

COMPARISON OF ONLINE DISPUTE RESOLUTION MECHANISMS IN THE EUROPEAN UNION, THE UNITED STATES AND CHINA: SUGGESTIONS ON POSSIBLE FUTURE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

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I INTRODUCTION

With the development of the internet and information technology, there come new opportunities for international online transactions. At the same time, creating access to online alternative dispute resolution mechanisms would decrease some perceived risks of online transactions, thereby encouraging electronic commerce and cross-border business transactions.¹ Recently, possibilities and practicalities of establishing an integrated online dispute resolution ("ODR") system have been researched and recommended.²

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1 T Proshkina "Future of Cross-border E-commerce Dispute Resolution: UNCITRAL and EU Approaches to Online Dispute Resolution" (2014) *Corporate Dispute* 96-100. See also: A L Nenstiel "Online Dispute Resolution: A Canada-United States Initiative" (2006) 32 *USLJ* 313-329.

2 UNGA "Possible future work on online dispute resolution in cross-border electronic commerce transactions" UN doc A/CN.9/710 (2010). See also N Muecke, A Stranieri and C Miller "Re-Consider: The Integration of Online Dispute Resolution and Decision Support Systems" in Marta Poblet (ed) *Expanding the Horizons of ODR: Proceedings of the 5th International Workshop on Online Dispute Resolution (ODR Workshop'08)*

The United Nations Commission on International Trade Law (UNCITRAL), as the core legal body of the United Nations system in international trade law, has made a lot of contributions to improve the development of electronic commerce.³ It is positioned to establish instruments or guidelines particularly suited for dispute resolution in the online commercial environment, which reflects the needs of both developed and developing countries. Currently, the practicality of creating an integrated system for online dispute resolution (ODR) is being studied by UNCITRAL.⁴ Although making a collaborative effort to create a global ODR system has achieved a consensus among different groups within the ODR community,⁵ several challenges exist in designing this system.

In the first place, technical challenges relating to system functioning and data communication should be dealt with through technology improvement.⁶ Secondly, some of the challenges are of a legal nature, such as determining a global definition of "consumer rights", and requirements of due process and fair results. In this context, an international legal framework is necessary to resolve disputes, and relevant studies mainly focus on the role of governments instead of business groups and civil society. The other challenges should be further studied when researching the establishment of a global ODR system. Privatisation of law-making and self-regulation is a typical example. So far, large numbers of private ODR providers have adopted their own dispute rules.⁷ In ODR mechanisms that mainly deal with electronic commerce

(Firenze, 2008) 62-72; David B Lipsky and Ariel C Avgar "Online Dispute Resolution through the Lens of Bargaining and Negotiation Theory: Toward an Integrated Model" (2006) 38 U Tol L Rev 47.

3 UNCITRAL Model Law on Electronic Commerce (1996) with additional art 5 bis as adopted in 1998 (adopted 12 June 1996; additional art 5 bis adopted in 1998); UNCITRAL Model Law on Electronic Signatures (adopted 5 July 2001); Addition to the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1998) 29 United Nations Commission on International Trade Law Yearbook 261-262.

4 UNGA "Possible future work on online dispute resolution in cross-border electronic commerce transactions" UN doc A/CN.9/710 (2010).

5 Ibid.

6 UNGA "Possible future work on online dispute resolution in cross-border electronic commerce transactions" UN doc A/CN.9/706 (2010).

7 Alibaba "Online Transactions Dispute Rules" (Alibaba.com) <<https://rule.alibaba.com/rule/detail/2058.htm>> accessed 29 November 2018; Taobao "Platform Dispute Handling Rules" (淘寶平台爭議處理規範) <<https://rule.taobao.com/detail-99.htm?spm=a2177.7231205.0.0.6ef017eaIgJQvH&tag=self>> accessed 29 November 2018; Taobao

disputes, the reality is characterised by more privatisation of law-making and an abundance of autonomous self-regulation.⁸ Therefore, it may raise a concern of legitimacy, transparency and fairness.⁹ In the mean time, consumer issues raise other thorny problems to a global ODR system. Different definitions and regulations for consumer protection in different countries are hard to harmonise.¹⁰ Different conceptions of pre-dispute binding arbitration agreements relating to consumers are examples.¹¹

In this paper, we take a comparative study approach to address the above problems. Specifically, we compare ODR mechanisms in the European Union, the United States and China, especially from the perspective of privatisation of law-making and consumer issues. The European Union, the United States and China are three distinct regions and countries where

Rules (淘宝网七天无理由退货规范) <<https://rule.taobao.com/detail-5507.htm?spm=a2177.7231193.0.0.2fa817eaBX3eTB&tag=self>> accessed 6 December 2018.

- 8 E Katsh and O Rabinovich-Einy "Facebook, Big Data, and the Privatization of Justice in the Digital Age. The Foundation for Law, Justice and Society" (Foundation for Law, Justice and Society, 1 May 2018) <<https://www.fljs.org/content/facebook-big-data-and-privatization-justice-digital-age>> accessed 12 April 2019. See also T Puurunen "International Online Dispute Resolution – Caveats to Privatizing Justice" in Martti Koskenniemi (ed) *Finnish Yearbook of International Law* (Springer, 2003) 233-270; L K Dore "Public Courts versus Private Justice: it's Time to Let Some Sun Shine in on Alternative Dispute Resolution" (2006) 81 *Chicago-Kent Law Review* 520; C A Carr and M R Jencks "The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision" (1999) 88 *KyLJ* 183-243; O Rabinovich-Einy and E Katsh "Technology and the Future of Dispute Systems Design" (2012) 17 *Harvard Negotiation Law Review* 198; Riikka Koulu *Law, Technology and Dispute Resolution: Privatisation of Coercion* (Routledge, London, 2018); L L Jaffe "Law making by private groups" (1937) 51 *Harv L Rev* 202.
- 9 D Wei "Consumer Protection in the Global Context: The Present Status and Some New Trend, Claudia Lima Marques" in Claudia Marques and D Wei (eds) *Consumer Law and Socioeconomic Development: National and International Dimensions* (Springer, 2017) 3-23; Hotur Krishna Bharadawj Bharadawj "The Ambivalence of Self- Regulation in ODR" (Mediate.com, May 2017) <<https://www.mediate.com/articles/Bharadawj1.cfm>> accessed 23 November 2019.
- 10 UNGA "Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules" (Track II) UN doc A/CN.9/WG.III/WP.130 (2014).
- 11 A J Schmitz "Drive-Thru Arbitration in the Digital Age: Empowering Consumers through Binding ODR" (2010) 62 *Baylor Law Review* 243; M Stegner "Online Dispute Resolution: The Future of Consumer Dispute Resolution" (2017) 5 *Yearbook on International Arbitration* 360; Vikki Rogers "Managing Disputes in the Online Global Marketplace: Reviewing the Progress of UNCITRAL's Working Group III on ODR" (2013) 19 *Dispute Resolution Magazine* 20-24.

electronic commerce and ODR mechanisms are both developed; hence their relevant experience is significant in establishing a global ODR system.¹² This qualitative research proposes that UNCITRAL continue its work on ODR and create a model law. It is suggested that the model law on ODR should contain guidelines and minimum requirements for providers and decision-makers of ODR mechanisms and some substantive legal principles and enforcement mechanisms. Meanwhile, we suggest that the UNICITRAL working group consider the importance of privatisation of law-making and consumer issues in drafting its model law on ODR. In addition, more specific suggestions are made for UNCITRAL and other related parties.

The rest of this paper is organised as follows. Part II analyses the opportunities and challenges of establishing a global ODR system and the UNCITRAL model law on ODR. Part III introduces the theoretical foundation and practice about privatisation of law-making of ODR mechanisms in the European Union, the United States and China. Relevant suggestions are included in the last part of this section. Part IV mainly analyses consumer issues in establishing a global ODR system. Part V concludes this study and suggests possible future research.

II GLOBAL ODR SYSTEM AND THE ROLE OF UNCITRAL

A Practicalities of Establishing a Global ODR System

Realising the significance of the ODR mechanism, relevant international and national authorities have begun to undertake some initiatives relating to ODR and electronic commerce.¹³ Among those documents, it has been recognised that an integrated ODR system benefits both merchants and consumers and is significant for the further development of electronic commerce. So far, a conservative estimate shows that millions of low-value

12 Y Zhao, T Sze, T Li and C Nagarajan "Online Dispute Resolution in Asia" in M A Wahab, E Katsh and D Rainey (eds) *Online Dispute Resolution Theory and Practice* (Eleven International Publishing, 2013) 511-516; A Pearlstein, B Hanson and N Ebner "ODR in North America" in M A Wahab, E Katsh and D Rainey (eds) *Online Dispute Resolution Theory and Practice* (Eleven International Publishing, 2013) 443-464.

13 For instance, OECD "Guidelines for Consumer Protection in the Context of Electronic Commerce" (approved on 9 December 1999; updated in 2016); ISO "Guidelines for Business-to-Consumer Electronic Commerce Transactions" ISO 10008:2013 (2013); UNCITRAL "Technical Notes on Online Dispute Resolution" (adopted 13 December 2016); UNGA "Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules" UN doc A/CN.9/WG.III/WP117 (2015).

disputes would be resolved through the integrated global ODR system annually. In addition, it would help to provide a global redress mechanism to resolve cross-border electronic commerce disputes, which benefits the development of cross-border electronic commerce. Moreover, it is also worth noting that mobile commerce, as part of electronic commerce, has developed fast in developing countries in recent years,¹⁴ and large numbers of small-value disputes of mobile commerce transactions have to be resolved every year. The integrated global ODR system would have important implications for improving mobile commerce transactions in developing countries.

Currently, making a collaborative effort to create a global ODR system has achieved a consensus among different groups within the ODR community, and relevant possibilities are understudied.¹⁵ First of all, E-commerce grows fast all over the world, in both developed and developing states. Online environment and infrastructure are preliminarily established in different countries. Hence, the technical basis of the integrated ODR system is formed. Then, the development of ODR mechanisms and their successful practices provide the possibilities of a global ODR system. On one hand, a lot of experience has been accumulated through ODR practices of different countries. On the other hand, the diversified ODR platform providers¹⁶ are exploring more possibilities of ODR mechanisms.

However, the establishment of a global ODR system faces several challenges.

Firstly, the technical challenge is surrounding the establishment of the global ODR system. The development of the ODR mechanism is dependent

14 Raymond Adjei Boadi and Avez Gause Shadik "M-commerce Breakthrough in Developing Countries, The Role of M-commerce in Wealth Creation and Economic Growth in Developing Countries" (M.Sc. Thesis, Luleå University of Technology, 2006) <<http://www.diva-portal.org/smash/get/diva2:1031416/FULLTEXT01.pdf>> accessed 17 April 2019.

15 UNGA "Possible Future Work on Online Dispute Resolution in Cross-Border Electronic Commerce Transactions" UN doc A/CN.9/710 (2010).

16 Currently, online dispute resolution platforms are both provided by public providers and private providers. For example, eBay and PayPal are both private ones who operate electronic commerce platforms as well as online dispute resolution mechanisms. In the European Union, a public online dispute resolution platform has been established by the European Commission. In China, Taobao and Alibaba are private online dispute resolution providers, whereas China International Economic and Trade Arbitration Commission (CIETAC) is a public one.

on technology, especially the development of information and communication technologies. For globally integrated ODR systems, instant communication technologies are significant despite differences in language and culture. Besides, a cross-border integrated ODR requires a system that can function effectively in all conditions. For instance, the platform should be operating successfully no matter how many disputes use its ODR mechanism simultaneously. Another challenge is the limited online environment and infrastructure in some countries. In some developing countries and in countries less developed, their online infrastructures are not sufficient to support the function of a global ODR system.¹⁷

Secondly, privatisation of law-making and self-regulation is another challenge. Generally, the difference between public providers and private providers of ODR mechanisms is that private platforms are usually financed by the industry on a for-profit basis. In contrast, public platforms are non-profit, publicly funded or relating to the judiciary.¹⁸ Private ODR providers have their own dispute rules. In ODR mechanisms for electronic commercial disputes, the reality is characterised by more privatisation of law-making and an abundance of autonomous self-regulation. Currently, some electronic commerce platform operators also provide ODR services and make decisions by themselves. These private providers could also base users' feedback to create special incentives or impose unique sanctions. Therefore, it may raise concerns of legitimacy, transparency, fairness, and reduced protection of the public welfare.¹⁹ Moreover, specific public supervision mechanisms for private ODR is often lacking. In addition, their cooperation with national and international official authorities is insufficient.

The third challenge relates to consumer issues. Currently, there are large numbers of low-value, high-volume electronic commercial disputes involving consumers. Whether traditional transactions or electronic commerce

17 C Gralf and P Z Peer *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing, Oxford and Portland, 2012) 180.

18 Suzanne van Arsdale "User Protections in Online Dispute Resolution" (2015) 21 *Harvard Negotiation Law Review* 120.

19 Jack B Weinstein "Some Benefits and Risks of Privatization of Justice Through ADR" (1996) 11 *Ohio States Journal on Dispute Resolution* 262-263; John B Goodman and G W Loveman "Does Privatization Serve the Public Interest?" (1991) 69 *Harvard Business Review* <<https://hbr.org/1991/11/does-privatization-serve-the-public-interest>> accessed June 2020.

transactions, consumers are relatively vulnerable. Compared with merchants in electronic commercial transactions, consumers have limited freedom of choice. For instance, in addition to language barriers, consumers are not familiar with foreign regulations and jurisdictions. They also have more difficulty in accessing justice through other remedies. There is also an information asymmetry problem in electronic commercial transactions between consumers and merchants. The consumer protection norms in different countries such as the different legal conceptions of pre-dispute binding arbitration agreements on consumers need to be harmonised.²⁰

Therefore, we propose several suggestions on dealing with these challenges of establishing a global ODR system in the following sections. The recommendations are mainly made for UNCITRAL.

B General Suggestions

We suggest UNCITRAL create a model law on ODR that deals mainly with electronic commerce disputes, especially cross-border ones.

Firstly, improving the development of ODR mechanisms for cross-border commercial disputes is one of the tasks of UNCITRAL. UNCITRAL is the core legal body of the United Nations system in the field of international trade law. Its general business is the modernisation and harmonisation of rules on international business.²¹ Specifically, UNCITRAL aims at "increasing coordination and cooperation on legal activities of international and regional organisations active in the field of international trade law and promoting the rule of law at the national and international levels".²² From 2010 to 2016, UNCITRAL's Working Group III had worked on ODR issues and held 12 meetings. During this period, more than 50 working documents relating to ODR were issued by UNCITRAL. Hence, UNCITRAL has played an essential role in improving the development of electronic commerce and ODR mechanisms.

20 UNGA "Report of Working Group III (Online Dispute Resolution) on the Work of its Thirtieth Session" UN doc A/CN.9/827 (2014).

21 United Nations Commission on International Trade Law "About UNCITRAL" (UNCITRAL) <http://www.uncitral.org/uncitral/en/about_us.html> accessed July 2020.

22 Ibid.

Secondly, previous model laws created by UNCITRAL are successful precedents for model law on ODR. So far, UNCITRAL has created several model laws, such as UNCITRAL Model Law on International Commercial Arbitration (1985), UNCITRAL Model Law on Electronic Commerce (1996) and UNCITRAL Model Law on Electronic Signatures (2001). These documents guide potential parties and harmonise the law of international trade in relevant areas. Relevant effects of these model laws are also widely recognised by scholars and different governments. For instance, the role of UNCITRAL model law texts has been confirmed by scholars of different countries and regions.²³ UNCITRAL Model Law on International Commercial Arbitration, as an example, has been adopted in 74 states in a total of 104 jurisdictions through incorporating into their domestic law.²⁴ The International Arbitration Act of Australia and the International Arbitration Law of Hong Kong are both examples.²⁵ These model laws can be regarded as successful precedents for ODR regulations. UNCITRAL Technical Notes on ODR was created in 2017, although some scholars criticised it for its descriptive nature and for having no requirements of any obligation on disputants or ODR providers.²⁶ Therefore, it is suggested that a uniform ODR legislative framework should be established.

23 Luca G Castellani "The Role of UNCITRAL Texts in Promoting a Harmonized Legal Framework for Cross-border Mobile Payments" (2013) 8 Washington Journal of Law, Technology & Arts 265-283; Luka G Castellani "The Importance of UNCITRAL texts on Arbitration for Japan: Current Status and Future Perspectives" (2013) The Japan Commercial Arbitration Association Newsletter <<http://www.jcaa.or.jp/e/arbitration/docs/news30.pdf>> accessed 8 April 2019; Christoph Liebscher "Austria Adopts the UNCITRAL Model Law" (2014) 23(4) Arbitration International 523-552; Sundra Rajoo "The Role of UNCITRAL in Harmonization and Modernization of Arbitration in ASEAN" (2015) Incheon Trade Law Digest <<http://uncitralrcap.org/wp-content/uploads/2015/12/harmonization-and-modernisation.pdf>> accessed July 2020.

24 74 Jurisdictions have adopted the UNCITRAL Model Law so far. See Law Reform Commission of Hong Kong "Report on the Adoption of the UNCITRAL Model Law of Arbitration" (2017) <<https://www.hkreform.gov.hk/en/docs/runcitral-e.pdf>> accessed 8 April 2019.

25 Law Reform Commission of Hong Kong "Report on the Adoption of the UNCITRAL Model Law of Arbitration" (1987) <<https://www.hkreform.gov.hk/en/docs/runcitral-e.pdf>> accessed 8 April 2019.

26 X H Zhang "Considerations in Drafting the UNCITRAL ODR Rules and the Implications for the ODR Practice in China" (2015) 22 CLJP/JDCP (HS) 33 at 331-349 <https://www.wgtn.ac.nz/data/assets/pdf_file/0019/1187011/Xiaohan.pdf> accessed July 2020.

Thirdly, through establishing a model law on ODR, UNCITRAL would help to support and promote the establishment of a global ODR system. First, the UNCITRAL model law on ODR would help provide useful guidance for different countries to adopt or modify their relevant national laws. Specifically, the UNCITRAL model law on ODR would help clarify applicable definitions, regulate basic principles and procedures, and provide guidance to ODR users, providers, and official authorities of different countries. Second, the unified rules would also help reduce the barriers to the functioning of cross-border ODR mechanisms and promote the cross-border application of ODR mechanisms. The model law would also play an important role in unifying relevant regulations of different countries. It would then help to harmonise relevant national laws, which is one of the objectives of UNCITRAL.

Finally, this UNCITRAL model law on ODR is practical. The UNCITRAL model law on ODR is intended to serve as model rules, which relevant providers and parties could apply on a voluntary and contractual basis.²⁷ This model law is not binding, but individual states may adopt the model law by incorporating it into their domestic law. The soft law nature makes it more acceptable for all the countries. Successful precedents of UNCITRAL model law would also help enhance the confidence of different parties to apply this model law. Therefore, it is possible and practical for UNCITRAL to create a model law on ODR.

Besides the UNCITRAL model law on ODR, there are several issues that UNCITRAL should consider, such as the role of technology and relevant encouragement and restriction as well as the relationship between ODR and traditional dispute resolution mechanisms. Among all relevant issues, the privatisation of law-making and self-regulation, and consumer issues are typically the ones that challenge the effectiveness and practicality of the global ODR system.

27 See Proshkina, above n 1.

III CHALLENGES OF PRIVATISATION OF LAW-MAKING AND SELF-REGULATION

A Theoretical Foundations and Analysis

Generally, "privatisation" means a shift of individual involvements from the whole to the part or public action to private concerns.²⁸ In respect of privatisation of law-making in ODR, privatisation refers to the shift from government provision of functions and services to the provision by private sectors.²⁹ Privatisation of governmental functions and services is generally a method to increase effectiveness.

However, further privatisation of law would lead to further privatisation of social relations and the state. Kleeger argues that rigorous judicial review of public-private acts is necessary to deal with this problem.³⁰ With more commercial and social interactions moving online, the online engagement of dispute resolution develops mainly in the electronic commerce setting. For instance, through their ODR mechanisms, eBay reported handling over 60 million disputes a year, and Alibaba reported hundreds of millions.³¹ In this context, more concerns are expressed than in the instances of private justice in the pre-digital era. However, the consistency and predictability of ODR mechanisms are challenged because of their different algorithm operations. Besides, relevant data collected by private ODR service providers might be used for discriminatory or commercial purposes. Hence, it is suggested ethical rules be developed for private ODR mechanisms. In the mean time, basic legal guarantees upheld by public courts should be respected by the privatisation of justice and delegation of its administration.³²

Increased transparency and accessibility of ODR are significant to other potential claimants. However, some concerns and limitations of ODR arise. For example, privatisation of law-making in ODR can cause erosion of the

28 Paul Starr "The Meaning of Privatization" (1988) 6(1) Yale Law and Policy Review 9.

29 George L Priest "Introduction: The Aims of Privatization" (1988) 6(1) Yale Law and Policy Review 2.

30 Jeffrey Kleeger "The Privatization of Law & the Weakening of Private Right" (2016) 6 Journal of Land and Development 82.

31 See E Katsh and O Rabinovich-Einy, above n 8.

32 See T Puurunen, above n 8.

overall corpus of the Common Law.³³ The flexibility of ODR may also cause a lack of procedural protections for users. Furthermore some issues, such as disputes relating to family law, cannot be resolved through private ODR mechanisms.³⁴

Business and commercial activities have been turning to private dispute resolution mechanisms for a long time, including ODR mechanisms. In this context, it may raise concerns about information loss and reduction of public welfare because of confidential features of private justice. Meanwhile, the power of courts when dealing with commercial disputes would be reduced. Moreover, the introduction of digital technology threatens the legal profession's monopoly over legal information and expertise. Hence, dispute system designers and legal professionals should understand the impact of this shift to the digital area and identify what is changing.

Private enforcement of ODR decisions may raise another concern. It brings challenges to the nation-state's monopoly on enforcement. Currently, technology-driven privatisation of enforcement, including direct enforcement of electronic commerce platforms and self-executing smart contracts, is the privatisation of enforcement, which causes conflict from law's coercive nature. This grey area calls for research on ethical issues of dispute resolution technology.

Although general concerns raised by privatisation of law-making and self-regulation of ODR mechanisms have been studied, empirical studies on privatisation of law-making of the ODR system in different countries are insufficient. In the mean time, its influence on establishing a global ODR system needs to be further analysed. By comparing ODR mechanisms in the European Union, the United States, and China, suggestions towards privatisation of law-making and self-regulation of the ODR system are introduced in this Part.

33 Trevor C W Farrow "Public Justice, Private Dispute Resolution and Democracy" (2008) 18 *Comparative Research in Law & Political Economy*. Research Paper 42-58 <<https://digitalcommons.osgoode.yorku.ca/clpe/192>> accessed June 2019.

34 *Ibid.*

B Comparison in the European Union, the United States and China

A comparison of privatisation of law-making issues of ODR mechanisms in the European Union, the United States and China is as follows:

Table 1: Comparison of Privatisation of Law-making Issues of ODR Mechanisms in the European Union, the United States and China			
	European Union	United States	China
Typical ODR service providers	<ol style="list-style-type: none"> 1. More than 750 alternative dispute resolution schemes exist, including ODR ones; 2. European Commission established an ODR Platform in 2016. 	<ol style="list-style-type: none"> 1. EBay; Amazon; 2. Specific private ODR mechanisms, such as Modria. 	<ol style="list-style-type: none"> 1. Alibaba; Taobao; 2. Internet courts.
Privatisation of law-making	<ol style="list-style-type: none"> 1. There are dispute resolution schemes, which are privately funded; 2. The public has low awareness of large numbers of dispute resolution schemes; 3. The ODR Platform can coordinate and approve private dispute 	<ol style="list-style-type: none"> 1. EBay and Amazon have own dispute resolution rules and enforce relevant decisions by themselves; 2. Private ODR service providers cooperate with electronic commerce platform operators and have their own dispute resolution rules. 	<ol style="list-style-type: none"> 1. Alibaba and Taobao have own dispute resolution rules and enforce relevant decisions by themselves; 2. A Public Review Mechanism is applied to support their ODR decisions.

	resolution mechanisms.		
Cooperation with official authorities	Cooperation between European Consumer Centers Network and ODR Platform.	There are official authorities in charge of ODR promoting;	1. Private ODR service providers have to assist relevant administrative departments; 2. Except private ODR mechanisms, there are three internet courts in China that mainly deal with electronic commerce disputes.
Comments	The European Union holds the leading position in cooperation between ODR providers and official authorities.	1. Governments are cautious about regulating the Internet; 2. Governments support the development of private dispute solutions and new technology.	Electronic commerce platform operators that provide ODR services is relatively robust in China.

1 European Union

In the European Union, alternative dispute resolution ("ADR") schemes, which include ODR mechanisms, are encouraged to develop through the provisions of European Union Directives. It is currently reported that Impact Assessment pays attention to more than 750 existing ADR schemes in the European Union, while few consumers or businesses are aware of their presence.³⁵ Some of these ADR schemes are publicly funded, while others are

³⁵ Burkhard Hess, Maria Bergström and Eva Storskrubb *EU Civil Justice: Current Issues and Future Outlook* (Bloomsbury Publishing, 2016) 46; PLC Dispute Resolution "EU

privately funded. Relevant decisions of these schemes are also different. They are just recommendations or binding decisions. However, despite these schemes operating, 8 per cent of consumers have no awareness of their existence, and 25 per cent of consumers say they would not use these schemes because they might be too expensive or take too long.

To manage schemes and provide guidelines to relevant users, the European Commission established an ODR Platform in 2016.³⁶ This platform lists appropriate dispute resolution mechanisms offering out-of-court settlement procedures that have been approved for quality standards, such as accessibility, efficiency and fairness. It can be regarded as one of the European Union's efforts to create an integrated ODR system, and it is a beneficial attempt.

There is a cooperation between ODR mechanisms and official authorities in the European Union. The European Consumer Centers Network (ECC-Net) is one of the typical examples. The ECC-Net is a network of different consumer centres in the European Union's member States and Iceland and Norway. ECC-Net guides consumers and helps to resolve disputes when consumers and sellers are in different member States. There is cooperation between the ODR Platform created by the European Commission and ECC-Net. The Platform provides hyperlinks of ECC-Net and introduces the role of ECC-Net. Therefore, the ODR Platform established by the European Commission combines ADR providers and official authorities in different European countries.

The European Union holds the leading position in cooperation between ODR providers and official authorities. That is because, different from other countries or regions, the European Union has its unique features. As a political and economic union of 28 member States, the European Union has already established an internal single market. Besides, the European Union

Consultation on the Use of ADR for Resolving Commercial Disputes" 3-504-5191 (Thomson Reuters Practical Law, 18 January 2011) <[https://uk.practical.law.thomsonreuters.com/3-504-5191?lrTS=20170515124319157&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practical.law.thomsonreuters.com/3-504-5191?lrTS=20170515124319157&transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)> accessed July 2020.

36 Online Dispute Resolution Platform was established by the European Commission <<https://ec.europa.eu/consumers/odr/main/?event=main.home2.show>> accessed July 2020.

member States also reached several agreements in politics, legal system, foreign relations, economy, and social policies.

2 *The United States*

In the United States, several electronic commerce platform operators also provide ODR services. Generally, they have their own dispute rules and decide disputes by themselves, such as eBay and Amazon. eBay's Resolution Center is such a tool that provides communication platforms for disputants to resolve their disputes.³⁷ eBay's Resolution Center mainly deals with disputes that arise due to missing packages, package damage, delay in shipment, or product that does not turn out as ordered. Meanwhile, in case of no cooperation, the resolution centres of electronic commerce platform can impose some "punishment" on non-cooperators. Generally, online sellers that fail to cooperate in good faith to resolve disputes may have their account privileges terminated or restricted.³⁸ Moreover, consumers can seek the participation of marketplace assistance to resolve their disputes online. The United States also have some specific private ODR mechanisms, such as Modria, which cooperate with electronic commerce platforms and provide ODR services.

An extensive ODR program in the government of the United States is in the National Archives and Records Administration's new Office of Government Information Services.³⁹ It is applied to improve dispute prevention and resolution through ODR mechanisms in a systematic way. Moreover, the Commerce Department's Commercial Service of the United States began to promote ODR to deal with disputes between consumers and sellers overseas.⁴⁰ At the same time, the National Mediation Board has also experimented with ODR in the federal government.

37 Lynda Boyce "How Does E-Bay and Amazon Handle Conflict Resolution" *Easystorehosting* (8 November 2016) <<https://www.easystorehosting.com/ecommerce/how-does-ebay-and-amazon-handle-conflict-resolution>> accessed 27 November 2018.

38 Louis F del Duca, Colin Rule and Kathryn Rimpfel "Ebay's de Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers" (2014) 6(1) *Arbitration Law Review* 204-219.

39 See A Pearlstein, B Hanson and N Ebner, above n 12.

40 See A Pearlstein, B Hanson and N Ebner, above n 12.

Many early activities relating to ODR took place in the United States because the US-based internet was developed early. The information and communication technology infrastructure in the United States was of high quality. Moreover, the corporate culture and ADR markets in the United States are competitive and innovative which benefits the development of the ODR system. Generally, the governments of the United States are cautious about attempting to regulate the internet. They prefer to leave room for private solutions or new technology.⁴¹

3 *China*

In China, Alibaba and Taobao are two typical electronic commerce platform operators providing ODR services. Alibaba is an electronic commerce platform operator that mainly deals with business-to-business ("B2B") transactions, and Taobao mainly deals with business-to-consumer ("B2C") transactions. Hence, the ODR mechanism provided by Alibaba mainly resolves B2B disputes, and the ODR mechanism provided by Taobao mainly resolves B2C disputes. Alibaba and Taobao are both private ODR providers, and they have their own online transactions dispute rules. For instance, Alibaba issued an updated Alibaba.com Online Transaction Dispute Rules in 2015,⁴² and Taobao published Taobao Platform Dispute Handling Rules in 2017.⁴³

Therefore, Taobao and Alibaba provide ODR services and provide their own rules to help disputants. This allows them to use their electronic commerce platforms to resolve disputes relating to the transactions, such as complaints about product quality, delivery, after-sale maintenance, and fraudulent selling conduct. Alibaba and Taobao have also developed a Public Review Mechanism⁴⁴ to support their resolution of transaction-related disputes. They want to expand public participation in ODR, although it raises

41 Roscoe B Starek III and Lynda M. Rozelle "The Federal Trade Commission's Commitment to On-Line Consumer Protection" (1997) 15(4) *Journal of Computer & Information Law* 702.

42 Alibaba.com "Online Transactions Dispute Rules" (Alibaba, 2018) <<https://rule.alibaba.com/rule/detail/2058.htm>> accessed 29 November 2018.

43 Taobao "Platform Dispute Handling Rules" (淘寶平台爭議處理規範) <<https://rule.taobao.com/detail-99.htm?spm=a2177.7231205.0.0.6ef017eaIgJQvH&tag=self>> accessed 29 November 2018.

44 Alibaba "Public Jury" <<https://pan.taobao.com>> accessed 29 November 2018.

concerns about fairness. Article 63 of E-Commerce Law of the People's Republic of China says, "an E-commerce platform business may establish an online dispute settlement mechanism, develop and publish dispute settlement rules..." Therefore, it can be concluded that the official authorities of China encourage electronic commerce platform operators to establish their own ODR mechanisms and make private rules. However, it may raise the concern of legitimacy, fairness and transparency of privatisation of law-making.

Generally, the transaction disputes relating to product quality and delivery issues are handled through the independent ODR mechanisms provided by electronic commerce platform operators. If private ODR providers cannot resolve the disputes, or if the disputants are not satisfied with the decisions, then they can complain to relevant authorities or ask for judicial remedies. Article 34 of Administrative Measures for Online Trading issued by State Administration for Industry & Commerce of China says: "A third-party trading platform operator shall actively assist the administrative department for industry and commerce in investigating and punishing illegal online business operations...". Hence, electronic commerce platform operators, which provide ODR services, have legal duties to cooperate with relevant official authorities.

China has established three internet courts. They are the Beijing Internet Court, Guangzhou Internet Court, and Hangzhou Internet Court. They mainly deal with disputes as follows:

- (1) disputes over online shopping contracts;
- (2) disputes over network service contracts;
- (3) disputes over online shopping product liabilities;
- (4) disputes over the ownership of network copyright and infringement;
- (5) disputes over internet domain name;
- (6) disputes over internet microfinance loan contracts;
- (7) disputes over infringements upon others' personality rights.⁴⁵

The court could help both parties to complete an entire dispute resolution process online, including implementation. Data shows that since Hangzhou Internet Court's establishment in February 2018, the online filing rate was 96

45 Yaru Ren "China to Establish the Second and Third Internet Court" *Heffels Spiegeler Advocaten* (27 July 2018) <<http://spiegeler.com/china-to-establish-the-second-and-third-internet-court/>> accessed July 2020.

per cent, and more than 7000 cases were accepted from April to May 2018.⁴⁶ Internet courts are an important example of officially provided ODR mechanisms. Nevertheless, there are only three internet courts in China so far, and most electronic commercial disputes are resolved through electronic commerce platforms that also provide ODR services.

C Suggestions

In summary, there are several concerns raised by the privatisation of law-making and self-regulation of private ODR providers. Firstly, without the support of public authorities, private ODR providers would raise concerns of legitimacy, transparency and fairness. Secondly, the decision-makers of private ODR mechanisms may lack specialised knowledge in the area of disputes.⁴⁷ For instance, neutral arbitrators generally have a professional legal background. In addition, judges may draw on all kinds of resources to accommodate the technical issues of a dispute, such as the appointment of a special expert to bring specific skills into the dispute resolution.⁴⁸ Finally, private ODR providers may be insensitive to the significance of nonmonetary intangibles.

Therefore, it is suggested that private law-making might be a potential topic for the future work of UNCITRAL. During the drafting of a model law on ODR, it is strongly recommended that UNCITRAL consider private law-making issues.

Specifically, UNCITRAL model law or other draft guidelines shall address the fair process, neutrality and independence of ODR providers.⁴⁹ First, the model law should emphasise the importance of a fair ODR process by regulating basic principles. At the same time, clear procedures relating to the neutrality of ODR process should be established,⁵⁰ along with the procedures for the process of evaluation and selection of neutral decision-makers. Second, the consistency between private online transactions dispute

46 Ibid.

47 See Weinstein, above n 19.

48 See Weinstein, above n 19.

49 UNGA "Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Guidelines" UN doc A/CN.9/WG.III/WP.128 (2014).

50 UNGA "Proposal on Principles Applicable to Online Dispute Resolution Providers and Neutrals" UN doc A/CN.9/WG.III/WP.114 (2012) 2-3.

rules and national laws should be improved. Besides the efforts made by the governments of different countries, UNCITRAL should provide clear guidance to ODR providers on consistency improvement within their national laws.

Furthermore, it should be clarified that justified States and public policy decision-makers should consider all concerns and make relevant regulations. Generally, the privatisation of law-making in different countries is managed by governments. On the one hand, to improve the further development of ODR mechanisms, governments should leave room for the development of privatisation of law-making and new technology.⁵¹ The development of private ODR providers would help to explore more possibilities of future development of ODR mechanisms. On the other hand, continuous governmental involvement would likely be necessary. First, the private law-making and self-regulation of ODR mechanisms should always be subject to judicial control and a public monitoring system. Second, governments should put on restrictions and guide the development of relevant private law-making organisations, including private ODR providers. Possible aspects of regulating private law-making of ODR providers may include enhancing neutrality of private ODR providers, improving the evaluation and selection of neutral decision-makers, and improving consistency between private online transactions dispute rules and national laws.

IV CONSUMER ISSUES

Besides privatisation of law-making and self-regulation, consumer issues are also challenges in establishing a global ODR system, which needs to be further studied.

A Theoretical Foundations and Analysis

Consumer issues are significant and debatable in the development of ODR mechanisms. Currently, several consumer protection rules of different countries conflict, and relevant regulations made by UNCITRAL are under debate. The European Union and the United States are currently two typical examples that show the different attitudes towards consumer protection. The

⁵¹ The United States is an example of deeply-set roots and wide adoption of private online dispute resolution mechanisms. Its market of online dispute resolution providers is relatively competitive and innovative. Hence early development of online dispute resolution mechanisms was mainly based in the United States.

European Union holds that a pre-dispute arbitration agreement that is not based on individual negotiation is not permitted to bind consumers. On the contrary, the United States allows pre-dispute arbitration agreements to bind both consumers and sellers in the United States. Based on whether the pre-dispute arbitration agreement in a consumer contract is effective or not, UNCITRAL tried to explore a two-track set of provisions.⁵²

Scholars show different opinions towards binding pre-dispute arbitration agreements involving consumers. Non-binding agreements may prevent consumers from benefitting from a more efficient procedure and influence the enforcement of outcomes.⁵³ Moreover, the European approach to ODR is limited and lacks opportunities to enhance access to justice since disputes stemming off-line are not allowed in its ODR Platform.⁵⁴ It is suggested powerful incentives such as trust marks or a chargeback system be created by competent authorities to enhance non-binding outcomes.⁵⁵ However, consumers may become sceptical of binding pre-dispute arbitration clauses because it has been reported that companies use off-line arbitration to curb class action and escape liability for consumer claims.

Towards this issue, the United States and the European Union delegates expressed different opinions in Working Group III sessions. Hence, the Working Group could not agree on a set of rules, whereas it elaborated a non-binding descriptive document reflecting elements and principles of an ODR process.⁵⁶ Meanwhile, the Working Group III of UNCITRAL expressed the consensus in favour of a two-track system in the reports. Specifically, Track

52 UNGA "Report of Working Group III (Online Dispute Resolution) on the Work of its Thirtieth Session" UN doc A/CN.9/827 (2014); UNGA "Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules" (Track II) UN doc A/CN.9/WG.III/WP.130 (2014).

53 Maxime Hanriot "Online Dispute Resolution (ODR) as a Solution to Cross-Border Consumer Disputes: The Enforcement of Outcomes" (2015) 2 McGill Journal of Dispute Resolution 21.

54 Fernando Esteban de la Rosa "Scrutinizing Access to Justice in Consumer ODR in Cross-Border Disputes: The Achilles' Heel of the EU ODR Platform" (2018) 4 IJODR 27.

55 See Maxime Hanriot, above n 53.

56 UNGA Annotated provisional agenda, UN doc A/CN.9/WG.III/WP.139 (2016).

I would end up with binding arbitration, whereas Track II does not require the disputants to go through an arbitration stage.⁵⁷

Some scholars criticised the two-track system.⁵⁸ In their opinion, this approach would place a significant burden on sellers for their dispute resolution clause in every individual sale. For instance, sellers have to identify whether the buyers are consumers or merchants and analyse buyers' domestic laws to determine relevant clauses. Therefore, the relevant legal risk would be transferred by sellers as additional costs onto every transaction, which in turn hurts consumers. The overall volume of B2B transactions is much higher than the volume of B2C transactions.⁵⁹ Hence, it is possible to suggest that UNCITRAL should first harmonise the law to establish an integrated ODR system mainly used by B2B disputants.

In addition, it is reported that consumers generally hope ODR mechanisms have features of transparency, independence, impartiality, effectiveness, fairness/integrity, accessibility, flexibility, affordability and speed.⁶⁰ In the mean time, language issues are also important for consumers when using ODR mechanisms.⁶¹ With relevant research, it is suggested that consumers must be notified of legal services and rights, while businesses should take more responsibility.

Based on the existing debate towards the two-track system, further analysis is made in this section. At the same time, through a comparison of consumer protection regulations of ODR mechanisms in the European Union, the United States and China, suggestions about consumer issues for UNCITRAL and a global ODR system are introduced.

57 UNGA "Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules" UN doc A/CN.9/WG.III/WP133 (2015).

58 See M Stegner, above n 11.

59 Dranz Aires "The Overall Volume of B2B (Business-to-Business) Transaction" (Prezi, 2014) <https://prezi.com/qigbg1po_iaj/the-overall-volume-of-b2b-business-to-business-transaction/> accessed 17 April 2019.

60 Lee A Bygrave "Online Dispute Resolution – What it Means for Consumers" (Domain Name Systems and Internet Governance Conference, Sydney, 7 May 2002) <http://cyberlawcentre.austlii.edu.au/2002/Domain/Bygrave_ODR.pdf> accessed July 2020.

61 Feliksas Petrauskas and Egle Kybartiene "Online Dispute Resolution in Consumer Dispute" (2011) 18(3) Jurisprudence 937.

B Comparison of the European Union, the United States and China

A comparison of consumer issues of ODR mechanisms in the European Union, the United States and China is as follows:

Table 2: Comparison of Consumer Issues of ODR Mechanisms in the European Union, the United States and China			
	European Union	United States	China
Main regulations of consumer protection in ODR process	1. Directive 2013/11/EU; 2. Regulation No. 524/2013; 3. Regulation (EU) 2017/2394.	1. Typical ones: Fair Credit Reporting Act; Mail or Telephone Order Merchandise Rule, the Electronic Fund Transfer Act and the Fair Credit Billing Act; 2. The existing consumer protection regulations are also used to online transactions.	1. E-Commerce Law; 2. Administrative Measures for Online Trading.
Pre-dispute arbitration agreement on consumer is binding or not	Non-binding	Binding	Binding
Other consumer protection mechanisms	Consumers are encouraged to resolve their disputes through the European Union ODR Platform.	1. American consumers can use econsumer.gov to resolve cross-border disputes of online transactions;	Commodities and service quality assurance mechanism and Alipay secured payment system

		2. Consumer education is a vital complement to law enforcement efforts on the Internet.	provided by Taobao.
Comments	1. Central focus of ODR mechanisms in the European Union is consumer protection. 2. The European Union prefers to integrate ODR mechanisms already existing in member States to function across a border.	The United States mainly focuses on encouraging existing law enforcement tools to be used successfully in online context.	Electronic commerce platform operators that provide ODR services provide the combination of proactive prevention and control measures with effective complaint handling and dispute resolution mechanism.

1 *European Union*

Several regulations have been adopted in the European Union, which regulate the consumer issues relating to electronic commerce and relevant ODR mechanisms. Directive 2013/11/EU and Regulation No 524/2013 allow consumers and sellers to resolve their disputes without applying for judicial redress, but cost-effectively and quickly. Among their regulations, the primary consumer protection mechanisms include but are not limited to the following:⁶²

- (1) Resolution mechanisms of domestic and cross-border disputes should benefit consumers, especially when consumers shop across borders.

⁶² Directive 2013/11/EU of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 (21 May 2013) and Directive 2009/22/EC (Directive on Consumer ADR) OJ L 165, 18 June 2013.

- (2) Relevant procedures should preferably be free of charge for the consumer, or they should be accessible, attractive and inexpensive for consumers.
- (3) Consumers' rights should be informed. This regulation requires ADR mechanisms providers inform consumers of their rights and possible consequences of their choices during the procedure.
- (4) ODR cannot be designed to replace court procedures, nor should it deprive consumers of their rights to seek redress before the courts. This regulation shows the attitude of the European Union towards ODR and the judicial system.
- (5) The European Union encourages consumer associations and business associations to provide an electronic link to the ODR Platform. This regulation aims to facilitate consumers to contact relevant official organisations and then offers more possibilities for consumers to protect their interests.

In 2017, the European Union enacted a new regulation relating to consumer protection, the Regulation of the European Parliament, and the council on cooperation between national authorities responsible for enforcing consumer protection laws, namely Regulation (EU) 2017/2394.⁶³ The regulation helps to improve cooperation between different national authorities of the member States in the European Union to deal with breaches of consumer rules. Generally, this regulation helps competent organisations to cooperate in the cross-border context and online practices. For instance, this regulation says competent authorities of member States can request any relevant information from other competent authorities, and requested authorities shall provide information within 30 days (art 11).

These three documents regulate the basic obligations of ODR providers, and specific legal principles and functions are left for the member States to develop. The functioning of ODR mechanisms between consumers and sellers is also established and regulated by these regulations. These regulations also deal with non-compliance with basic consumer rules of the European Union in cross-border markets.

63 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on Cooperation Between National Authorities Responsible for the Enforcement of Consumer Protection Laws and Repealing Regulation (EC) No 2006/2004 (Text with EEA relevance) OJ L 345, 27 December 2017.

In practice, an ODR Platform was established by the European Commission in 2016. The main aim of this Platform is to support consumer dispute resolution through approved ADR entities established in member States.⁶⁴ Through this Platform, disputants can make a complaint and resolve it by an independent dispute resolution body. After making a complaint, users can select a dispute resolution body from the lists provided by this Platform that has been approved for quality standards. Then, with another disputant's consent, the selected ODR body would help disputants resolve the complaint. On this ODR Platform established by the European Commission, consumers' rights are informed clearly, and the electronic links of other means of redress are provided.⁶⁵ This platform also guides consumers to find relevant official authorities in their countries.⁶⁶ Hence, consumers' access to justice is more accessible via the European Union ODR Platform.

After two years of the European Union ODR Platform running, statistics show that 85 per cent of complaints filed in this Platform were closed, and the traders refused 9 per cent of the complaints. Only 2 per cent of the complaints were submitted to a specific ADR entity, and only half of them had final outcomes.⁶⁷ The statistics show the European Union ODR Platform takes effect in helping consumers solve relevant disputes, although its effectiveness needs to be further improved.

Therefore, we can comment that the central focus of ODR mechanisms in the European Union is consumer protection. The legislation and legal practice in the European Union both show this trend. At the same time, compared with establishing an international ODR scheme, the European Union prefers to integrate ODR mechanisms already existing in member States to function across a border. The Platform that the European Commission established in

64 Fernando Esteban de la Rosa "Scrutinizing Access to Justice in Consumer ODR in Cross-Border Disputes: The Achilles' Heel of the EU ODR Platform" (2018) 4 IJODR 27.

65 Other means of redress include European Consumer Centers, Small claims procedure, Court procedure, European payment order and Consumer organisations. Relevant information is provided on the ODR Platform of the European Commission <<https://ec.europa.eu/consumers/odr/main/?event=main.consumer.rights>> accessed 3 December 2018.

66 The role of the European Consumer Centres Network - ECC Net is clarified on the platform. At the same time, the links of consumer centers of different countries in the European Union are provided on the platform.

67 See Fernando Esteban de la Rosa, above n 69.

2016 and the listed relevant out-of-court settlement procedures of different member States are examples.

2 *United States*

In the United States, currently, various laws at both federal and state levels regulate consumer affairs. Generally, the Federal Trade Commission's Bureau of Consumer Protection is tasked with enforcing federal laws dealing with unfair or deceptive practices throughout the consumer economy. The Telemarketing Sales Rule that prohibits fraudulent practices is an example issued by the Federal Trade Commission. Some other regulations that contain guidance on consumer issues are also enforced by the Federal Trade Commission.

In the United States, the existing consumer protection regulations are also used for online transactions, and the Federal Trade Commission is in charge of this process. The specific regulations of the United States relating to online transactions include the Mail or Telephone Order Merchandise Rule,⁶⁸ the Electronic Fund Transfer Act⁶⁹ and the Fair Credit Billing Act.⁷⁰

In practice, when consumers have disputes relating to online transactions in the United States, they are encouraged to resolve disputes directly with the seller or website first. The electronic commerce platform operators generally also provide ODR services in the United States, such as eBay and Amazon. These electronic commerce platforms operators offer a platform for both consumers and sellers to communicate when there is a problem with their transaction. In addition, they express that they always "encourage" their members to contact the disputant through their resolution centre and try to solve the problem.⁷¹ For instance, Amazon describes that "when this happens, buyers should first contact merchants directly" to find a solution.⁷² If communication does not work, consumers could file a complaint with the consumer protection agency, Federal Trade Commission, or State Attorney

68 Mail or Telephone Order Merchandise Rule 16 CFR para 435.

69 Electronic Fund Transfer Act 15 USC para 1693-1693r.

70 Fair Credit Billing Act 15 USC para 1601.

71 Resolution center of eBay (eBay) <<https://resolutioncenter.ebay.com>> accessed 4 December 2018.

72 Amazon Pay Support (Amazon.com) <<https://pay.amazon.com/ie/help/201751470>> accessed 4 December 2018.

General. Each state's Attorney General in the United States also provides informal complaint resolution services to its residents and the consumers with complaints about businesses located in their state.

As for cross-border disputes of online transactions, econsumer.gov established by the International Consumer Protection and Enforcement Network (ICPEN) is the ODR platform most American consumers use. Econsumer.gov is a partnership of more than 35 consumer protection agencies and where consumers can report international scams.⁷³ According to data released by the Federal Trade Commission, from 1 April to 30 June 2018, consumers located in the United States filed 3283 complaints to econsumer.gov, occupying 45 per cent of total complaints.⁷⁴

Moreover, compared with other countries and regions, ODR mechanisms in the United States also provide consumer education materials online. For instance, private ODR providers in the United States also offer electronic links of official authorities to guide consumers to protect their interests.⁷⁵ Therefore, we can comment that in the United States, consumer education is a vital complement to law enforcement efforts on the internet. At the same time, the United States mainly focuses on encouraging existing law enforcement tools to be used successfully in an online context.

3 *China*

Currently, E-Commerce Law and Administrative Measures for Online Trading are two primary regulations relating to electronic commerce and ODR in China. The E-Commerce Law⁷⁶ requires that electronic commerce platform operators develop accessible and effective complaint and report

73 Econsumer official website <<https://econsumer.gov/#crnt>> accessed 4 December 2018.

74 Ibid.

75 For instance, eBay provides a guidance for consumers to help them sign a petition to the Federal Trade Commission. See Petition to the Federal Trade Commission "Stop eBay deceptive business practices" (The eBay Community, 3 August 2015) <<https://community.ebay.com/t5/Archive-Selling/Sign-a-Petition-to-the-Federal-Trade-Commission-Stop-eBay/td-p/24324005>> accessed 4 December 2018; The Federal Trade Commission also issued guidelines to consumers towards online transactions, such as "Identifying Demand in EBay Auctions" (FTC, 2004) <<https://www.ftc.gov/reports/identifying-demand-ebay-auctions>> accessed 4 December 2018.

76 E-Commerce Law (People's Republic of China). Adopted at the Fifth Session of the Standing Committee of the 13th National People's Congress on 31 August 2018. Order No 7 of the President.

mechanisms, release complaint and report means and other information, and promptly accept and handle complaints and reports (art 59). Moreover, the law requires electronic commerce platform operators to actively help consumers protect their lawful rights and interests when they are involved in disputes with in-platform sellers (art 61). If electronic commerce platform operators fail to provide original, or provide faulty, contract and transaction records, they shall assume corresponding legal liability (art 62).

Administrative Measures for Online Trading⁷⁷ came into force on 15 March 2014. It requires the electronic commerce platform operators to establish self-disciplinary rules to reconcile consumption disputes and consumer protection (art 1). At the same time, where any consumer that purchases commodities or receives services through the platform requires mediation through the platform, mediation shall be conducted through the platform (art 28). Therefore, the relevant authorities of China also consider consumer issues when they regulate electronic commerce business and ODR mechanisms.

In practice, Taobao is the electronic commerce platform operator that mainly deals with B2C transactions and provides ODR service. To protect consumers' rights and interests, Taobao provides commodities and service quality assurance mechanisms favourable to the protection of consumer rights and interests, such as the trust mark of "speed refund" and "authentic guarantee". Generally, the goods purchased on Taobao can be returned for no reason within seven days of receipt of them.⁷⁸ At the same time, for Taobao users who meet the requirements of Credit Sesame Score,⁷⁹ Taobao would provide speed refund service, namely refunding the purchase price immediately even before the sellers receive the returning goods. Taobao as an electronic commerce platform operator also provides an authentic

77 Administrative Measures for Online Trading (15 March 2014). Order No 60 of the States Administration for Industry and Commerce.

78 Taobao Rules <<https://rule.taobao.com/detail-5507.htm?spm=a2177.7231193.0.0.2fa817eaBX3eTB&tag=self>> accessed 6 December 2018.

79 Sesame Credit or Zhima Credit is a private credit scoring and loyalty program in China, which is developed by Alibaba Group.

guarantee for approved sellers. Taobao would punish the sellers that provide fake products.⁸⁰

Furthermore, Taobao also developed an Alipay secured payment system to enhance the enforcement of their ODR decisions. Alipay is an online payment system established in 2004 by Alibaba Group. At present, Alipay provides online third-party payment services in China and some other countries. Moreover, it can be regarded as a coordinator between the buyer and the seller throughout their online transactions.⁸¹ To ensure the safety of online transactions, Alipay serves as a middleman during the transactions process. Therefore, Alipay can put the payment on hold once there is a dispute between consumers and sellers. Then after the dispute is resolved, Alipay would transfer the amount to consumers or sellers according to dispute decisions.

Overall, it can be observed that the electronic commerce platform operators that provide ODR services are relatively robust in China. The electronic commerce platform operators deal with relevant online transaction disputes through their ODR mechanisms and according to their own online transactions rules. At the same time, the application of a third-party secured payment system helps to enhance the enforcement of their ODR decisions. Moreover, the electronic commerce platform operators that also operate ODR mechanisms provide the combination of proactive prevention and control measures with effective complaint handling and dispute resolution mechanisms. For one thing, relevant regulations require electronic commerce platform operators to protect consumers' rights and interests both during the transactions process and during the dispute resolution process. Electronic commerce platform operators that also provide ODR services have established several consumer protection mechanisms in practice.

C Suggestions

Consumer issues of ODR might be another potential topic for future work of UNCITRAL. Currently, towards consumer protection in ODR

80 Taobao Platform "Dispute Handling Rules" (淘寶平台爭議處理規範) <<https://rule.taobao.com/detail-99.htm?spm=a2177.7231205.0.0.6ef017ealgJQvH&tag=self>> accessed 29 November 2018.

81 A Patterson "Alipay Payment System Review: Rates, Merchants and Security" Woldcore (2017) <<https://worldcore.eu/blog/alipay-payment-system-review-rates-merchants-security/>> accessed 6 December 2018.

mechanisms, experts within the legal community still have not agreed on possible approaches and the scope of application.

Based on different opinions of delegates from the United States and the European Union towards binding pre-dispute arbitration clauses on consumers, the Working Group III of UNCITRAL expressed the consensus in favour of a two-track system in the reports. However, there are different opinions on consumer protection requirements of a global ODR system.

It should be emphasised that the consumer issues are critical in establishing a global ODR mechanism and drafting relevant model law. Firstly, although the overall volume of B2B transactions is much higher than the volume of B2C transactions, the number of B2C transactions and the number of relevant disputes are more than B2B. Currently, the low-value electronic commerce transactions in which consumers are engaged most could annually amount to multi-millions. Secondly, unlike traditional B2B online sales, there is no direct interaction between consumers and traders. Hence, consumers are relatively vulnerable, and their interests need to be protected. Thirdly, enhancing consumers' confidence would help to improve the development of electronic commerce further because establishing an effective cross-border ODR system that is friendly to consumers would help strengthen their trust in electronic commerce transactions.

Moreover, UNCITRAL Technical Notes on ODR clearly states that ODR processes "...apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions". Hence, legal consistency should be taken into consideration by UNCITRAL. In addition, any future model law and relevant rules made by UNCITRAL should seek to address both B2B transactions and B2C transactions.

Specifically, several consumer protection measures are suggested for discussion by the working group of UNCITRAL to explore the possibilities of mentioning these measures in the future model law of ODR. First, ODR providers should clarify consumers' rights on their websites. For instance, the special status of consumers and their rights to ask for other remedies might be mentioned. It is also suggested that the electronic links of consumer associations and official consumer protection organisations should be provided on the websites of ODR mechanisms. Second, cross-border ODR providers should respect consumer protection regulations of different national laws and guide consumers. Finally, ODR mechanisms should be accessible,

attractive and inexpensive for consumers. For instance, multi-language service by ODR providers is encouraged.

V CONCLUSIONS

Creating access to online alternative dispute resolution mechanisms would decrease some perceived risk of online transactions, thereby encouraging the development of electronic commerce and cross-border business. So far, the practicality of creating a global system for online dispute resolution is being studied within the online dispute resolution community, including UNCITRAL. Among relevant research, privatisation of law-making and self-regulation and consumer issues are two crucial topics on which legal experts could not achieve consensus.

From the perspectives of privatisation of law-making and consumer issues, we made a comparative study on online dispute resolution mechanisms in the European Union, the United States and China. From the perspective of private law-making, the European Union holds the leading position in cooperation between ODR providers and official authorities. The governments of the United States are cautious about attempting to regulate the Internet, yet they prefer to leave room for private solutions or new technology. In China, electronic commerce platform operators that provide ODR service are relatively robust, and large numbers of disputes relating to electronic commerce transactions could be resolved using such a mechanism.

From the perspective of consumer issues, the central focus of ODR mechanisms in the European Union is consumer protection, and its legislation and legal practice show this trend. In the United States, consumer education is a vital complement to law enforcement efforts on the Internet. At the same time, the United States mainly focuses on encouraging existing law enforcement tools to be used successfully in the online context. In China, relevant regulations require electronic commerce platform operators to protect consumers' rights and interests during transactions and dispute resolution processes. In addition, electronic commerce platform operators and ODR providers have established several consumer protection mechanisms in practice.

Therefore, it is suggested that UNCITRAL begin creating a model law on ODR, which mainly deals with cross-border disputes relating to electronic commerce transactions. At the same time, privatisation of law-making and consumer issues may be potential topics for future work of UNCITRAL.

Based on the experience of the European Union, the United States and China, UNCITRAL should consider relevant issues and make pertinent provisions in possible future rules.

The contribution of this research is twofold. First, to our best knowledge, our study represents one of the efforts that compares ODR mechanisms in the European Union, the United States and China from the perspective of privatisation of law-making and consumer issues to give suggestions for future work of UNCITRAL. Second, specific recommendations resulting from this research would enhance the future work of UNCITRAL on ODR and electronic commerce. Some proposed mechanisms may also be helpful in other contexts, such as governments of different countries and ODR service providers. Besides privatisation of law-making and consumer protection, other challenges exist. Hence, future research may focus on other issues relating to the global ODR system, such as procedural rules and the enforcement of online awards.