standards of due process, confidentiality, independence, neutrality and impartiality conducted offline.¹⁵³

Through the analysis of the above legislations, except the common features like application on cross-border transactions and emphasis on low-value, high volume disputes, there are some disparities of construction of ADR and ODR system between EU and UNCITRAL. However, the principles and values from them could be adopted to resolve disputes happening between consumers or users and these big online platform economic entities. For instance, the purpose of the EU ADR Directive and EU ODR Regulation to enhance the level of consumer protection which is mainly the foundation of the reason that the author attempts to seek a more suitable way to resolve consumer disputes related to E-business. And the unification code recommended by UNCITRAL Technical Notes on ODR could provide a model of the systemic process of the ODR system to change the chaotic and complex status of the current ODR system in China. Therefore, there are several recommendations will be proposed in the following paragraphs to make the current ODR system more suitable to resolve disputes between consumers or users and these big online platform economic entities.

5.3 Recommendations on Modification of ODR Mechanism

As literature reviews and cases analysis mentioned above, in addition, the traditional offline disputes resolution couldn't address the dispute arising out of the online market which is low-value and high volume in a well suitable way, in particular, there is blank area of current disputes resolution mechanism to resolve E-disputes between consumers or users and these big online platform economic entities, by reference to the EU ADR Directive and EU ODR Regulation and UNCITRAL Technical Notes on ODR with the experience and practices from the

¹⁵³ Ibid., Footnote 143.

report on the application of ADR Directive and ODR Regulation of EU, there could be reformations are adopted for ODR system in China where has a long time of ADR mechanism based on tradition. Therefore, there are several modifications for the ODR system in China to attempt to optimize for resolving the consumer disputes including the landscape of ODR, the scope of application, principle, model system and standard procedure of ODR.

5.3.1 Landscape of ODR

5.3.1.1 private entities or public entities or the combination

Under the EU ADR Directive, there is no specific requirement at the level of Commission and give the Member States more flexibility, so Member States approve and certify those different qualities of ADR entities, including singular public entities, private entities in the close list or open list and the combination of public and private entities.¹⁵⁴ Given that the practices and experiences in China, compared to the institution conducted by the official government, the private institution is rather inactive for instance, most of them are hard to find recent statistic and information. Besides, the ADR or ODR entities are run by a private company, which will incline to lead to consumers are skeptical that there is a certain relationship with these big corporations, ultimately losing the trust of ODR entities. In China, the People Conciliation Committee as a social organization, providing conciliation services for resolving civil disputes on daily basis, having reached the great achievements. Therefore, if to construct the ODR system is based on the traditional people's conciliation system, will make the new ODR system easier for people to accept. There are several private ADR and ODR institutions at the top of the dispute resolution area while the public institutions achieve the greater job. Therefore, the author believes

¹⁵⁴ Ibid., Footnote 119.

that there should construct a combination of public entities and private entities, which make parties have the right to choose the suitable one.

5.3.1.2 Assistance Center

In geography, China is a broad country with a unitary state, to facilitate this country easily, the work and policies are operated in a two-tiered structure, which means the framework and coordination will be addressed in the central government, and the specific planning and report of proceedings and data will be addressed in the provincial government. Towards the ODR system, there must be amounts of ODR entities to be established in all provinces, and the online disputes involve the complication of allocation of jurisdiction. Two of them tangle together will make consumer perplex about pointing the right ODR entity to exercise their rights without profession. Like EU ODR Regulation, the ODR platform at Commission should be established and to indicate the ADR entities when the consumer submits the disputes to the platform, which makes it convenient for the consumers to exercise their rights on the online platform. The function of ODR assistance center governance could provide an “integrated information reservoir” for disputants to easily get access to achieve the demand, and also the trust mark recognized by ODR assistance center will enhance the trust for consumers to face the disputes in the future. Towards the professionals as third party to mediate the disputes, the ODR assistance center screen the qualified institution and qualified conciliators or mediators to make results more professional.¹⁵⁵ In China, for ODR to resolve the consumer disputes, in the consideration of the profession and competence of common consumer, it’s a better way to establish a single entrance for the consumer to submit their disputes at the first

¹⁵⁵ Ursa Jeretina, “Consumer Online Dispute Resolution (ODR) - A Mechanism for Innovative E-Governance in EU,” *Central European Public Administration Review (CEPAR)* 16, no. 2 (November 2018): 45-68.

place like ODR platform in the EU, being an assistance center to coordinate and disperse the cases to alleviate the obstacles preclude the consumers to exercise their rights.

5.3.1.3 Education

The education and training of relevant persons for the ODR system is a critical part of enhancing the efficiency and efficacy of the ODR system, this should be separated into three parts, firstly, professional training for a natural person who charges in the whole process, secondly, for consumers, providing basic knowledge and information of the rule of ODR procedure, the information of relevant entities and the knowledge of consumer protection and so forth. Lastly, for the whole society, there should abundant education of campaign to publicly disseminate the function and benefits of the ODR system. For a long period of time, to improve the competence and expertise of people's conciliator is tough and steady work. According to the Opinions on strengthening the construction of the people's conciliator team promulgated by Ministry of Justice¹⁵⁶, there are at least two aspects could be strengthened the expertise, including focusing on the selection and recruitment of lawyers, notaries, arbitrators, grassroots legal service workers, doctors, teachers, experts and scholars and other social professionals and retired judges, prosecutors, civilian police, judicial and administrative police and retired personnel in charge of relevant industries as people's conciliator to improve the professional level of people's conciliator, which is improving expertise through raising the standard of qualification and holding people's conciliator training program, judicial administrative departments and people's mediator associations should set up training courses according to the characteristics of local and industrial and professional fields of conflicts and disputes, focusing on social situation, legal policies, professional

¹⁵⁶ Ministry of Justice of the People's Republic of China, the Opinions on strengthening the construction of the people's conciliator team, 4.27.2018.

ethics, professional knowledge and mediation skills, which is educating the existing group to make improvement. Under the EU ADR Directive and the legislation of Member States, the necessary knowledge and skills are at least required, in some States, even make additional standards of qualification.¹⁵⁷ Under UNCITRAL Technical Notes on ODR, neutrals or conciliators are required to have the relevant professional experience but don't have to be a qualified lawyer.¹⁵⁸ In China, under the Arbitration Law of the People's Republic of China, according to Article 13, Arbitrators must fulfil one of the following conditions, (1)they have been engaged in arbitration work for at least eight years; (2) they have worked as a lawyer for at least eight years; (3) they have been a judge for at least eight years; (4) they are engaged in legal research or legal teaching and in senior positions; and (5) they have the legal knowledge and are engaged in professional work relating to economics and trade, and in senior positions or of the equivalent professional level. The arbitration commission shall establish a list of arbitrators according to different professionals.¹⁵⁹ Under the People's conciliation Law, conciliators are required to education level, policies level and legal knowledge, in practice, conciliators have at least a high school degree which is much lower standards than EU rules.¹⁶⁰ To establish an ODR system in China for consumer disputes, the natural person in charge of the whole process should have basic knowledge and skills to handle the disputes in the domestic market with the constant training program to keep up with the speed of upgrade and update of technological application, especially, there should be computer and Internet training program for them to facilitate the disputes on the online platform.

Besides, basic education for a consumer is essential as well to provide fully information and resources to exercise their rights. Under the Consumer interest and

¹⁵⁷ Ibid., Footnote 119.

¹⁵⁸ Ibid., Footnote 143.

¹⁵⁹ Arbitration Law of the People's Republic of China, Ninth Meeting of the Standing Committee of the Eighth National People's Congress, 9.1.1995.

¹⁶⁰ Ibid., Footnote 46

rights protection law Article 13, a consumer shall have the right to obtain information relating to consumption and the protection of the rights and interests of consumers. A consumer shall strive to master all of the necessary information and the ability to use a commodity or service, shall use commodities properly and shall increase the awareness of self-protection.¹⁶¹In addition, Consumer association and other consumer organizations shall be the social organization that is established in accordance with the laws that carry out social supervision of commodities and services and protect the legal rights and interests of consumer under the legislation. And one of the obligations of the Consumer association shall provide information and advice services for consumers under Article 32.¹⁶² In reality, the Consumer association hold various meetings to propoganda the information and knowledge of consumer interests' protection related to the certain area. As ODR system, the author thinks the Consumer association or other competent authorities could take responsibility to further education and campaign to further enhance the awareness of consumer about the operation of the ODR system like the function of ODR contact points under EU ODR Regulation.

Last but not least, improving public awareness is indispensable to promote the ODR system. In practice in China, there is barely a campaign for disputes resolution out of court, but people's mediation promoted by the government, which to some extent cause the insufficient effect of the ODR system. Likewise, on the basis of the report from the EU Commission, awareness levels in retailers particularly small business retailers are still rather low not execute their full potential, which spreading misleading and confuses information to preclude the mass to accept this new ADR

¹⁶¹ Ibid., Footnote 28.

¹⁶² Ibid., Footnote 28.

framework.¹⁶³ Therefore, to promote the ODR system should have a huge campaign to improve public awareness level at the beginning of the stage.

5.3.2 The scope of application

Although there are various views and opinions to discuss the definition and application of ODR. For instance, what the quality of online arbitration such as NetCase set up by International Chamber of Commerce (ICC)? What is the profile of the users making use of ODR? with the development of online transaction, all of roles of transaction will make deal through Internet, however, the different shareholders have different advantages and position in the market for instance, there are model of business to business transaction (B2B)¹⁶⁴, business to consumer disputes transaction (B2C)¹⁶⁵, consumer to consumer transaction (C2C)¹⁶⁶, the different transaction will probably cause the different consequences for participants even based on the same or similar reasons, so that adopting the method of classification in different model could resolve disputes more accurate and unambiguous.¹⁶⁷ In this thesis, the purpose of establishment of ODR system mainly focus on resolving the disputes arising out of the transaction between these big online platform economic entities and consumers, so the values and interests shall be protected are differentiate from others. Due to the principle of the ODR system for consumer dispute is protecting consumer based on the public interest, the definition of the consumer should be limited. Even in the

¹⁶³ Ibid., Footnote 119.

¹⁶⁴ B2B refers to the business model of exchanging and transferring data and information and conducting transactions between enterprises through private networks or the Internet.

¹⁶⁵ B2C refers to a model of e-commerce, which is also a commercial retail model for selling products and services directly to consumers.

¹⁶⁶ C2C refers to a transaction that provides a platform for e-commerce activities directly between individuals and is a type of modern e-commerce.

¹⁶⁷ Mireze Philippe, "ODR Redress System for Consumer Disputes: Clarification, UNCITRAL Works & EU Regulation on ODR," *International Journal of Online Dispute Resolution* 1, no. 1 (2014): 57-69.

European countries, there are disparities for the definition and limitation of consumers for instance the difference between the EU ADR Directive and UK legislation. The definition of consumer is under the EU ADR Directive is any natural person who is acting for a purpose which is outside his trade, business, craft or profession and under UK legislation, the definition of consumer is an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession. The UK legislation attempts to avoid defending against the consumer, which treated as their secondary business for occasional purchases.¹⁶⁸ In China, under the Protection of Rights and Interests of Consumers Law of the P.R.C, the definition of consumer is a person who purchases goods or services for living consumption.¹⁶⁹ Making a comparison of them, it is obvious the scope of the consumer is much beyond than counterparts. However, if the ODR system pursue to achieve substantial equality, there must identify who is in a weak position in the society, so the scope of the consumer should be limited to suitable and necessary standards. It is critical to identify the application of rules of ODR system and clarify the features of target issues which make it more accurate to resolve disputes should be focused in this research like under UNCITRAL Technical Notes on ODR, the scope of dispute arising out of trade transaction cross-border at low-value.¹⁷⁰ and under the EU ODR Regulation, the scope of disputes could apply to the both domestic and cross-border online market.¹⁷¹ In this thesis, the author only discusses how to modify the ODR system based on tradition and practice to apply for the domestic market due to there are disparities in cultural philosophy has be discussed in Chapter 4. In addition, if the ODR system is

¹⁶⁸ Graham Ross, *European Businesses and the New European Legal Requirements for ODR*, 3 *IJODR* 135 (2016).

¹⁶⁹ Article 2 of the Protection of Rights and Interests of Consumers Law of the P.R.C, the rights and interests of consumers when purchasing or using commodities or receiving services as consumer needs for daily use shall be protected by this law. Rights and interests covered by this Law shall be protected by other relevant laws and regulations.

¹⁷⁰ *Ibid.* Footnote 143.

¹⁷¹ *Ibid.* Footnote 120.

mandatory to online platform economics entities based on the protection of public interest and taking consideration of the weak position of consumers, the author suggests the limitation of maximum amounts of disputes should be fixed.

5.3.3 Principle

To establish procedure rules, first and foremost, to clarify the principle of the substantive standards. According to Article 3 of People's conciliation law in China, the people's conciliation committee shall follow the following principles in mediating civil disputes: (1) conciliation on the basis of voluntariness and equality of the parties concerned; (2) do not violate the laws, regulations and national policies; (3) respect the rights of the parties, and shall not prevent the parties from maintaining their rights in accordance with the law through arbitration, administration, justice and other means.¹⁷² Likewise, the principle of arbitration in China also emphasizes on the three parts, (1) voluntariness, parties decide if the disputes will submit to the arbitration institution, as the Article 4 of Arbitration law of PRC, the parties adopting arbitration for dispute settlement shall reach an arbitration agreement on a mutually voluntary basis. An arbitration commission shall not accept an application for arbitration submitted by one of the parties in the absence of an arbitration agreement; (2) Justness, the law requires the arbitrator to adjudicate the disputes with the just and reasonability in accordance with the fact and legislation, as the Article 7, disputes shall be fairly and reasonably settled by arbitration on the basis of facts and in accordance with the relevant provisions of law; (3) Independence, the arbitration committee should be independent of any other entities, to make sure there won't any bias and preferences to resolve disputes, as Article 8, the arbitration shall be conducted in accordance with the law, independent of any intervention by administrative organs, social

¹⁷² Ibid. Footnote 46.

organizations or individuals.¹⁷³ When it comes to the ODR system, especially the limitation of application for consumer disputes, moreover, on the basis of the practices in the EU Member States, there are some variation of principles should be made to resolve this issue. According to the EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR, the principle of impartiality, accessibility, transparency, expertise, liberty, independence, legality and fairness have been stipulated as the substantive standards to apply. From the author's perspective, there are some principles that should be discussed in detail in the context of the ODR system to resolve disputes between consumers and these big online platform economic entities.

5.3.3.1 Efficiency

The principle of efficiency of dispute resolution plays a significant role to promote tools to resolve disputes which are low-value and high volume in a more suitable way. As the ODR system is a dispute resolution mechanism to be created to resolve disputes in a simpler and fast way. Given that under UNCITRAL Technical Notes on ODR or EU ADR Directive and ODR Regulation, proposing or requiring series of conducts to achieve efficiencies like reducing the burden of cost from charge free or nominal fees, the limitation of time and the assistance services for getting access to the platform. Besides, UNCITRAL Technical Notes on ODR suggests the due process of the designation of neutrals could be compromised at a certain level¹⁷⁴, in the practice of China, the due process of conciliation has been compromised much more than other States to pursue efficiency so that create rather degree of freedom for disputants to reach agreements to resolve their disputes under the guidance and advice from the conciliators. It is no doubt the principle of efficiency should be optimized

¹⁷³ Ibid. Footnote 39.

¹⁷⁴ Ibid. Footnote 143.

and emphasized in the ODR system while it will involve the discussion of the balance between due process and efficiency.

5.3.3.2 Fairness

When it comes to the fairness of principle, the voluntariness of principle should be discussed in the first place. The voluntariness has been treated as the most essential principle to implement the ADR or ODR system, wherever in China or EU ADR Directive and ODR Regulation emphasis on parties should reach an agreement to submit the dispute to the ADR or ODR system. However, in both places, the practices and statistics all show the complete voluntariness cause impediment for the consumer to get access to ADR or ODR system. As case mentioned in Chapter 3, these big online platform economic entities will use standard form clause and user service agreement to ensure the jurisdiction of the dispute to be happening in favor of themselves which usually cause a burden on cost taken by the consumer. In the online marketplace in China, when these big online platforms economic entities occupy absolute predominance over the consumer, pro forma equality creates de facto inequality. From author's perspective, if the goal of the ODR system is to resolve consumer disputes to enhance the level of consumer protection, the principle of the system should emphasize the social benefit to provide substantial fairness and consumer protection. Therefore, to construct the ODR system in China should require the binding of these big online platform economic entities after the disputes arise. Only the ODR system is applied for this requirement, the function of the whole system could be truly operated instead of stagnant in the theoretical space.

5.3.3.3 Transparency

Transparency is one of the most significant elements for the public to conduct the inspection and examination of disputes resolution mechanism. It involves in another layer of the establishment of ODR system, integration layer, which stress information integration in particular to make any party of disputes and mediator or conciliator to easily get access to information to negotiate.¹⁷⁵ In China, most judicial process and adjudication are published online in accordance with the Civil Procedure Law of Article 134¹⁷⁶ and Article 156¹⁷⁷ but the process and result of conciliation are not published for the public to access. Under UNCITRAL Technical Notes on ODR and EU ADR Directive and ODR Regulation, are all underpin transparency of the ODR system to provide abundant information and data to the consumer at the same time to protect individual privacies. Therefore, there must be a balance between the transparency and confidentiality. In practice, consumers inclined to trust the comment of goods or services have been purchased by others released on the platform. And also, the person who wants to resort to the court will browse the adjudication on the official website as a reference. Like the recommendation in UNCITRAL Technical Notes on ODR, State can use the anonymity method to make the public get access to the key information of cases.¹⁷⁸ For the construction of the ODR system in China, the author thinks it should use the anonymity way and encryption system to provide the mass with the process of cases operated by the ODR system, to convince people to build

¹⁷⁵ Zbynek Loebel, "Identifying and Establishing Standard ODR Processes," *International Journal of Online Dispute Resolution* 3, no. 2 (2016): 125-134.

¹⁷⁶ Article 134 of Civil Procedure Law of P.R.C, Civil cases shall be tried in public, except for those that involve State secrets or personal privacy or are to be tried otherwise as provided by the law. A divorce case or a case involving trade secrets may not be heard in public if a party so requests.

¹⁷⁷ Article 156 The public can access the legal effect of the judgment, ruling, except for the contents of state secrets, commercial secrets and personal privacy.

¹⁷⁸ *Ibid.* Footnote 143.

trust in this new system. To some extent, it also could be a channel to improve public awareness for ODR system to resolve their E-disputes.

5.3.3.4 Accessibility

The establishment of ODR system could be treated as two levels of structure, including access layer and integration layer. The principle of accessibility stresses the execution of access layer in particular. Based on the different situation and condition, the accessibility means disputants could easily choose the ODR institution in the most convenient way and varied preferential position.¹⁷⁹

On the basis of the quality of consumer disputes, lowering the cost for consumers to exercise their rights is a significant condition to have a great impact on accessibility. Consumers have to give up exercising their rights when facing the threshold of application fee is way beyond the amounts in dispute. In practice of China, traditional conciliation doesn't charge any fee according to the law,¹⁸⁰ which makes the consumers are more willing to use it that virtually make a campaign at the first stage. Like the cases aforementioned, When the fee required by the arbitration institution is unreasonably burdened to the consumer, the complainant has to cease the proceedings of defending rights. Therefore, when there is a new framework of ODR system will be built in China, the fee to accessibility of ODR system should still keep up with the rules of traditional conciliation. Secondly, it should provide the available channels and information to enhance the awareness of consumer to exercise recourse rights. In the practice of China, most of online platforms don't provide a clear and obvious information for consumers to exercise their recourse rights. Taking Taobao as an example, the link or channel to the user service agreement and ODR platform are all

¹⁷⁹ Ibid. Footnote 155.

¹⁸⁰ According to Article 4 of the people's Mediation Law of the People's Republic of China, the People's mediation committee does not charge any fees for mediating civil disputes.

lumped into the vibrant colorful web interface and amounts of information, which means the consumers barely notice the content important to them. According to Article 15 of the EU ADR Directive, Member States don't only establish the whole system and infrastructure of ADR, it also shall disseminate and encourage the relevant entities and bodies to provide clear and underlined link and information for the consumer to access the system.¹⁸¹ This stipulation could adapt to the circumstances in China to increase the chances of accessibility for consumers or users, in particular, most consumers or users don't notice these accesses if they are all shown in a relatively small, light color like grey. Therefore, the author thinks there must a mandatory requirement from the government to force the business bodies especially these intermediary platforms to provide such information and access in an eye-catching way.

To strengthen the accessibility for the consumer must reduce the burden of works consumer need to prepare in the pre-stage. In the judicial system, the consumer could make a consultation with lawyers but the ODR system usually encourage the consumer to make self-action to lower the cost, which makes the structure and procedure of the whole system couldn't be complicated. In the practices in the Member States in EU, the diversity of ADR is perplexed to consumer and merchant, in particular, it will cause tremendous troubles when an ADR system from an entity couldn't apply for a type of dispute.¹⁸² The whole circumstance will become even tougher with online technologies. Therefore, modifying the ODR system in China should provide the consumers with the unification model and standard procedure of ODR to make it easier for consumers to effectively exercise their recourse rights.

¹⁸¹ Ibid. Footnote 119.

¹⁸² Ibid. Footnote 127.

5.3.3.5 Due process

Under UNCITRAL Technical Notes on ODR, it suggests the due process of ODR should be in conformity with the offline version.¹⁸³ Also, EU ADR Directive and ODR Regulation emphasize the principle of due process of alternative dispute resolution. Based on the philosophy of Confucianism, the conciliation in China often reach a settlement with harmony and comity, which is fully discussed in Chapter 4. It easily ignores the due process of conciliation while could keep a good relationship with the other parties. Given the attempt of ODR system is unification and standards of procedures around the world in accordance with the Singapore Convention on mediation¹⁸⁴, the reformation of the ODR system in China should put more efforts on the due process, which requires specific proceedings should be stipulated and the requirements of being neutrals should be raised at a certain level.

5.3.4 Model system

5.3.4.1 Mandate or Semi-Mandate or Voluntary

To discuss the model system of ODR is more about the question of the ODR system should be applied to big online platform economic entities in a mandated way. According to the report of the application of the EU ADR Directive, it demonstrates the policies of the mandate have a considerable impact on the traders' participation. There is a high rate of participation in the Member States which adopt the system in the four categories of the model, first of all, the model is to mandate traders to participate in the system by national legislation; secondly, the model is mandate

¹⁸³ Ibid. Footnote 143.

¹⁸⁴ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, United Nations Convention on International Settlement Agreements Resulting from Mediation, New York, March 2019.

traders to participate in the system by not national legislation, instead, by the other institution like industries association; thirdly, the model is to virtually increase the burden of the reputation of companies and publish the information will cause the negativity for companies to promote the participation rate like “naming and shaming” mechanism; last but not least, the model is to charge free to both parties instead of the Directive only emphasize on the consumer, to encourage the trader to voluntarily participate in the system.¹⁸⁵ though some experts argue it doesn’t attract or causing the substantial effect if these big online platform economic entities become oligopolistic economic entities.¹⁸⁶ Based on the tradition and practice in China, so that raising the participation rate of online platform economic entities to enhance the level of consumer protection, the author suggests it is at least semi-mandate model for these big online platform economic entities to participate in.

5.3.4.2 Single track system or Double track system

If a single-track system is adopted, it means the legislation outside China is the same as inside China, otherwise, a double track system means different legislations will be respectively applied for. As mentioned above, Confucianism as one of traditional Chinese philosophy, playing a considerable role in establishing the conciliation practice and convention for a long period time, the harmony it pursues is to settle down the dispute out of court, which more emphasis on reducing disputes to recover the normal order of society, however, ODR system outside China is treated as alternative dispute resolution to resolve disputes in an efficient way with due process to supplement the deficiencies of judicial system. That’s exactly why it causes some disparities in the ODR system. For instance, conciliation and mediation represent

¹⁸⁵ Ibid. Footnote 127.

¹⁸⁶ Ibid. Footnote 114.

different actions of neutrals, the neutrals in mediation is more passive than in conciliation. However, in China, two of them is used interchangeably¹⁸⁷ due to conciliator or mediator are all in an active way to communicate with parties and proposes settlements for parties to decide. Although China has signed the Singapore Convention on mediation and propose the mediation or conciliation should be used to resolve disputes within the jurisdiction of regional agreement and bilateral agreement, the author still thinks it's not proper time to adopt the single-track system. It must exist the transition period from double track system to single track system to make the mass get used to this new ODR system otherwise it will cause chaos in the domestic market. Therefore, until now the model system of ODR should be designed separately, to construct different ODR systems are suitable to resolve disputes separately for the domestic transaction and the cross-border transaction.

5.3.5 Standard Procedures of ODR

To make the whole ODR system is easier for the consumer to exercise their rights, it's necessary and essential to stipulate the standard procedures of ODR as legislation. Although the EU ADR Directive doesn't stipulate the specific requirements of procedures, it will cause confusion and obstacles for the consumers in reality. For instance, in the practices of China, different institutions who apply for ODR mechanism promulgate their own rules, it causes the uncertainty and confusion for the mass when they resort to relevant ODR system to resolve their disputes.

5.3.5.1 ODR Platform

To construct an ODR platform as the first step of the management of the whole ODR proceedings. Due to the ODR system is expected to conduct all the proceedings

¹⁸⁷ Ibid. Footnote 67.

online, under UNCITRAL Technical Notes on ODR and EU ODR Regulation, they all require there should be a platform to perform the duties including receiving messages and documents, disseminating information, coordinating the persons related, and providing a communication space, to make all of proceedings should be exercised by the parties simpler and easier. There are slight differences between the function of the ODR platform under UNCITRAL Technical Notes on ODR and EU ODR Regulation. Under UNCITRAL Technical Notes on ODR, due to there is no requirement of physical presence, so it should be built an ODR platform for assistance and coordination to inform the message and receive documents and materials in the technological tools especially conducted the whole proceedings of ODR on the platform, creating a communication space for the parties, which mainly applied for one specific ODR entities¹⁸⁸ instead the function of ODR platform under EU Regulation is the resemblance of an assistance center could make a distribution to the right ADR entities which are in fact handling the disputes if the consumers submit the disputes to the platform.¹⁸⁹ The function of the assistance center has been mentioned above, so we only discuss the construction of the ODR platform for a specific ODR entity. The ODR providers in China, taking CIETAC as an example, if the parties decide to resolve disputes on online arbitration, the arbitration institution shall receive documents and evidence online and adopt the videoconferencing hearings in accordance with the online arbitration rule promulgated by their own.¹⁹⁰ However, thorough investigation on their website, it doesn't have access to the ODR platform conducting the functions aforementioned. Although it seems the ODR platform in China still in its infant stage, there are outstanding Internet platforms have been established to resolve the disputes submitted to the Internet Court. The platform of the Internet Court could provide online filing, litigation services, evidence exchange and

¹⁸⁸ Ibid. Footnote 143.

¹⁸⁹ Ibid. Footnote 120.

¹⁹⁰ Ibid. Footnote 65.

videoconferencing trials and so forth through the online platform operated by the Internet Court. Therefore, based on the traditions and practices in China, it is needed to construct the ODR platforms based on traditional ADR entities in China to achieve the current status model of the Internet Court as much as possible. After the distribution by the Assistance Center, each case will be suitably addressed by these ODR platforms which all provide the whole process and submit materials in a long distance based on innovative technologies.

5.3.5.2 Three-tiered structure

Under UNCITRAL Technical Notes on ODR, there is a three-tiered structure of disputes resolution process to be proposed including negotiation, facilitated settlement and the final stage.¹⁹¹ Some experts argue it's unnecessary to design a negotiation stage, it may cause more fusion in parties because consumer failed to negotiate with the other party resorting to the ODR system. However, in reality, the service center of big online platform economic entities outsources this part of business to another company, which means they may only answer specific questions prepared. So, it means there are staffs or workers inside the company of disputant who will participate in the negotiation stage of ODR to truly represent the opinion of the company. If making the negotiation as the first stage, to some extent it turns out to reach settlements of the majority of disputes if the companies are not willing to escalate conflicts and take the interest of consumers into consideration, and also could require the companies raise more public interest awareness and take more social responsibilities.

¹⁹¹ Ibid. Footnote 120.

5.3.5.3 Electronic proceedings

One of the ultimate goals of the ODR system is to completely conduct the proceedings online. Under UNCITRAL Technical Notes on ODR, Article 26, disputes are resolved on the ODR platform based on the use of technology¹⁹², and under EU ODR Regulation, after the ADR entities are designated or agreed, the ADR entities will use the platform to conduct the disputes online.¹⁹³ In China, according to the online arbitration rules of CIETAC, Article 10 all documents, notices and materials relating to the arbitration shall be sent by the Arbitration Tribunal of the Arbitration Commission to the parties or their authorized representatives by e-mail, electronic data interchange or facsimile. Depending on the specific circumstances of the proceedings of the case, the Arbitration Tribunal of the Arbitration Commission may also decide to send documents to the parties by or in addition to regular and express mail or other appropriate means and under Article 33, it also requires the Arbitration Tribunal conduct the proceeding through videoconference and other similar formats, in some situation, the offline hearings could be applied at Arbitration Tribunal's discretion.¹⁹⁴ As mentioned in Chapter 4, the rules applied for the Internet Court or Smart Court also require the proceedings conducted online at their maximum potential, only on the unusual occasions, the partial offline proceedings could be adopted at the adjudicator's discretion. The design of ODR system pursue to reduce the burden of resolving disputes on both parties, in particular, the transportation fee and travel fee are traditionally undertaken by a complaint at the first place should be gradually reduced. Therefore, the reformation of the ODR system in China should keep all of the proceedings related to resolve the disputes in the online platform and set up stringent standards and conditions for neutrals to transform into offline ones.

¹⁹² Ibid. Footnote 143.

¹⁹³ Ibid. Footnote 120.

¹⁹⁴ Ibid. Footnote 65.

5.3.5.4 Time limited

Under UNCITRAL Technical Notes on ODR and EU ADR Directive and ODR Regulation, all emphasis on the time control of the proceedings at a reasonable time, at the level of Member States, there are more additional requirements to regulate the extended time. To ensure the efficiency of the dispute resolution mechanism, it's not just the principle of the ODR system, it is also the principle for Civil Procedure Law and Arbitration Law. For the summary procedure to resolve simple civil disputes, in accordance with Article 161 of Civil Procedure Law, the people's court shall, in handling a case to which summary procedure is applied, close it within three months from filing the case.¹⁹⁵ As for Arbitration rules, under Article 48 of CIETAC's arbitration rules, the time limit for making an award is within 6 months after the tribunal is constructed. At the request of the arbitral tribunal, the President of the Arbitration Tribunal of the Arbitration Commission believes that there are legitimate reasons and necessary may extend the period.¹⁹⁶ Under Article 43 of Labor Dispute Conciliation and Arbitration Law of P.R.C, the arbitral tribunal shall decide labor dispute cases within forty-five days from the date of acceptance of the application for arbitration by the Labor Dispute Arbitration Commission. If the complexity of the case requires an extension, the arbitral tribunal may, with the approval of the Director of the Labor Dispute Arbitration Commission, extend the period and notify the parties in writing, but the extension shall not exceed fifteen days.¹⁹⁷ Under Article 47 of Rural Land Contract Dispute Conciliation and Arbitration Law of P.R.C, arbitration of rural land contracting disputes shall be concluded within sixty days from the date

¹⁹⁵ Ibid. Footnote 27.

¹⁹⁶ Ibid. Footnote 65.

¹⁹⁷ The thirty-first meeting of Standing Committee of the Tenth National People's Congress of the People's Republic of China, Labor Dispute Conciliation and Arbitration Law of P.R.C, 5.1.2008.

of acceptance of the application; the complexity of the case requires an extension, approved by the Director of the Rural Land Contracting Arbitration Commission can be extended, and notify the parties in writing, but the extension period shall not exceed thirty days.¹⁹⁸ Therefore, the time limit of the proceedings of ODR should be stipulated in the legislation to facilitate the process at a fast pace based on the rules and practices from the domestic market and international market.

5.3.5.5 Enforcement

One of the aims of the ODR system for resolving consumer disputes is efficient to settle the disputes down. To ensure efficiency and reduce the cost of the operation of whole disputes' resolution mechanism, there is the question about the solution of ODR is binding or not. Under the EU ADR Directive, there is no specific clause to regulate it and leave it to the Member State at their discretion, only under Article 10 of the Directive, for sake of consumer protection, stipulating the nature of the binding the solution of ADR should be informed and accepted in advance. Towards conciliation, under the Article 32 of People's conciliation Law, the people's Conciliation Committee for conciliation after a conciliation agreement is reached, the dispute between the parties for conciliation agreement or the content of the conciliation agreement, a party may bring a lawsuit to the people's court and under Article 33, the people's Conciliation Committee for mediation after a conciliation agreement is reached, the parties may consider necessary, within thirty days can be submit to the people's court for judicial confirmation since the day of conciliation agreement take effect, the people's court shall timely review the conciliation agreement in accordance with the law to confirm the effectiveness of conciliation agreement and if the people's court confirm the conciliation agreement is valid in

¹⁹⁸ The Ninth meeting of Standing Committee of the Eleventh National People's Congress of the People's Republic of China, Rural Land Contract Dispute Conciliation and Arbitration Law of P.R.C, 1.1 2010.

accordance with the law and that one party refuses to perform or fails to perform it in full, the other party may apply to the people's court for compulsory enforcement¹⁹⁹, which means the conciliation agreement made by the Committee is not binding, the parties still have the rights to bring the dispute to the court, unless the effectiveness of conciliation agreement is confirmed by the court. When it comes to the nature of solution of ODR to resolve the consumer disputes, there are two schemes including both parties have the rights to bring the action to the court or only consumers have the rights to do so. To consider the nature of disputes that need to resolve, the author inclines to grant this right only to the consumer due to the imbalance of power and abilities between consumers and these big online platform economic entities.

5.3.5.6 Ethics Code of Neutrals

There is the requirement of the ethics code of neutrals both under UNCITRAL Technical Notes on ODR and EU ADR Directive. For neutrals of the ODR system, they should keep independence and impartiality and disclose the important information which may have an impact on causing skepticism on his or her independence and impartiality. In China, there is an ethic code for judges, stipulated in the Basic Ethics Code for judges of P.R.C, which includes ensuring justness, enhancing efficiency, keeping impartiality, conforming with comity and so forth.²⁰⁰ In the meantime, the ethic code also applies the arbitrators, under Article 13 of Arbitration Law of the People's Republic of China, the arbitration commission shall appoint fair and honest person as its arbitrators.²⁰¹ Also, there are requirements for people's conciliators to conform in accordance with People' Conciliation Law of

¹⁹⁹ Ibid. Footnote 62.

²⁰⁰ Supreme Court of P.R.C, Basic Ethics Code for judges of P.R.C, 12.6.2012. http://www.chinacourt.org/flwk/show.php?file_id=146360

²⁰¹ Ibid., Footnote 117.

P.R.C. Therefore, to reform the ODR system in China, to strengthen the ethic code of neutrals is a significant factor to raise the professionalism and reinforce the credibility, which means the ethic code for people's conciliator should be upgraded to reach the necessary requirements and standards for ODR system to resolve the E-disputes between consumers and these big online platform economic entities.

5.4 Concluding Remarks

The purpose of enact and promulgating of EU ADR Directive and ODR Regulation is to provide a high level of consumer protection, to ensure the consumer resolve disputes arising from the goods or service contract in an efficient, low-cost, simple way. Due to there is the same purpose between the reformation of the ODR system in China and the execution of the EU ADR Directive and ODR Regulation, hence, there are some inspirational stipulations that could be as references to make recommendations on the reformation of the ODR system in China to make it more suitable to resolve the disputes between consumers and these big online platform economic entities, these key stipulations are contents we should pay attention to. In general, under the EU ADR Directive, the Member States of the Union need to offer the lists of ADR entities to EU Commission, which make it easier for EU Commission to acquire information and coordinate with the different ADR entities in different States, and facilitate the accessible procedures for a consumer to get into the ADR for instance, under this legislation, Member States shall ensure and encourage the official department, relevant consumer organizations and business associations to disseminate the information to make the consumer access. When it comes to the expense of initiating a claim, under the EU ADR Directive, the ADR procedure is free of charge or available at a nominal fee for consumers, which reduce the cost that should be borne by consumers at the pre-stage. The specific requirements stipulated in this legislation is mandatory and minimum, Member States in the EU could enact higher standard requirements. Except there are some requirements which each State

must comply with, at the same time, for some aspects, there are no specific requirements in Directive, to leave them with the State's own decision, for instance, the quality of ADR entities, the specific procedures of ADR, the participation is mandatory or voluntary and the outcome of ADR is binding or not.

To enact and promulgate EU ODR Regulation based on the EU ADR Directive is to promote the online Single Market. ODR platform established in accordance with the stipulation of this legislation could be deemed as an assistance center to distribute disputes submitted by consumers to certified ADR entities or ADR entities the parties agreed on online management system with a certain limited time. Also, there are information distribution channels to provide enough information to facilitate their disputes via the ODR system for instance ODR contact points and links to the ODR platform published on the website of online traders and online markets.

In the light of the report on the application of the EU ADR Directive and EU ODR Regulation, it is found that there are different ways to certify the ADR entities in the Member States including open list and close list. Some Member States adopt more stringent requirements compared to the Directive for instance higher standards for the natural persons in charge of the ADR process. About the extension of the period for ADR procedures, some Member States set up the strict limitation of expansion for time. Meanwhile, there are various ways to design the ADR landscapes in the Member States including model, coverage, funding and procedures and so forth. For transparency, there are requirements for ADR entities and national authorities to exchange information and successful experience. In the final part, this research looks into the effect of the execution of these legislations, in mature developed ADR culture of Member State, there is no obvious increase of new ADR system, in less developed ADR system of Member States, where is an upward trend, and the trending is really slow in the no tradition of ADR in the Member States. And the rate of participation of traders is higher than other States in the Member States which adopting the models either is mandated by national legislation or trade association or is voluntary but

establish “naming and shaming” mechanism or the free of charge for trade. About the effect of the execution of ODR platform, because of inaction from traders for disputes, most of them couldn’t take a further step after consumers submit, however, there are amounts of demands to inquiry the relevant question from consumers for instance how to use ODR platform and what obstacles have happened to. It is exposed there are some shortcomings of stipulations of the EU ODR Regulation, which should be optimized to make the ODR system could operate its full potential.

Under UNCITRAL Technical Notes on ODR, the stipulations emphasize the principle of transparency, independence, expertise, consent and so forth. Also, there is a recommendation on the design of ODR procedures: a three-tiered structure to resolve the disputes including negotiation as the first stage; facilitated settlement as the second stage and the binding stage as the third stage. Besides, there are some recommendations of appointment, powers and functions of the neutral, language and governance. Except for these exact requirements, there still exist lots of flexible room for countries to make laws adapt to their context.

To optimize the ODR system in China make it more suitable to resolve the disputes between consumers or users and these big online platform economic entities, based on the practice and tradition in China, there are several recommendations on reformation of the ODR system in China by references to the EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR as follows: (1) Landscape of ODR, including the quality of ADR or ODR entities, establishing assistance center, the training and education for neutrals and the mass in particular making appropriate campaign; (2) The scope of application, including the definition of consumer and the types of disputes; (3) Principle, emphasizing on the principle of efficiency, fairness, transparency, accessibility and due process; (4) Model system, to discuss how the ODR system apply to online platform economics entities and what types of the model should be adopted in China to address the disputes arising out of both domestic market and international market; (5) Standard Procedures of ODR,

including the construction of ODR platform, to establish the three-tiered structure of ODR proceedings, to conduct the whole proceedings of ODR in technological tool, stipulating the reasonable limitation of time and paying attention to the ethic code of neutrals. There is not an inclusive list of recommendations for the reformation of ODR system in China, the much more work will be improved and optimized based on the concrete practice.



Chapter 6 Conclusion

With the model of development of online platform economics entities gradually transforms into the oligopolistic economy, the legislation and system were stipulated and established in the past for consumer protection could not well fit in the current situation. From the study of the typical cases that happen in China: Online Ticketing Consumers v. OTAs and Users of “Sharing Bicycle” v. Ofo, both of them are shown that there are impediments for consumers to exercise their recourse rights when it comes to the disputes with these big online platform economic entities. These big online platform economic entities often take advantage of legal loopholes and a legal blank area to create conditions and situations of the jurisdiction of disputes in their favor for instance they will use “standard term contract” combined with a “one-click” model of acceptance of service to stipulate the clause of jurisdiction that only consider the costs and other factors which these big corporates will face. Hence, the determination of jurisdiction will make consumers or users undertake drastic unnecessary costs in the pre-stage of submitting a claim including attorney fees, legal costs, travel fees and other expenditures. In comparison with the value in dispute, these expenses will force consumers or users to waive their recourse rights against these big online platform economic entities. Therefore, in this research, after looking into the predicament consumers or users happen to, it brings a question to find out the solution about this issue to enhance the level of consumer protection in China.

Although the issues mentioned above are new issues arising out of the rapid development of Internet platform companies by the application of innovative technologies, there are many similarities with the traditional transaction. Therefore, in this research, at first, the author examines if the current disputes resolution mechanism could suitably resolve the disputes between consumers or users and these big online platform economic entities and what deficiencies of the current dispute resolution mechanism applies to. After the comprehensive analysis, the deficiencies of

the current dispute resolution mechanism apply to resolve the disputes between consumers or users and these big online platform economic entities could be summarized as follow: firstly, comparing to the value in dispute, the cost of initiating a claim under the current dispute resolution mechanism is way beyond the value in dispute, which will make consumers or users are reluctant to exercise their recourse rights; Secondly, the legislations of the current dispute resolution mechanism doesn't take consideration of unbalanced power between consumers or users and these big online platform economic entities, which means only pursue the formal equalities won't achieve the substantive qualities. Hence, there are some principles of the current disputes resolution mechanism not fit in resolving disputes aforementioned. Last but not least, to optimize and update the current dispute resolution mechanism to resolve the disputes between consumers or users and these big online platform economic entities, the social cost of updating the current model should be taken into account. Ideally, when it comes to reforming the current mechanism, constitutor should take thorough analysis and evaluation about the social cost, to reduce the burden from the current disputes resolution system reform at the same time accomplish the aim of reform.

ODR system as an extrajudicial dispute resolution mechanism is considered to offer the most suitable way to resolve disputes which are low-value and high-volume from E-business. One of the essential characteristics of the ODR system is the application of innovative technologies, which provides a channel for disputants to resolve their disputes in a long distance. Therefore, in the international market, the ODR system is considered a suitable way to resolve cross-border disputes. Due to the characteristics and features of the ODR system, it could be the most suitable way to resolve the dispute between consumers or users and these big online platform economic entities. Therefore, the brief introduction and study of the development of the ODR system in China are thoroughly illustrated in chapter 4. The history of the development of the ADR and ODR system in China is different from the West. The

philosophical ideas and values from ancient China play a significant role in history. Based on the core values of Confucianism, the evolvement of society is a constant and continuous course, hence, the study of the ODR system in China should not only emphasize its modern functional values but also focus on the traditional philosophical ideas hidden behind the history of development. There is a strong connection between the traditional philosophical ideas and modern function values about the development of the ODR mechanism in China, in particular, the traditional mediation based on Confucianism is applied to resolve disputes from modern society which has achieved great success. With skyrocketing growth of the application of innovative technologies, ODR mechanisms particularly online conciliation or mediation gradually adopted by many countries to resolve E-disputes. Mediation based on Confucianism represents “the art of compromise” and pursues the harmony of society to maintain the order of society. It inclines to emphasize the responsibilities and obligations of the individual to achieve the interest and benefit of society, which provides a basic foundation for a society to develop an ODR system. However, through the analysis of the current ODR mechanism in China, there are deficiencies in the ODR system to resolve disputes between consumers or users and these big online platform economic entities, which could be summarized as follows: firstly, the rules of the ODR mechanism established by the institution could not suitably apply to consumer dispute related to E-business, secondly, the application of ODR mechanism doesn't reach the effect of the execution of traditional conciliation or mediation in China, which means the potential of ODR mechanism hasn't been fully realized. Last but not least, the internal ODR mechanism established by online economics platform takes rather huge quantities of E-disputes between consumers and merchants, but it doesn't apply to the disputes between consumers or users and these big online platform economic entities, which means there is still a blank area of the current ODR system to resolve disputes between consumers or users and these online platform economic entities in a more cost-effective, efficient and just way.

With regard to making recommendations on the reformation of the ODR system in China make it more suitable to resolve disputes between consumers or users and these big online platform economic entities, it is referenced that EU ADR Directive and ODR Regulation enacted and promulgated by EU and UNCITRAL Technical Notes on ODR enacted and promulgated by the United Nations Commission. Based on the analytical result about contents and stipulations of these important documents and the study of the effect of execution in the EU Member States, it is found that there are strengths and shortcomings exposed which could be as experiences for reforming the ODR system in China. In a nutshell, in the light of tradition and practice in China, to make the ODR system more suitable to resolve the disputes between consumers or users and these big online platform economic entities, there are recommendations on reformation of the ODR system in China as follows:

Firstly, it should be discussed about the design of landscape of ODR system, what qualities of institutions could operate ODR mechanism, given that the practices and experiences in China, compared to the institution conducted by the official government, the private institution is rather inactive for instance, most of them are hard to find recent statistic and information and there are needs of building trust on the ODR system from consumers' perspective. Therefore, the author believes that there should construct a combination of public entities and private entities, which make parties have the right to choose the suitable one. For the establishment of assistance center, in China, to consider the profession and competence of consumers, it is better to have a single entrance for consumers make submission like ODR platform in the EU, being an assistance center to coordinate and disperse the cases to alleviate the obstacles preclude the consumers to exercise their rights. It is important to conduct education on a natural person who charges in the whole process for professional training; consumers about basic knowledge and information of ODR procedures and consumer protection; the public about the function and benefits of the ODR system.

Secondly, there are disparities among issues and disputes, for enhancing the level of consumer protection under the ODR system, there must limitation of the scope of application. Due to the principle of the ODR system for consumer dispute is protecting consumers based on the public interest, the definition of the consumer should be limited. Comparing to the West, the definition of consumer in China is much beyond than counterparts. However, the purpose of optimizing the ODR system to resolve disputes between consumers or users and these big online platform economic entities is enhancing the level of consumer protection, it requires people who are in a weak position of society should be identified, hence, there must suitable and necessary standards preclude the unlimited expansion of the scope of the consumer. In this research, the ODR system is designed to resolve disputes which are low-value and high-volume, in addition, if the ODR system is mandatory to online platform economics entities based on the protection of public interest, the author suggests the limitation of maximum amounts of disputes should be fixed.

Thirdly, there are some principles of the ODR system that should be discussed in detail by reference to the EU ADR Directive and ODR Regulation and UNCITRAL Technical Notes on ODR. Efficiency is one of the most essential principles of the ODR system to resolve disputes, however, in the practice of China, the due process of conciliation has been compromised much more than other States to pursue efficiency, there should be a discussion of the balance between due process and efficiency. There is a connection between fairness and voluntariness. Wherever in China or the EU, the legislation emphasis on parties should reach an agreement to submit the dispute to the ADR or ODR system. However, in both places, the practices and statistics all show that complete voluntariness cause impediment for the consumer to get access to ADR or ODR system. Therefore, the author suggests there should be a mandatory requirement for these big online platforms economic entities to participate in. To emphasize the transparency is essential to provide shareholders with enough information to participate in and build trust in the ODR system around the society

while there is a balance between transparency and confidentiality. For the ODR system in China, the author suggests it should use the anonymity way and encryption system to provide the public with the process of cases operated by the ODR system, which not only satisfy the demands of the information transparency but also keep private information confidential. For the principle of accessibility, the author suggests there are three ways that could be stipulated to make it easier for consumers to get access to the ODR system including lowering the cost which will be borne by the plaintiff in the first place, the available channels and information to enhance the awareness of consumer to exercise recourse rights and unification model and standard procedure of ODR make the ODR system clear to the consumer. Due to traditional mediation based on Confucianism, the principle of due process has been compromised in the practice of China, however, there is an expectation to unify the standards and procedures of ODR around the world, hence, there should put more effort on the due process of ODR system.

Fourthly, to consider the model of the ODR system, based on the experience of Member States in the EU, most of the States which have a high rate of participation are adopt mandatory or semi-mandatory model or charge free to both parties. Taking into consideration of the oligopolistic economic position of these big online platform economic entities, the author suggests it is at least a semi-mandate model of ODR system for these big online platform economic entities to participate in. Because the ODR system could be applied to resolve cross-border disputes, it brings a question if it is suitable to establish a single-track ODR system in China. In this research, due to there are some disparities of philosophical values and ideas between China and the West, the author thinks it should be a transition period from a double-track system to a single-track system to make the public get used to this new ODR system. Therefore, there should separate system of ODR to resolve disputes in the domestic market and cross-border market.

Last but not least, establishing standard procedures of the ODR system will make it clear to the consumer, in this research, there are recommendations on designing the standard procedures of the ODR system in China including the ODR platform, three-tiered structure, electronic proceedings, time-limited, enforcement and other aspects. For the ODR platform, although it seems the ODR platform in China is still in its infant stage by investigating the Website of institutions, the model of establishment of Internet Court could be as a reference to construct the ODR platform. While there are some arguments about if a negotiation stage should be stipulated, in the light of practice in China, a three-tiered structure could provide more chances for disputants to deescalate their conflicts and require the companies to raise more public interest awareness and take more social responsibilities. One of the ultimate goals of the ODR system is to completely conduct the proceedings online, which could reduce the costs of resolving disputes on both parties for instance travel fees. Therefore, the design of the ODR system in China should keep proceedings online as much as possible to make the most of E-disputes that could be resolved in a long distance. The limitation of time is significant to achieve the efficiency of the dispute resolution mechanism, therefore, based on the legislation and practice in China, the stipulations of time for ODR proceedings should be made at a fast pace. Due to the ODR system as a dispute resolution mechanism that should ultimately settle disputes down, it is essential to consider if the solution of the ODR system is binding or not. Take into consideration of imbalance power between consumers or users and these big online platform economic entities, the author inclines to grant the right to bring the action to the court only to the consumer. Also, it is worth noting that there should be necessary requirements and standards of ethics code for neutrals of ODR system in China.

In conclusion, the issues that consumers or users happen to when they bring a claim against these big online platform economic entities are arising out of the development of application of innovative technologies in the Internet era. Consumers or users are deprived of exercising recourse rights in a disguised way due to these big

online platform economic entities take advantage of legal loopholes and legal blank to manipulate the determination of jurisdiction. Under the current dispute resolution mechanism, they could not suitably resolve the disputes between consumers or users and these big online platform economic entities. Meanwhile, the characteristics and features of the ODR system are considered the most suitable way to resolve disputes which are low-value and high volume and are facilitated in a long-distance, hence, the ODR system could be the most suitable way to resolve the disputes between consumers or users and these big online platform economic entities. However, the current ODR system in China is not efficient to resolve the disputes aforementioned. Therefore, there must be some recommendations on the reformation of the ODR system in China to make it more suitable to resolve these disputes. Although the suggestion made in this research is imperfect, more modifications should be made based on the effect of the execution of the new ODR system. But for enhancing consumer protection in a society, the structure of the system and standard procedures of ODR should be at least constructed. This is a long-term work, the central government should take considerable efforts to reach the sophisticated level about this ODR system, at present, the most essential action is to get started to take the first step.

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