FACULTY OF LAW AND CRIMINOLOGY

The Resolution of Disputes Arising from E-commerce Transactions

Perspectives from the European Union and China

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Table of Contents

CHAPTER 1. INTRODUCTION 1

1.1. RESEARCH BACKGROUND 1

1.2. RESEARCH AIM AND SCOPE 4

1.3. RESEARCH QUESTIONS AND METHODOLOGIES 6

1.4. STRUCTURE OF THE RESEARCH 9

CHAPTER 2. CONCEPTUAL SETTINGS 11

2.1. ELECTRONIC COMMERCE AND DISPUTES ARISING FROM ELECTRONIC COMMERCE 11

2.1.1. Definition of "e-commerce" 12

2.1.2. Major types of e-commerce transactions 13

2.1.2.1. Types of e-commerce transactions classified by the parties' identity 13

2.1.2.2. Type of e-commerce transactions classified by the structure of transactions 15

2.1.3. Characteristics of e-commerce disputes 18

2.1.3.1. Virtualization 18

2.1.3.2. Cross-border 19

2.1.3.3. Low-value and high-volume 20

2.2. ELECTRONIC CONTRACT RULES 21

2.2.1. International legal instruments on electronic contract rules 21

2.2.1.1. UNCITRAL Model Law on E-commerce 21

2.2.1.2. UNCITRAL Model Law on Electronic Signatures 22

2.2.1.3. United Nations Electronic Communications Convention 22

2.2.2. Legal principles of electronic communications 23

2.2.2.1. Non-discrimination principle 23

2.2.2.2. Technological neutrality principle 24

2.2.2.3. Functional equivalence principle 24

2.3. THE DEVELOPMENT OF ODR IN E-COMMERCE TRANSACTIONS 26

2.3.1. Theory of ODR 27

2.3.1.1. Development of ODR 28

2.3.1.2. Forms of ODR 31

2.3.1.3. Connections between ADR and ODR 35

2.3.2. ADR and ODR in the EU 35

2.3.2.1. ADR development in the EU 36

2.3.2.2. Current legal instruments on ADR in the EU 36

2.3.3. ADR and ODR in China 40

2.3.3.1. Cultural roots of harmonization and its important role in ADR 40

2.3.3.2. Current ADR mechanism in China 44

2.3.3.3. China ODR development towards a diversified dispute resolution mechanism 48

2.3.4. Comparison of ADR and ODR development between the EU and China 48

CHAPTER 3. VALIDITY OF ELECTRONIC ALTERNATIVE DISPUTE RESOLUTION AGREEMENTS 51

3.1. FORMAL VALIDITY REQUIREMENTS OF E-ADR AGREEMENTS 52

3.1.1. Direct formal validity requirements in ADR legislation 54

3.1.1.1. International legal instruments on the direct formal validity of e-ADR agreements 55

3.1.1.2. European legal instruments on ADR agreements 68

3.1.1.3. The English legislation on the formal validity of e-ADR agreements 70

3.1.1.4. Formal validity requirement of e-ADR agreement in China 72

3.1.1.5. Sub-conclusion 76

3.1.2. Indirect formal validity requirements: ADR agreements concluded in electronic contexts 78

3.1.2.1. Legal framework of electronic communications 79

3.1.2.2. The EU legislative framework of electronic communications 92

3.1.2.3. The English legislation in electronic communications 99

3.1.2.4. Chinese legislative framework of electronic communications 104

3.1.2.5. Sub-conclusion 112

3.2. SUBSTANTIVE VALIDITY REQUIREMENT TO E-ADR AGREEMENT 119

3.2.1. Electronic consent in standard form contracts 120

3.2.1.1. Consent in browse-wrap agreements 122

3.2.1.2. Consent in click-wrap agreements 128

3.2.2. The application of EU public policy to judicial review of ADR agreements 131

3.2.2.1. EU competence and procedural autonomy of EU member states 132

3.2.2.2. EU legal instruments in consumer protection and their influence on B2C ADR agreements 134

3.2.2.3. EU public policy affecting the substantive validity of ADR agreements 141

3.2.2.4. EU's approach to assess the substantive validity of e-ADR agreements 148

3.2.3. Case study on e-ADR agreements in England 149

3.2.3.1. Common Law rules in general contracts 151

3.2.3.2. Statutes regulating unfair terms in B2C contracts 158

3.2.3.3. English approach in assessing the substantive validity of e-ADR agreements 165

3.2.4. Case study of e-ADR agreements in China 166

3.2.4.1. The application of "standard form clause rule" 167

3.2.4.2. The application of consumer protection law 173

3.2.4.3. Case study on the substantive validity of e-ADR agreements in China 177

3.2.4.4. Chinese regulation of e-ADR agreements 198

3.2.5. Sub-conclusion 199

3.2.5.1. Comparison between English law and Chinese law on the limitation of consent in e-ADR agreements 199

3.2.5.2. Common denominators in regulating substantive validity of e-ADR agreements 202

3.3. PRELIMINARY CONCLUSION 207

CHAPTER 4. ODR PROCEDURAL STANDARDS 211

4.1. SOURCES OF ODR PROCEDURAL JUSTICE 212

4.1.1. Technical Notes on ODR issued by UNCITRAL Working Group III 213

4.1.1.1. Procedures of ODR 214
4.1.1.2. Principles of ODR proceedings 215
4.1.1.3. Technical Notes on ODR: A task unaccomplished 216
4.1.2. Procedural principles from civil procedure law 216
4.1.2.1. Access to justice in the digital age 217
4.1.2.2. Procedural fairness 220
4.1.2.3. Procedural efficiency 224
4.1.3. ADR principles and rules 226
4.1.3.1. Principle of expertise, independence, and impartiality 228
4.1.3.2. Principle of transparency 228
4.1.3.3. Principle of effectiveness 229
4.1.3.4. Principle of fairness 229
4.1.3.5. Principle of legality 230
4.1.4. Special procedural matters of ODR 230
4.1.4.1. Security of data collected from ODR proceedings 231
4.1.4.2. Online communication and trust in ODR proceedings 233
4.1.4.3. Non-territoriality feature of ODR 236
4.2. APPLICATION OF ODR PRINCIPLES TO SELECTIVE ODR RULES IN E-COMMERCE DISPUTES 237
4.2.1. Online arbitration 237
4.2.1.1. Right to be notified 239
4.2.1.2. Right to be heard 241
4.2.1.3. Time limits of online arbitration 243
4.2.1.4. Seat of online arbitration 245
4.2.2. Internal complaint mechanism of third-party online platform 247
4.2.2.1. Access to justice 251
4.2.2.2. Fairness in procedure 251
4.2.2.3. Procedural efficiency 255
4.2.2.4. Principle of transparency 258
4.2.3. Domain name dispute resolution 258
4.2.3.1. Procedural efficiency 262
4.2.3.2. Procedural fairness 263
4.2.3.3. Principle of transparency 267
4.3. PRELIMINARY CONCLUSION 268
4.3.1. Challenges to the ODR development 268
4.3.1.1. Lack of uniform procedural rules in ODR 268
4.3.1.2. Conflict between procedural fairness and procedural efficiency 271
4.3.1.3. Weighing flexibility and transparency in ODR procedures 272
4.3.2. Proposed solutions to improve justice in ODR proceedings 273
4.3.2.1. Lessons from successful ODR procedural rules 273
4.3.2.2. Co-regulation of the ODR industry to improve the quality of ODR rules 276
CHAPTER 5. ENFORCEMENT OF THE ODR OUTCOMES 285

5.1. PUBLIC ENFORCEMENT: JUDICIAL MEASURES 286
5.1.1. Enforcement of online commercial arbitral awards 286
5.1.1.1. Recognition and enforcement of online arbitral awards under domestic legal regimes 287
5.1.1.2. Cross-border recognition and enforcement of online arbitral awards under the New York Convention 294
5.1.2. Enforcement of online mediated settlement agreements 300
5.1.2.1. Possible enforcement mechanisms of the MSA under the current legal framework 300
5.1.2.2. Enforcement of mediated settlement agreements in the EU 307
5.1.2.3. Enforcement of a mediated settlement agreement in China 313
5.1.3. Sub-conclusion 317
5.2. PRIVATE ENFORCEMENT: EXTRA-JUDICIAL MEASURES 320
5.2.1. Automatic execution of ODR decisions 320
5.2.1.1. Monetary enforcement mechanism in e-commerce marketplace 321
5.2.1.2. UDRP domain name transfer 331
5.2.1.3. Automatic enforcement based on blockchain technology 333
5.2.2. Incentive-driven enforcement mechanism 336
5.2.2.1. Trustmark scheme 336
5.2.2.2. Rating system 340
5.2.2.3. Blacklisting system 342
5.2.2.4. Punitive measures 344
5.2.3. Sub-conclusion 347
5.3. PRELIMINARY CONCLUSION 348
CHAPTER 6. CONCLUSION 353
6.1. CHALLENGES TO THE FUTURE ODR DEVELOPMENT 353
6.1.1. Cross-border recognition of e-ADR agreements 353
6.1.2. Lack of procedural fairness in ODR 355
6.1.3. Lack of enforceability mechanism for ODR outcomes 355
6.2. RECOMMENDATIONS FOR THE FUTURE ODR SYSTEM DESIGN 356
6.2.1. Establish common grounds in recognizing the validity of e-ADR agreements 357
6.2.2. Improve procedural fairness in ODR 358
6.2.3. Enhance the enforcement mechanism of ODR outcomes 359
6.3. ODR DEVELOPMENT IN THE FUTURE 359
ANNEX 1. GUANGZHOU ARBITRATION COMMISSION (GZAC) ONLINE ARBITRATION RULES 361
ANNEX 2. ALIBABA'S STANDARD OF PENALTY POINTS INCURRED FOR NON-COMPLIANCE OF TRANSACTIONS 371
ABBREVIATIONS 375
BIBLIOGRAPHY 377

Chapter 1. Introduction

1.1. Research background

1. Alvin Toffler has described the development of human society as three waves in 1980.[1] The first wave is the agricultural society where people live on agriculture and hunting. The second wave is the industrial revolution society, which is characterized by mass production, distribution, and entertainment. The third wave is the "information age", which is driven by information technology. Owing to the invention of the Internet, people are able to work remotely and conduct businesses with each other without meeting each other in person. Electronic commerce (hereinafter as "e-commerce") is a new business model that allows parties to make transactions via the Internet. While e-commerce improves the efficiency and reduces the cost of transactions, it raises traditional disputes that offline business transactions may encounter as well as new types of disputes (such as domain name disputes, bitcoin disputes) that arise from the Internet.

2. The scholars in the ODR field held the view that online dispute resolution (hereinafter as "ODR") is an effective dispute resolution mechanism in resolving cross-border e-commerce transactions as it saves time and cost for the parties travelling from one place to another.[2] The importance of developing an ODR mechanism in e-commerce has been recognized by international organizations and governments through various legal instruments. The OECD (Organization for Economic Co-operation and Development) issued Guidelines for Consumer Protection in the Context of Electronic Commerce in 1999 and made Recommendations on Consumer Dispute Resolution and Redress in 2007.[3] Both documents have recalled member states to establish fair and timely alternative dispute resolution (hereinafter as "ADR") services (including ODR) without undue cost or burden, and to handle cross-border disputes between businesses and consumers arising from e-commerce transactions. ODR is also believed to be

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[1] Alvin Toffler and Toffler Alvin, *The third wave*, vol 484 (Bantam books New York 1980).

[2] Ethan Katsh and Janet Rifkin, Online dispute resolution: Resolving conflicts in cyberspace (John Wiley & Sons, Inc. 2001) 10-13; Esther van den Heuvel, 'Online dispute resolution as a solution to cross-border e-disputes: an introduction to ODR', OECD archive < http://www.oecd.org/internet/consumer/1878940.pdf>; Orna Rabinovich-Einy and Ethan Katsh, 'Digital Justice: reshaping boundaries in an online dispute resolution environment' (2014)1 International Journal of Online Dispute Resolution 5.

[3] OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (2000), < http://www.oecd.org/sti/consumer/34023811.pdf> accessed 17 January 2018; OECD Recommendation on Consumer Dispute Resolution and Redress (2007), <http://www.oecd.org/sti/ieconomy/38960101.pdf> accessed 17 January 2018.

an effective tool to enhance consumers' confidence in e-commerce.[4] The American Bar Association drafted a Task Force to recommend the best practices for ODR service providers.[5] The Task Force believed that technological innovation and the development of interoperable standards will help to facilitate the use of ODR as a means of cross-border dispute resolution.[6] The UNCITRAL Working Group III on ODR has conducted its work on the subject of ODR in cross-border e-commerce transactions from 2010 until 2016. The non-binding Technical Notes on ODR reflecting elements and principles of an ODR process have been finalized by the UNCITRAL Working Group III on ODR in 2016.[7]

3. The development of ODR is driven by public-funded ODR projects and private ODR entities. Early public-funded trial projects are for example: Virtual Magistrate, Mediate-Net, Online Ombuds Office, and ECODIR.[8] With the emergence of domain name disputes and marketplace giants such as Amazon and eBay,[9] there is a growing need for an efficient and low-cost dispute resolution mechanism. Private ODR entities, such as Smartsettle, Cybersettle and Mediate Room, were created as a response to the needs of both merchants and consumers in dispute settlement.

4. Academic works in the ODR field have been developed in tandem with the ODR practices. The earliest extensive study on the subject of ODR can be traced back to 2001 by Ethan Katsh and Janet Rifkin.[10] Based on the experience of Virtual Magistrate and Online Ombuds Office projects, Katsh and Rifkin have proposed the concept of the "fourth party". They suggest that the role of technology can be understood as a "fourth party" in facilitating the dispute resolution and assisting traditional third-party neutrals.[11] Colin Rule, the pioneer of eBay dispute resolution and founder of Modria[12], has also discussed the important role of ODR in building

[4] OECD Consumers in the Online Marketplace: The OECD Guidelines Three Years Later, 9 < http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=dsti/cp(2002)4/final> accessed 17 January 2018.
[5] American Bar Association, Task Force on E-commerce and Alternative Dispute Resolution Final Report, 2002.
[6] *Ibid*, 15.
[7] United Nations Commission on International Trade Law, Working Group III (Online dispute resolution) Thirty-third session, A/CN.9/WG. III/WP.
[8] See Section 2.3.1.1 Development of ODR. ECODIR was led by the Faculty of Law of the University College Dublin with a consortium of partners of European and Canadian Universities and with the funding obtained from the Irish Government Department of Enterprise, Trade and Employment.
[9] Amazon is the largest e-commerce marketplace, which was founded in 1994. Established in 1995, eBay is an online auction website which provides Internet users with a place where they can exchange goods and services.
[10] Katsh and Rifkin (n 2).
[11] *Ibid*, 93. Note that the "third-party neutral" will be used interchangeably with "adjudicator" and "decision maker".
[12] Modria is a technology company in designing ODR modules for businesses on their websites.

trust in e-commerce transactions.[13] ODR can be used to resolve transboundary disputes both in B2C and B2B disputes. Gabrielle Kaufmann-Kohler and Thomas Schultz, followed on, discussing the challenge of justice in ODR by analyzing critical issues such as the binding nature of ODR, electronic communication and evidence, due process and enforcement.[14] Julia Hornle has applied the principle of procedural fairness in online arbitration and implied the necessity of applying higher due process standards to ODR especially between parties with unequal bargaining positions.[15] However, Hornle's analysis has been challenged by other scholars[16] who argued that the requirement of an efficient and less costly ODR is not compatible with such a higher due process requirement. A compromise needs to be made between procedural fairness and procedural efficiency in ODR. Pablo Cortés has conducted research on how to use information technology in ADR to resolve consumer disputes in the EU.[17] A theoretical study in ODR has been conducted by experts to discuss the interactions between ODR and other fields (ex. E-commerce, consumers, culture, trust, justice). [18] Scholars have also explored legal issues in online arbitration from different perspectives among legislators, institutions and users.[19] Constructive proposals have been made by Amy J. Schmitz and Colin Rule to establish an international consumer redress platform (newhandshake.org) for cross-border consumer disputes.[20] Nevertheless, the viability of such a private redress and dispute resolution system has yet to be seen as the redress platform requires voluntary participation of merchants and trust of consumers to use the system. Orna Rabinovich-Einy and Ethan Katsh recently explored the new boundaries of ODR[21] and found that the application scope of ODR is no longer limited to e-commerce but also extends to other fields such as healthcare, social media, and labor. In addition, the online court has also become an

[13] Colin Rule, *Online dispute resolution for business:B2B, E-Commerce, Consumer, Employment, Insurance and other Commercial Conflicts* (Jossey-Bass 2002).
[14] Gabrielle Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International 2004).
[15] Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press 2009).
[16] Pablo Cortés, 'Book Review of Julia Hörnle on Cross-border Internet Dispute Resolution' (2010)73 Modern Law Review, 175; Thomas Schultz, 'Internet Disputes, Fairness in Arbitration and Transnationalism: A Reply to Julia Hornle' (2011)19 International Journal of Law and Information Technology 153.
[17] Pablo Cortés, *Online Dispute Resolutions for Consumers in the European Union* (Routledge Research in IT and E-Commerce Law 2011).
[18] Mohamed Abdel Wahab, Ethan Katsh & Daniel Rainey, *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2013).
[19] Maud Piers and Christian Aschauer, Arbitration in the Digital Age: The Brave New World of Arbitration (Cambridge University Press 2018); F.F. Wang, *Online Arbitration* (Informa Law from Routledge 2018).
[20] Amy J. Schmitz and Colin Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection* (American Bar Association 2017).
[21] Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press 2017).

important branch of ODR, expanding the scope of ODR.[22]

5. In view of these theoretical developments in ODR, I will examine the feasibility of using ODR in resolving e-commerce disputes from a substantive law perspective and a procedural law perspective. It is substantive in the sense that electronic ADR agreements (e-ADR agreements) are scrutinized by contract rules and mandatory laws to protect the interests of weaker parties. It is procedural in the sense that ODR procedural rules need to fulfill minimum quality standards in order to be enforced in a cross-border context.

1.2. Research aim and scope

6. The research explores the possible use of ODR in resolving e-commerce disputes by ensuring both the parties' access to justice and procedural fairness in ODR. This research aims to find out the challenges for ODR development and its implications for the dispute resolution system design in e-commerce transactions.

7. With the development of e-commerce, there is a strong initiative to develop a special dispute resolution mechanism in resolving e-commerce disputes. This is for instance the case in the European Union (EU) and the People's Republic of China (PRC). The e-commerce turnover in 2016 increased by 15% to 530 billion EURO.[23] The EU has started its work on studying the relations between alternative dispute resolution mechanism and the development of cross-border e-commerce transactions in the internal market.[24] The EU has made two legal instruments to enhance consumer's redress in cross-border disputes: the Directive on Consumer ADR and the Regulation on Consumer ODR.[25] China is also developing a diversified dispute resolution mechanism as a result of the growing e-commerce market.[26] This dissertation explores the different landscape of dispute resolution mechanisms in the EU and

[22] See UK Online Dispute Resolution Advisory Group, 'Online Dispute Resolution for Low Value Civil Claims' February 2015. China has launched three Internet Courts in Hangzhou, Guangzhou and Beijing.

[23] Digital Single Market, 'Online platforms: new European rules to improve fairness of online platforms trading practices' Fact Sheet, < https://ec.europa.eu/digital-single-market/en/news/online-platforms-new-rules-increase-transparency-and-fairness> accessed 14 March 2019.

[24] Policy Department Economic and Scientific Policy, 'Redress & Alternative Dispute Resolution in Cross-border E-commerce Transactions' (IP/A/IMCO/IC/2006-206).

[25] Commission Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, OJ L 165/63 ("Directive on Consumer ADR"); Council Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("Regulation on Consumer ODR").

[26] In 2017, the trade volume of e-commerce in China reached 29.16 trillion RMB (around 3.6 trillion EUR). China is the largest market with e-commerce trade volume. See International E-commerce Report 2017 by China International Electronic Commerce Center (Co., Ltd.) (2017 年世界电子商务报告).

China for e-commerce transactions, which are influenced by their history, legal culture and policy considerations. It intends to build the link between e-commerce disputes and ODR from a comparative perspective between the EU and China.

8. This doctoral dissertation is focused on the use of ODR in resolving disputes arising from e-commerce disputes. For delimitation purpose, ODR in this dissertation is limited to online ADR, without touching upon the online court. The scope of e-commerce includes both B2B and B2C transactions related to buying and selling of products, services and other digital assets (such as data and domain names).[27] A domain name dispute is a special type of e-commerce dispute as it involves disputes between domain name registrant and the trademark owner who do not have any direct contractual relationship. The first-come-first-served feature of domain name registration has attracted speculators to purchase domain names ("cyber-squatting"), which are similar to trademarks of famous companies, and resell these domain names to the trademark owners for profit. ICANN, the non-profit enterprise managing domain names, has designed a dispute resolution system for domain name disputes to tackle cyber-squatting.[28] Domain name registrant has agreed to the dispute resolution process designated by ICANN when registering the domain name. The special structure of domain name disputes has inspired ODR providers to develop the ODR mechanism with a set of built-in dispute resolution rules and self-enforcement mechanism. Other types of e-commerce disputes include for example sales disputes arising from the marketplaces and online loan disputes from financial enterprises. This has brought me to study other two types of ODR, namely the Internal Complaint Mechanism of Taobao marketplace[29] and the Online Arbitration Rules of Guangzhou Arbitration Commission.[30] The type of ODR in this study only deals with the technology-assisted ODR that uses information technology to assist in dispute resolution handled by human beings. The technology-based ODR that entirely relies on computer algorithm[31] (such as blind-bidding and automated adjudication based on algorithms) is not touched upon in this dissertation.

[27] ABA Task Force on E-commerce and Alternative Dispute Resolution Final Report, 6.
[28] Internet Corporation for Assigned Names and Numbers (ICANN) has designed Uniform Domain Name Dispute Resolution Policy (UDRP) and Rules for Uniform Domain Name Dispute Resolution Policy to resolve disputes arising domain names between cyber-squatters and legitimate trademark owners.
[29] Dispute Resolution Rules of Taobao marketplace (a C2C online marketplace belonging to Alibaba group), effective from 1 January 2015 <https://rule.taobao.com/detail-191.htm> accessed 19 October 2016, Article 21.
[30] Guangzhou Arbitration Commission has designed a set of online arbitration rules for different types of disputes, including small-claim online shopping disputes, online loan disputes, credit card disputes, etc.
[31] Schmitz and Rule (n 20) 133.

1.3. Research questions and methodologies

9. The main research question is whether ODR is proved to be an efficient and effective dispute resolution in resolving e-commerce disputes and what are the challenges to the development of ODR? This major research question can be further divided into three inter-related sub-questions:

(i) First, what is the validity requirement of e-ADR agreements? What are the legal barriers to the cross-border recognition of e-ADR agreements?
(ii) Second, what are the minimum procedural fairness standards that can ensure the quality of ODR? Whether current ODR rules are in compliance with the minimum procedural fairness requirements?
(iii) Third, how to enforce the outcomes of ODR effectively? Whether ODR should be enforced by judicial forces or by private enforcement mechanisms based on monetary or reputation incentives?

10. This research has applied three types of methodologies. First, this dissertation involves a study between law and other disciplines such as technology, economics, and psychology. It is interdisciplinary in the sense that it answers legal questions by involving known data from these other disciplines. This is so done with various aims. First, the interplay between law and technology in respect of ODR is an obvious thread in this dissertation. The distance between technology innovation and legislation may affect the legal certainty in the cross-border recognition of e-ADR agreements, the procedural justice of ODR process and the effectiveness of ODR enforcement mechanisms, creating stumbling blocks to the development of ODR. This research intends to fill in the gap between new emerging technologies in the field of ODR and the lengthy lawmaking process falling behind the technology.[32] Moreover, the research adopts a law and economics analysis in the sense that it involves the analysis of the function of law. This is relevant, for instance, dealing with contract law rules that correct market failure by protecting vulnerable parties. In order to restore the balance between traders and consumers, platforms and their users, national courts apply standard form contract rules and unfair terms rules to determine the validity of e-ADR agreements.[33] In addition, ODR has been challenged for its procedural fairness due to the electronic communications applied in hearings and

[32] Erica Palmerini, 'The interplay between law and technology, or the RoboLaw project in context' in *Law and technology* (Pisa University Press 2013) 16.
[33] See Section 3.2.

deliberation procedures.[34] In order to reduce the gap between face-to-face communication and screen-to-screen communication in ODR procedures, this research relies on scientific data from psychology studies on procedural justice regarding the improvement of inter-personal trust during electronic communications.[35] Researchers have found that the disputants' satisfaction with dispute resolution decisions and their adherence to them would be influenced by their perceptions about the fairness of the dispute resolution process.[36] The application of non-verbal communication tactics in electronic communication can also promote the parties' perception of procedural fairness in ODR.

11. Second, this research adopts a comparative approach to the study of the ODR legislation and practices in the EU and China. While e-commerce increases the number of cross-border transactions, it also raises challenges to dispute resolution in multi-jurisdictions. Jurisdictions such as the EU and China have started to consider the infrastructure of ODR mechanism in order to facilitate transactions in e-commerce. Although the EU legislature has the competence to legislate on the subject matters conferred by the member states,[37] the EU laws do not intervene in contract rules or procedural rules of the national laws. Therefore, a functional approach will be used by referring to national laws of certain member states to reflect how EU laws are implemented. In the EU, the jurisdiction of England has been selected partly because English is the most approachable language and partly because the UK is the largest e-commerce market in the EU. [38] The legislation of England has a great influence on the development of its e-commerce market. Moreover, the English legislation embodies features of both Common Law rules[39] and Civil Law rules as a result of implementing EU laws.[40] While the Common Law rules provide a functional approach for national courts to assess the validity of electronic

[34] Hörnle (n 15); JB Martin, 'Delivering Due Process and Procedural Efficiency at Low Cost: The Grail Quest of International Online Arbitration' (2017) Transnational Dispute Management (TDM).
[35] See Section 4.1.2.2 and 4.1.4.2.
[36]John W Thibaut and Laurens Walker, *Procedural justice: A psychological analysis* (L. Erlbaum Associates 1975); E Allan Lind and Tom R Tyler, *The social psychology of procedural justice* (Springer Science & Business Media 1988); Neil Vidmar, 'The origins and consequences of procedural fairness' (1990)15 Law & Social Inquiry 877, 877; Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural justice and the rule of law: fostering legitimacy in alternative dispute resolution' (2011) Journal of Dispute Resolution 1, 5.
[37] TEU, Article 5(2), principle of conferral.
[38] UK is the largest E-commerce market within Europe with 178 billion EUR in 2018, which constitutes one-third percent of EU e-commerce revenue (a total of 534 billion EUR). See the European Ecommerce Report 2018: relevant findings outlined, <https://www.eurocommerce.eu/media/159952/2018.07.02%20-%20Ecommerce%20report_annex.pdf> accessed 24 January 2019.
[39] In Section 3.2.3.1, Common Law rules of incorporation and unconscionability will be explored.
[40] This for example is the case in standard form contract rules prescribed by Article 3 of the Unfair Terms Directive in Consumer Contracts.

contracts, the implementation of EU legislation shows a policy priority over consumer protection. The comparative study of legislation in ADR and ODR between EU and China is helpful to determine the barriers to the development of ODR in resolving e-commerce disputes and find out solutions to tackle these barriers.

In view of the economic potential of the information and communication technologies, the European Commission has set the 2020 Strategy to turn the EU into a smart, sustainable and inclusive economy delivering high levels of employment, productivity, and social cohesion, to be implemented through concrete actions at EU and national levels.[41] The Digital Agenda for Europe is one of the initiatives of the Europe 2020 Strategy to promote the free movement of goods, persons, services and capital, and allow individuals and business to seamlessly access and exercise online activities under conditions of fair competition and a high level of consumer and personal data protection.[42] In this background, an alternative dispute resolution mechanism is viewed as an effective mechanism in enhancing consumer trust and facilitating e-commerce.[43] In order to promote the use of alternative dispute resolution in the EU, the European Commission launched an ODR platform in 2016 for consumer disputes to improve the consumer's access to justice online and explore the growth potential of European Digital Single Market.[44]

In China, the government has introduced the "Internet Plus" strategy to boost the digital economy in 2015.[45] The "Internet Plus" strategy refers to the incorporation of the Internet into the conventional industry and to the fostering of new industries and business development in China. One of the major tasks of "Internet Plus" strategy is to boost e-commerce in China.[46] McKinsey & Company predicts that, by 2020, the size of the Chinese e-commerce market will

[41] Communication from the Commission Europe 2020: A strategy for smart, sustainable and inclusive growth, COM (2010) 2020, 3.
[42] A Digital Agenda for Europe, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2010/0245 f/2, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0245R(01)> accessed 7 June, 2018.
[43] Policy Department Economic and Scientific Policy, 'Redress & Alternative Dispute Resolution in Cross-border E-commerce Transactions' (IP/A/IMCO/IC/2006-206) Briefing Note; Communication on the Single Market Act (COM/2011/0206 final) also emphasized the importance of using ADR to empower consumer rights in the e-commerce dimension.
[44] 'Solving disputes online: New platform for consumers and traders, 15 February 2016, < http://europa.eu/rapid/press-release_IP-16-297_en.htm> accessed 24 January 2019.
[45] State Council's opinion on actively promote "Internet Plus" strategy, Guo Fa (2015) No. 40, No. 8. (国务院关于积极推进"互联网+"行动的指导意见) < http://www.gov.cn/zhengce/content/2015-07/04/content_10002.htm> accessed 13 December 2017.
[46] *Ibid.*

be equal to that of the US, Japan, the UK, Germany, and France combined today.[47] In order to support the development of e-commerce, the E-commerce Law of the PRC has been promulgated from 1 January 2019 in which a whole chapter is related to dispute resolution mechanism for e-commerce disputes.[48] Moreover, the judicial reform for a diversified dispute resolution mechanism and Internet courts has promoted the development of ODR in China.[49]

12. Third, this research adopts case studies in two aspects. In the first place, it uses various types of e-ADR clauses that are selected from several website agreements to reflect the state of the art on the use of e-ADR agreements and examine their compliance with the law. In the second place, it selects several ODR rules (online arbitration rules, platform's internal dispute resolution rules and UDRP rules for domain name disputes) to assess whether currently available ODR rules are in compliance with procedural fairness principles. Based on the assessment, suggestions are made on how to improve the fairness of ODR rules while taking into account the efficiency and low-cost requirement of dispute settlement.

1.4. Structure of the research

13. The research will be composed of six main parts.

Chapter 1 is the introduction, including research background and aim, research scope, methodology, and structure overview. It will set out the scene for the scope and purpose of this research.

Chapter 2 will clarify basic concepts and prepare the background knowledge of the ODR in e-commerce transactions from the perspectives of the EU and China, including the scope and major characteristics of e-commerce, electronic contract rules, and the theory of ODR.

Chapter 3 will assess both the formal validity and the substantive validity of e-ADR agreements, in which a study on the tension between public policy and party autonomy will be conducted to assess the validity of e-DAR agreements in the EU and China.

Chapter 4 will examine the minimum procedural fairness standards for ODR and how the

[47] Iris Mir, 'China's E-Commerce Companies Go Global', June 3, 2013, <http://knowledge.ckgsb.edu.cn/2013/06/03/china/chinas-e-commerce-companies-go-global/> accessed December 20, 2014.

[48] E-Commerce Law of the PRC, Order of the President (No. 7) 2018, effective from 1 January 2019.

[49] Opinions of the Supreme People's Court on Further Deepening the Reform of Diversified Dispute Resolution Mechanism of the People's Courts (关于人民法院进一步深化多元化纠纷解决机制改革的意见), Fa Fa [2016] No. 14; Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts, Interpretation No. 16 [2018] of Supreme People's Court.

selective types of ODR rules are in conformity with these standards. It depicts current practices in the ODR field, points out major challenges to the development of ODR procedural rules, and makes proposals in regulating ODR industry and improve the quality of ODR rules.

Chapter 5 will explore the public and private enforcement mechanism through which the ODR outcomes[50] can be implemented. While public enforcement of ODR results is executed by national courts (enforcement of arbitral awards and mediated settlement agreements), private enforcement of ODR results is carried out by the automatic execution mechanism or the incentive-based mechanism.

Chapter 6 is the conclusion. On the basis of main findings, it will demonstrate challenges to the future development of ODR based on previous discussions, propose recommendations for the future ODR system design, and finally envisage the future development of ODR.

[50] The term "ODR outcome" will hereinafter be used as it includes not only adjudicative ODR decisions but also consensual ODR outcomes.

Chapter 2. Conceptual Settings

14. Chapter 2 will explore three major concepts in relevance to the dissertation: e-commerce disputes, electronic contract rules, and the connection between ADR and ODR. These concepts are co-related with each other in the sense that e-commerce transactions are concluded by electronic contracts and ODR has been developed to facilitate disputes arising from e-commerce transactions.

15. Section 2.1 will introduce the major types of e-commerce transactions that are commonly used. With the development of triangular e-commerce transactions, the delimitation between consumers and traders has become blurred. This also brings challenges to the regulation of triangular e-commerce transactions when disputes arise as the current legal framework is insufficient to handle these types of disputes. The three characteristics of e-commerce disputes (virtualization, cross-border, low value and high volume) have called for an efficient and cost-effective dispute resolution.

16. Section 2.2 will examine international legal instruments on electronic contract and provides fundamental principles of electronic communications to establish the connection between contracts in paper form and electronic contracts. This serves as a theoretical basis for the analysis on the validity of e-ADR agreements in Chapter 3.

17. Section 2.3 will provide basic theories of ODR including historic development, forms of ODR and the connection between ADR and ODR. Built on the ADR mechanism, ODR has its unique features which integrate dispute resolution with human interactions via online communication.[51] Then, it will examine the current legislative framework of ADR and ODR in the EU and China. The legislative development between the EU and China demonstrates the role of ODR in resolving e-commerce transaction disputes.

2.1. Electronic commerce and disputes arising from electronic commerce

18. Electronic commerce (hereinafter "e-commerce") has broken the boundary of space, altered the trade pattern, reduced the transaction cost and improved the efficiency of transactions.[52] This section will first explore the definition and major types of e-commerce transactions and

[51] Leah Wing & Daniel Rainey, 'Online Dispute Resolution and the Development of Theory' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey, *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2011) 46.
[52] Zheng Qin, *Introduction to E-commerce* (Springer science & business media 2010) 4.

then examine the distinctive features of e-commerce disputes.

2.1.1. Definition of "e-commerce"

19. There is no uniform definition of "e-commerce" probably due to the ongoing development of various electronic means of transactions. There is both a broad and a narrow definition of e-commerce depending on the technology it uses and the scope of business activities it covers.

20. Regarding technology, the broad scope of technology covers any kind of digital technology including extranets[53] and other applications that run over the Internet, and traditional telecommunications such as telephone, facsimile, or conventional e-mail. Under the narrow definition, the scope of technology is limited to the use of Internet. According to the OECD, the type of business activities of e-commerce is defined narrowly as "the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders."[54] Other scholars have defined e-commerce more broadly as "any kind of transaction that is made by using digital technology."[55] In the UNCITRAL Model Law on E-commerce,[56] the scope of "commercial" activities covers matters arising from all relationships of a commercial nature, whether contractual or not.[57]

21. While e-commerce has brought great convenience and efficiency to parties in cross-border trade, it has also brought challenges to legal issues due to the uncertainty of jurisdiction, insecurity of transactions and potential infringement of intellectual property rights. When disputes arise from e-commerce transactions, it has been found that traditional litigation is no longer sufficient to handle these disputes because it cannot meet the efficient and cost-effective demand of e-commerce.[58] Moreover, parties may encounter difficulties both in bringing a

[53] An extranet is a private network that uses Internet technology and the public telecommunication system to securely share part of a business's information or operations with suppliers, vendors, partners, customers, or other businesses.
[54] OECD, *OECD Guide to Measuring the Information Society 2011*, (OECD Publishing, 2011) 72.
[55] Barry B Sookman, 'Electronic Commerce, Internet and the Law: A Survey of the Legal Issues' (1999)48 UNBLJ 119, 120; Chu Zhang, *E-commerce Law* (Qing Hua University Press 2005) 3.
[56] United Nations, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996. (UNCITRAL Model Law on E-commerce)
[57] Relationships of a commercial nature include, without limitation to: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers. See UNCITRAL Model Law on E-commerce with Guide to Enactment 1996, Article 1 in footnote.
[58] Faye Fangfei Wang, *Law of Electronic Commercial Transactions: Contempoary issues in the EU, US and China* (Routledge Research in IT and E-Commerce Law 2010) 151-152.

claim and enforcing a decision in a foreign jurisdiction due to time and cost concerns.[59]

2.1.2. Major types of e-commerce transactions

22. E-commerce transactions can be categorized into different groups according to various classification standards. The following section will illustrate the types of e-commerce transactions divided by the identity of the parties and the structure of transactions.

2.1.2.1. Types of e-commerce transactions classified by the parties' identity

23. E-commerce transactions can be categorized in accordance with the bargaining powers of the parties in transactions. There are various types of e-commerce transactions: B2B (Business to Business), B2C (Business to Consumer), C2B (Consumer to Business), C2C (Consumer to Consumer), C2G (Consumer to Government), B2G (Business to Government), G2G (Government to Government), etc. The distinctions among B2B, B2C and C2C disputes are important to determine the applicability of international legal instruments such as the New York Convention on the Recognition of Commercial Arbitral Awards and the UN Convention on Electronic Communications in International Contracts.[60] Three major types of e-commerce transactions will be shortly discussed hereunder: B2B, B2C and C2C.

24. The first type, Business to Business (B2B) e-commerce transactions constitute a vast majority of all e-commerce transactions. Earlier B2B transactions were conducted via EDI (Electronic Data Interchange), which is a computer-to-computer transfer of business information between two businesses adopting a standard format.[61] However, the cost of using EDI is high and therefore it is used only by large enterprises. In the late 1990s, B2B transactions have extended to online marketplaces where businesses could interact with each other and make business transactions. The major difference between EDI and open Internet lies in the size of the parties involved. The transaction is conducted between two parties in EDI while the transaction on the Internet is conducted among multiple parties.

E-commerce is changing the landscape of small business transactions. Small and medium sized

[59] Uta Kohl, *Jurisdiction and the Internet: Regulatory competence over online activity* (Cambridge University Press 2007).
[60] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article I(3) on commercial reservation (the "New York Convention") entered into force on 7 June 1959; UN Convention on Electronic Communications in International Contracts of 2007 Article 1.
[61] P. Schneider Gary, *Electronic Commerce* (Course Technology 2011) 229.

enterprises (SMEs) have different concerns and needs compared to large enterprises. E-commerce provides SMEs with lower market entry cost and the ability to extend the geographic reach to a much larger market.[62] However, unlike large enterprise who have the resources to establish and operate their own websites, SMEs participate in e-commerce by joining an online marketplace established by a third-party intermediary. A recent Eurobarometer survey showed that almost half (42%) of SMEs use online marketplaces to sell their products and services.[63] The SMEs are also faced with terms and conditions provided by the online marketplace on a take-it-or-leave-it basis and they cannot afford risks of sanctions, unenforceable contracts and tort liabilities that arise from e-commerce transactions.[64]

25. In Business to Consumer (B2C) e-commerce transactions, Internet is used by businesses to provide consumers goods and services via websites. Although B2C e-commerce represents a smaller fraction of all e-commerce, it has been growing rapidly. According to e-Marketer, B2C e-commerce is forecast to double from 1.2 trillion USD in 2013 to 2.4 trillion USD in 2018. [65]

As B2C e-commerce involves consumers who are in a weaker position than their counterpart, national legislators have provided consumer protection rules to redress the power imbalance between the parties. In the EU, it has been estimated that 37% of e-commerce websites do not respect basic consumer rights.[66] This generates a consumer detriment with an estimated amount of 770 million EUR per year for consumers shopping online across borders in travel, entertainment, clothing, electronic goods and financial services.[67] The enhancement of the consumer protection regime is seen by the EU as an effective way to improve consumer confidence to promote B2C e-commerce.[68]

26. Consumer to Consumer (C2C) e-commerce transactions are usually concluded on a third-party

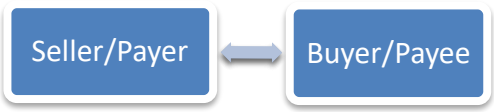
[62] Norman Solovay and Cynthia K Reed, *The Internet and dispute resolution: untangling the Web*, vol 671 (Law Journal Press 2003) 4-18.
[63] Flash Eurobarometer 439, Report on The Use of Online Marketplaces and Search Engines by SMEs, April 2016,<http://ec.europa.eu/information_society/newsroom/image/document/2016-24/fl_439_en_16137.pdf> accessed May 9, 2018.
[64] *Ibid*, 4-20.
[65] UNCTAD, Information Economy Report 2015: Unlocking the Potential of E-commerce for Developing Countries, 13 <http://unctad.org/en/PublicationsLibrary/ier2015_en.pdf> accessed 7 November 2017.
[66] Page 9 and Annex IV of the Commission Staff Working Document Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, COM (2016) 283 final.
[67] *Ibid*.
[68] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: A comprehensive approach to stimulate cross-border e-Commerce for Europe's citizens and businesses, SWD (2016) 163 final.

online platform, which plays a prominent role in facilitating transactions.[69] Online marketplace platforms such as Etsy, eBay, Craigslist, Taobao, Amazon, and Kickstarter facilitate C2C transactions by providing technological infrastructures for sellers to establish online shops and for buyers to select merchandise. Moreover, the intermediary also takes responsibilities in monitoring the creditability of sellers to minimize fraud and keep the market order. However, compared to B2C e-commerce, the sellers in C2C e-commerce are prone to reputation and trust challenges as they are non-professionals.[70]

The consumer protection rules are generally limited to B2C e-commerce as the parties in C2C transactions are presumed to have equal bargaining powers. The national legislators do not set out specific rules for C2C transactions and by default C2C transactions are regulated by the contract laws instead. However, civil redress is very limited for consumers in C2C transactions by pondering over the conflict between expensive civil proceedings and low value of C2C transactions.[71] It is therefore controversial whether a separate regulation on C2C transactions is needed or whether incorporating C2C transactions into the existing legislative framework is sufficient.[72]

2.1.2.2. Type of e-commerce transactions classified by the structure of transactions

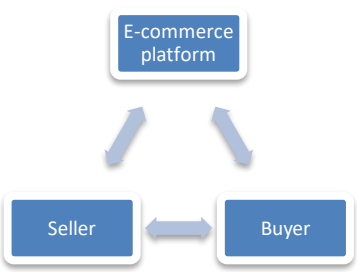
27. The development of e-commerce has shifted from the traditional bipolar transaction mode, which only involves two parties (the buyer and the seller or the payer and the payee), to a triangular transaction mode, which adds a third-party intermediary between the seller and the buyer or between the payer and the payee.

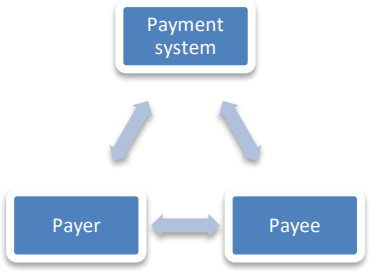


28. The bipolar e-commerce transaction is conducted on an online platform where sellers contract directly with customers. The websites provided by sellers enable customers to search for

[69] Qin (n 52) 36.
[70] Janejira Sutanonpaiboon and Ayman Abuhamdieh, 'Factors influencing trust in online consumer-to-consumer (C2C) transactions' (2008)7 Journal of Internet Commerce 203.
[71] 'Exploratory study of consumer issues in online peer-to-peer platform market', Annex5 Task5 Legal Analysis Report, May 2017, 10.
[72] Dr. Aneta Wiewiórowska-Domagalskat, 'Online Platform: how to adapt regulatory framework to the digital age', EU Committee on the Internal Market and Consumer Protection Briefing, 8 < http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607323/IPOL_BRI(2017)607323_EN.pdf> accessed 8 November 2017.

merchandise and to pay directly online. As the bipolar e-commerce transaction was the most common type of transactions, current national legislation (such as contract law, consumer law) is mainly focused on this type of transactions.





29. The triangular e-commerce transaction is a new structure in which a third-party intermediary (the online platform) brings together contracting parties on the online platform and facilitates transactions between them. The online platform is a "two-sided" or "multi-sided" marketplace, which facilitates interactions (exchange of information, a commercial transaction, etc.) between parties.[73] There are several roles that an online platform can play: aggregation of information on buyers, suppliers and products; facilitation of the search for appropriate products; reduction of information asymmetries through the provision of product and transactional expertise; matching buyers and sellers for transactions; and trust provision to the marketplace.[74] The most common function of the online platform is to provide parties with a trading venue and facilitate parties to conclude electronic transactions. The platform acts as an intermediary who provides information releasing and matchmaking services to the trading parties.[75] Another common function of the online platform is to provide users with online payment instruments and services, transferring payments from payers to payees.[76]

30. The triangular e-commerce transactions bring at least three new challenges to the legislative control over electronic transactions as the delimitation between "traders" and "consumers" becomes blurred on the platform.[77]

Firstly, there is the issue of whether small and medium sized enterprises (SMEs) should be

[73] Staff working document on Online Platforms Accompanying the Communication on Online Platforms and the Digital Single Market, COM (2016) 288, 1. Chapter 2 Section 2 of the E-commerce Law of the PRC have also stipulated the duties and obligations of online trading platforms.
[74] Alina M Chircu and Robert J Kauffman, 'Limits to value in electronic commerce-related IT investments' (2000)17 Journal of Management Information Systems 59.
[75] E-Commerce Law of the PRC, Order of the President (No. 7) 2018, Article 9, paragraph 2.
[76] OECD, The Economic and Social Role of Internet Intermediaries, April 2010, 13.
[77] Exploratory study of consumer issues in online peer-to-peer platform markets, Final Report, 126.

offered special protection in online marketplaces. The development of online marketplaces has extended the geographic scope of SME's business activities. However, there is also an imbalance in the bargaining power between big platforms and SMEs. SMEs may not be aware of their redress rights and find complaints too cumbersome.[78] However, it is quite controversial whether SMEs ought to be granted special protection as weaker parties because it is difficult to distinguish SMEs and giant enterprises, which make it technically impossible to apply such rules.[79]

Secondly, consumers are not protected by special protection rules in disputes arising from C2C transactions. In C2C transactions, a user may have the wrong impression that the platform is the seller, whereas in fact, the real seller is also a private individual. The existing legislation does not provide the same degree of protection to consumers in C2C transactions as afforded to consumers in B2C transactions. C2C transactions involve parties with an equal footing, while consumers are protected in B2C transactions as it is presumed that the traders have greater bargaining power than consumers.[80]

Thirdly, in most national legislation, the third-party information service providers are not held liable for the illegal activities of their users if they have no knowledge of that.[81] Plus, the platform operator will exempt their liabilities by their terms and conditions and contend that they are not those who provide products and services to customers. The Report on the Exploratory Study of Consumer Issues in Online Peer-to-Peer platform markets showed that there is also a lack of information about the identity of the seller and so the question arises whether consumer protection rules are applicable in electronic transactions over the platforms.[82]

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[78] Commission Staff Working Document: A Digital Single Market Strategy for Europe-Analysis and Evidence Accompanying the document A Digital Single Market Strategy for Europe, COM (2015) 192 final, 55.

[79] The criteria for defining SME vary from country to country. For example, in the EU, SME is made up of enterprises which employ fewer than 205 persons and which have an annual turnover not exceeding 50 million EURO; in Australia, a SME has 200 or fewer employees; in Singapore, SME is businesses which employ fewer than 200 staff and with an annual sales turnover of not more than 100 million USD.

[80] 'Exploratory study of consumer issues in online peer-to-peer platform market', Annex5 Task5 Legal Analysis Report, May 2017, 83.

[81] For example, in the EU, Commission Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular e-commerce, in the Internal Market [2000] OJ L 178, Article 14(1); in the U.S., Section 230 of the Communications Decency Act of 1996 grants legislative immunity from liability for providers and users of an "interactive computer service" who publish information provided by others. The OECD Council Recommendation on Principles for Internet Policy Making (13 December 2011) stresses the importance of limit Internet intermediary liability in promoting innovation and creativity.

[82] Exploratory study of consumer issues in online peer-to-peer platform markets (n 71), Final Report, 118.

31. The question then arises as to what role the platform operators should play? Although the platform operators are not involved in the transactions between buyers and sellers, they are responsible to provide users with a transparent trading market for the exchange of goods and services. On the one hand, the limitation of the platform operators' liabilities plays an important role in promoting the development of the platform economy. Too much regulation may harm the innovation of the platform economy. On the other hand, the platform operators should take responsibility in facilitating transactions taken place on the platform.[83] This could, for instance, be done by providing communication tools, dispute resolution services, as well as value-added services such as insurance, product guarantees, extra customer service, etc.[84] An example of the legislation on the online intermediary services can be found in the EU Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediary Services.[85] This regulation requires online intermediary services to provide their business users with a fair and transparent environment. It shows that not only consumers but also business users should be protected against the online platforms who have more bargaining power and advantageous conditions.[86]

2.1.3. Characteristics of e-commerce disputes

32. A study on the characteristics of e-commerce disputes will provide us with clues on what kind of dispute resolution is more suitable for e-commerce disputes. Compared with traditional transactions that are conducted offline, e-commerce disputes have three features: virtualization, cross-border, low-in-value and high-in-volume.

2.1.3.1. Virtualization

33. E-commerce disputes are electronic transactions which are conducted between parties on the

[83] Exploratory study of consumer issues in online peer-to-peer platform markets, Final Report, 16; Chris Reed, *Internet law: text and materials* (Cambridge University Press 2004) 206-210.
[84] OECD, Protecting Consumers in Peer Platform Markets: Exploring the Issues 2016, 22.
[85] The European legislature reached a political deal on the proposed regulation aimed at creating a fair and transparent environment for businesses and traders when using online platforms in February 2019. Article 9 of the Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediary Services (COM (2018)238 final) stipulates that the platform operators shall provide for an internal dispute resolution system for handling the complaints of business users. Article 63 of the E-commerce Law of the PRC also encourages the online platform operators to provide an internal online dispute resolution mechanism for their users to resolve disputes.
[86] Annabelle Gawer, 'Online Platforms: Contrasting perceptions of European stakeholders, A qualitative analysis of the European Commission's Public Consultation on the Regulatory Environment for Platforms', 18, Final Report, 2015/0077.

Internet. A virtual world is a place online, accessed by either a computer program or a website, where many people can interact with each other.[87] The parties can exchange information electronically rather than sending and receiving paper documents. The digital products or services can be delivered online and the payment can be made electronically either with virtual currency or currencies of a specified country.

34. It seems that e-commerce facilitates cross-border transactions by overcoming traditional barriers presented by geographic, lingual and cultural disparities.[88] Undoubtedly, disputes may arise also from virtual transactions. It is more practical to resolve e-commerce disputes by using ODR as the electronic transactions are also taken place in virtual space where parties meet and enter into contractual relationships. In ODR, parties also do not need to meet in person and can resolve disputes in a low cost and in an efficient manner.

2.1.3.2. Cross-border

35. E-commerce transactions are conducted on the Internet and may, by the nature of its virtual environment, have consequences in many jurisdictions. There are various connecting factors[89] (such as the domicile of the parties, the place where the contract was performed or the place where the contract was concluded) which are used to determine the jurisdiction of disputes.[90] The connecting factor used to determine the jurisdiction may vary from country to country, and this especially the case in the context of e-commerce disputes. For example, in the U.S., the criterion for the American courts to have jurisdiction is the fact that a business uses the Internet to purposefully direct activities in that jurisdiction.[91] In the EU, the criterion is whether the business directs such activities to customers in the member state and whether the contract concluded with the consumer falls within the scope of such activities.[92] In China, there is no particular Internet jurisdiction legislation and therefore jurisdiction rules of contract disputes may apply. The criterion is where the defendant is domiciled or where the contract is

[87] Michael H Passman, 'Transactions of virtual items in virtual worlds' (2008)18 Alb LJ Sci & Tech 259, 261.
[88] Jeffrey B Ritter, 'Defining international electronic commerce' (1992)13 Northwestern Journal of International Law & Business 3, 3-4.
[89] In private international law, connecting factors are a means of ensuring the closest and the most appropriate, jurisdiction of a dispute can be foreseen or determined with a degree of certainty and predictability.
[90] Lorna E Gillies, *Electronic commerce and international private law: A study of electronic consumer contracts* (Routledge 2016) 10-11.
[91] Third Circuit: *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 119 (W.D. Pa. 1997).
[92] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and commercial Matters (Recast), Article 17(1)(c). (Brussels I Regulation Recast)

performed.[93] In electronic contract, in the absence of party's agreement on the place of contract performance, the domicile of the buyer is presumed to be the place of contract performance in case of digital products, and the place where the product is received is the place of contract performance in case of physical products.[94]

36. The cross-border nature of e-commerce disputes creates uncertainties for the parties to assert jurisdiction due to disparate national rules in regulating e-commerce disputes. [95] Moreover, even if the parties have obtained a judgment, problems may still be foreseen during the enforcement of such a judgment in a foreign state.

2.1.3.3. Low-value and high-volume

37. It is estimated that at the end of 2017, B2C e-commerce sales hit $2.3 trillion USD and B2B sales reached $7.7 trillion USD.[96] While B2B represents the largest share of e-commerce, B2C appears to be expanding faster. The cross-border e-commerce market accounted for 15% of e-commerce overall.[97] It is estimated to grow up to 22% of the global e-commerce market in 2020.[98] The online marketplaces (giants such as Amazon and Alibaba) accounts for a significant part of total cross-border e-commerce sales. Studies have shown that around 1% to 3% of e-commerce transactions generate a dispute and the number of disputes grows with e-commerce.[99] A large portion of the e-commerce disputes is related to disputes in low-value due to the growing number of B2C and C2C e-commerce transactions taken place over the cross-border online marketplaces. In order to boost cross-border e-commerce and settle cross-border e-commerce disputes which are low in value but high in volume, several governmental organizations (such as the UNCITRAL and the EU) found it necessary to establish legal frameworks on dispute resolution for e-commerce disputes that are low-in-value and high-in-

[93] Civil Procedure Law of the PRC, Order No. 59 of the President of the PRC, Article 23.
[94] Judicial Interpretation on the Application of the Civil Procedure Law of the PRC, Fa Shi [2015] No.5, Article 20.
[95] Solovay and Reed (n 62) 5-4.
[96] Shopify: 'Global Ecommerce: 10 Growth Trends and All the Statistics You need to Know' <https://www.shopify.com/enterprise/global-ecommerce-statistics > accessed 2 November 2017.
[97] DHL, 'The 21st Century Spice Trade: A guide to the cross-border e-commerce opportunity' <http://www.dpdhl.com/content/dam/dpdhl/presse/pdf/2017/dhl-express-cross-border-ecommerce-21-century-spice-trade.pdf> accessed 2 November 2017.
[98] *Ibid*.
[99] Hiroki Habuka and Colin Rule, 'The Promise and Potential of Online Dispute Resolution in Japan' (2017)2 International Journal of Online Dispute Resolution 74, 76.

volume.[100]

2.2. Electronic contract rules

38. E-commerce transactions are concluded via electronic contracts. This section will examine how legislators integrate the electronic contract into the current legal framework. Firstly, international legal instruments on the electronic contract will be examined. The international legal instruments include the UNCITRAL Model Law on E-commerce, UNCITRAL Model Law on Electronic Signatures and the United Nations Electronic Communications Convention. These three international legal instruments have laid down fundamental principles to ensure that electronic contracts can be recognized with similar legal effects as contracts in paper form. Secondly, three legal principles of electronic communications are introduced to establish the link between contracts in paper form and electronic contracts.

2.2.1. International legal instruments on electronic contract rules

2.2.1.1. UNCITRAL Model Law on E-commerce[101]

39. The UNCITRAL Model Law on E-commerce is an international instrument, which has been widely adopted by national legislation, as a model for the evaluation and modernization of their laws and practices in the field of commercial relationships involving the use of modern communication technology.[102] The purpose of the UNCITRAL Model Law on E-commerce is

[100] United Nations Commission on International Trade Law, Working Group III (Online dispute resolution) Thirty-third session, A/CN.9/WG. III/WP. 140, UNCITRAL Technical Notes on Online Dispute Resolution; Council Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

[101] UNCITRAL Model Law on E-commerce (1996) with additional article 5 bis as adopted in 1998.

[102] Countries that have adopted the UNCITRAL Model Law on E-commerce: Australia, Electronic Transactions Act 1999; China, Electronic Signatures Law, promulgated in 2004; Colombia, Ley de comercio electrónico; Dominican Republic, Ley sobre comercio electrónico, documentos y fi rmas digitales (2002); Ecuador, Ley de comercio electrónico, fi rmas electrónicas y mensajes de datos (2002); France, Loi 2000-230 portant adaptation du droit de la preuve aux technologies de l'information et relative à la signature électronique (2000); India, Information Technology Act, 2000; Ireland, E-commerce Act, 2000; Jordan, Electronic Transactions Law, 2001; Mauritius, Electronic Transactions Act 2000; Mexico, Decreto por el que se reforman y adicionan diversas disposiciones del código civil para el Distrito Federal en materia federal, del Código federal de procedimientos civiles, del Código de comercio y de la Ley federal de protección al consumidor (2000); New Zealand, Electronic Transactions Act 2002; Pakistan, Electronic Transactions Ordinance, 2002; Panama, Ley de fi rma digital (2001); Philippines, E-commerce Act (2000); Republic of Korea, Framework Act on E-commerce (2001); Singapore, Electronic Transactions Act (1998); Slovenia, E-commerce and Electronic Signature Act (2000); South Africa, Electronic Communications and Transactions Act (2002); Sri Lanka, Electronic Transactions Act (2006); Thailand, Electronic Transactions Act (2001); Venezuela (Bolivarian Republic of), Ley sobre mensajes de datos y fi rmas electrónicas (2001); and Viet Nam, Law on Electronic Transactions (2006). The Model Law has also been adopted in the British Crown dependencies of the Bailiwick of Guernsey (Electronic Transactions (Guernsey) Law 2000), the Bailiwick of Jersey (Electronic Communications (Jersey) Law 2000) and the Isle of Man (Electronic Transactions Act 2000); in the overseas territories of the United Kingdom of Bermuda (Electronic

to offer national legislators a set of internationally acceptable rules to overcome barriers of using electronic communications in contracts, considering that national legislation governing communication and storage of information in e-commerce is lacking.[103] Three principles in electronic communications (the legal principles of non-discrimination, technological neutrality and functional equivalence)[104] have been established by the UNCITRAL Model Law on E-commerce to facilitate e-commerce in a cross-border context.

2.2.1.2. UNCITRAL Model Law on Electronic Signatures

40. The UNCITRAL Model Law on Electronic Signatures is intended to provide essential guidelines to facilitate the use of electronic signatures,[105] which was set forth in Article 7 of the UNCITRAL Model Law on E-commerce. It intends to promote the reliance on electronic signatures for producing a legal effect where such electronic signatures are functionally equivalent to handwritten signatures. It also provides criteria for the legal recognition of electronic signatures irrespective of what kind of technology is used.[106]

2.2.1.3. United Nations Electronic Communications Convention

41. Unlike the UNCITRAL Model Laws on E-commerce and Electronic Signatures, the United Nations Electronic Communications Convention has a binding legal effect on the contracting states but only a few countries have ratified this convention.[107] It applies to the "use of electronic communications in connection with the formation or performance of a contract between parties whose places of business are in different states."[108] However, the United Nations Electronic Communications Convention does not apply to electronic communications exchanged in connection with contracts entered into for personal, family or household

Transactions Act 1999), the Cayman Islands (Electronic Transactions Law 2000) and the Turks and Caicos (Electronic Transactions Ordinance 2000); and in Hong Kong Special Administrative Region (SAR) of China (Electronic Transactions Ordinance (2000). Promoting confidence in e-commerce: Legal issues on international use of electronic authentication and signature methods, UNCITRAL 2009, 38.

[103] Guide to Enactment of the UNCITRAL Model Law on E-commerce, paragraph 3.

[104] See in Section 2.2.2.

[105] UNCITRAL Model Law on Electronic Signatures (2001), Article 6.

[106] The application of technological neutrality principle.

[107] UN Convention on Electronic Communications in International Contracts of 2007 (the United Nations Electronic Communications Convention), only Congo, Dominican Republic, Honduras, Montenegro, Russian Federation and Singapore have ratified the Unite Nations Electronic Communications Convention. <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html> accessed April 5, 2015.

[108] United Nations Electronic Communications Convention, Article 1(1).

purposes.[109] The principles of technological neutrality and functional equivalence have also been indicated in Article 8 and 9 of the United Nations Electronic Communications Convention. Moreover, the United Nations Electronic Communications Convention has laid down specific contract rules in connection with electronic communications from Article 10 to Article 12.[110] Nevertheless, the United Nations Electronic Communications Convention is not intended to establish the uniform substantive contract rules but allowing contracting states to adapt their domestic legislation to the developments in electronic communications technology without removing the paper-based requirements or disturbing the legal concepts and approaches underlying those requirements.[111]

2.2.2. Legal principles of electronic communications

2.2.2.1. Non-discrimination principle

42. The non-discrimination principle refers to the equal treatment between electronic communications and non-electronic communications. It means that the form in which certain information is presented or retained cannot be used as the reason for that information to be denied legal effectiveness, validity, and enforceability.[112] National legislation on e-commerce has adopted this non-discrimination principle to grant electronic communication legal effect vis-à-vis paper documents.[113] It is stipulated in Article 5 of the UNCITRAL Model Law on E-commerce that "information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message." A similar stipulation has been indicated in Article 8 paragraph 1 of the United Nations Electronic Communications Convention.

43. Article 11 of the UNCITRAL Model Law on E-commerce has further applied the principle of non-discrimination to the electronic contract formation:

> *"In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied of validity or enforceability, on the sole ground that a data message was used for that*

[109] The United Nations Electronic Communications Convention is not applicable to B2C contracts.
[110] Article 10 Time and place of dispatch and receipt; Article 11 Invitations to make offers in a contract through electronic communications; Article 12 Use of automated message system for contract formation.
[111] Explanatory note on the United Nations Electronic Communications Convention, paragraph 52.
[112] UNCITRAL Model Law on Electronic Commerce, Article 5.
[113] For example, the EU Directive on E-commerce (Article 9), Uniform Commercial Code (§ 2-211) and Electronic Signature Law of the PRC (Article 3).

purpose."

44. However, this rule does not provide legal equivalence that a contract in paper form can be replaced by an electronic one. It merely confirms the formal validity of electronic contract without overruling national legislation that imposes stricter formal requirements. There may be statutory rules that apply to a certain type of contract in national laws, such as the requirement to have a communication notarized or presented in a conspicuous manner.[114]

2.2.2.2. Technological neutrality principle

45. The principle of technological neutrality means that legislation shall not impose the use of or otherwise favor any specific technology.[115] The principle of technological neutrality requires the equal treatment of different technologies that are used for electronic communications such as the use of EDI, e-mail, telegram, telex, or fax.[116] Another example is the equal treatment requirement of different types of electronic signatures with various technologies (such as PKI[117], biometric[118] or password) in the UNCITRAL Model Law on Electronic Signatures. It is stipulated in Article 6 of the Model Law on Electronic Signatures that nothing shall exclude, restrict or deprive of the legal effect of any method of creating an electronic signature that satisfies the reliability requirement.

2.2.2.3. Functional equivalence principle

46. The functional equivalence principle is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determine how those purposes or functions could be fulfilled in the electronic context.[119] It is used to facilitate e-commerce by adapting existing legal requirements of documents to electronic communications.

47. The UNCITRAL Model Law on E-commerce adopted a flexible standard from Article 6 to 8 with respect to the concepts of "writing", "signature" and "original", taking into account various existing requirements in a paper-based environment. A similar approach has been

[114] Henry D Gabriel, 'The United Nations Convention on the Use of Electronic Communications in InternationalCcontracts: an Overview and Analysis' (2006)11 Uniform Law Review 285, 296.
[115] Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, paragraph 6.
[116] For example, electronic contracts that are concluded via emails should have same legal effects as electronic contracts that are concluded via websites.
[117] Public Key Infrastructure: an information processing system which issues and revokes digital certificates based on public-key cryptography.
[118] Biometric refers to the biometric feature of electronic signature such as fingerprint, face or iris recognition.
[119] Guidance Note of UNCITRAL Model Law on E-commerce, paragraph 16.

adopted by the United Nations Electronic Communications Convention in Article 9.

48. There are a number of formal requirements that provide distinct levels of reliability, traceability, and inalterability with respect to paper documents.[120] These are the writing, signature and originality requirements. The writing requirement is the lowest layer in this hierarchy of formal requirements. The signature requirement and originality requirement provide for more stringent formal requirements than the writing requirement, and therefore more functions are expected from the data message in which the information is stored.

A. Writing requirement

49. The requirement of writing is met by a data message if "the information contained therein is accessible so as to be usable for subsequent references."[121] It implies that information in the form of a data message should be readable and interpretative, and that the software that might be necessary to render such information readable should be retained.[122]

B. Signature requirement

50. The signature requirement of a person is met if: "(i) a record is used to identify that person and to indicate that person's approval of the information contained in the data message; and (ii) that method is reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant documents."[123] There are no detailed rules on the criterion of "reliability" of an electronic signature, which is later explained in the Model Law on Electronic Signatures in Article 6.[124]

51. The UNCITRAL Model Law on Electronic Signatures has been established based on Article 7 of the UNCITRAL Model Law on E-commerce to the fulfillment of the signature function in an electronic environment.[125] It seeks to find an intermediate level between the generality of the UNCITRAL Model Law on E-commerce and the specificity that might be required when dealing with a given signature technique.[126]

C. Originality requirement

[120] Guide to Enactment of UNICTRAL Model Law on E-commerce (1996), paragraph 49.
[121] UNCITRAL Model Law on E-commerce, Article 6.
[122] Guide to Enactment of UNICTRAL Model Law on E-commerce (1996), paragraph 50.
[123] *Ibid*, Article 7.
[124] See Section 3.1.2.1 D. c.
[125] Preamble of UNCITRAL Model Law on Electronic Signatures.
[126] Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures, paragraph 34.

52. The originality requirement is not only used in national laws to assess the evidentiary value, which gives evidence in original documents higher probative value than replicates,[127] but also used in international conventions such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[128] For example, in order to apply for the recognition and enforcement of an international commercial arbitral award, the party shall, at the time of application, provide the original arbitral award and arbitration agreement or the duly certified copies.[129]

53. In electronic communications, "originality" requires that the data message be transmitted unchanged so that other parties in international commerce may have confidence in the authenticity of its content.[130] The requirement of originality is met by a data message if: "(i) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; (ii) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented."[131] The originality requirement stipulates the minimum formal requirements of a data message to have the legal equivalence of a paper document.

2.3. The development of ODR in e-commerce transactions

54. ODR is seen as a promising dispute resolution avenue that facilitates e-commerce transactions because it accommodates all the characteristics of e-commerce disputes.[132] Firstly, ODR exists in the virtual world: it provides parties with dispute resolution via the Internet. Secondly, it avoids jurisdictional issues by applying a set of self-regulated rules.[133] Thirdly, it proves to be a low-cost and efficient dispute resolution method, which matches the low-in-value and high-in-volume feature of e-commerce disputes.[134]

55. Section 2.3.1 will provide the basic theory of ODR including the history, forms of ODR and illustrate the connection between ADR and ODR. Section 2.3.2 and 2.3.3 will demonstrate the

[127] For instances, Article 70 of the Civil Procedure Law of the PRC (Order No. 59 of the President of the PRC, effective from 1 January 2013) stipulates that "documents submitted as evidence should be in the original form. If it is truly difficult to present the original document, then duplicates of the original may be submitted." Similar can be found in Article 1334 of French Civil Code, Belgian Civil Code.
[128] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") entered into force on 7 June 1959.
[129] New York Convention, Article IV (1)(b).
[130] Explanatory Note on the United Nations Electronic Communications Convention, paragraph 167.
[131] UNCITRAL Model Law on E-commerce, Article 8.
[132] See Section 2.1.1.2 Characteristic of e-commerce disputes.
[133] See Section 4.2 with regard to selected ODR rules.
[134] See (n 2).

ADR and ODR development in the EU and China, together with their comparison (Section 2.3.4).

2.3.1. Theory of ODR

56. ODR literally means a dispute resolution process that utilizes the Internet and information technology. Depending on whether a court proceeding is included, ODR has a broad and narrow scope of the definition. Colin Rule suggests that ODR can take a broad scope meaning "any use of technology to complement, support or administer a dispute resolution process".[135] The broad definition of ODR includes all kinds of dispute resolution that adopt information technology, regardless of whether they are judicial or not.[136] It includes online court proceedings that are conducted via the Internet. Examples of a broad scope of ODR are the online court projects developed in the United Kingdom and China.[137] The narrow definition of the ODR, entails only ADR mechanisms supplemented by new technologies.[138] As defined in the Technical Notes by the UNCITRAL Working Group III on ODR, ODR encompasses a broad range of approaches and forms (including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others).[139] For delimitation purpose, this research will narrow down the study on the ODR established on ADR mechanism specifically used to resolve e-commerce disputes.

57. ODR originated from two sources. The first line of ODR originates from the adaptation of traditional ADR to the Internet environment.[140] ODR shares some common features of ADR such as providing dispute resolution with lower cost, confidentiality, efficiency and flexible

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[135] Rule (n 13) 44.

[136] Rossa McMahon, 'The Online Dispute Resolution Spectrum' (2005)71 Arbitration: the Journal of the Chartered Institute of Arbitrators 218, 227.

[137] In the United Kingdom, the justice system is making reforms to establish online courts to resolve claims of up to £25,000. See Lord Justice Brigg's Civil Courts Structure Review: Interim Report, 75 & Online Dispute Resolution Advisory Group on Online Dispute Resolution for Low Value Civil Claims, <https://www.judiciary.gov.uk/reviews/online-dispute-resolution/> accessed 12 December 2017. In China, the first cyber court was established on 18 August 2017 to solve internet disputes such as e-commerce disputes, intellectual property disputes, <http://www.netcourt.gov.cn/portal/main/domain/index.htm> accessed 12 December 2017.

[138] Martin Gramtikov, *Costs and Qualtiy of Online Dispute Resolution: A handbook for measuring the costs and quality of ODR* (Maklu 2012) 41; Ethan Katsh, 'Bringing online dispute resolution to virtual worlds: Creating processes through code' (2004)49 NYL Sch L Rev 271, 285.

[139] United Nations Commission on International Trade Law, Working Group III (Online dispute resolution) Thirty-third session, A/CN.9/WG. III/WP. 140, UNCITRAL Technical Notes on Online Dispute Resolution, paragraph 2.

[140] Orna Rabinovich-Einy, 'Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age' (2002) 7 Virginia Journal of Law & Technology 4, para 2.

procedures. It takes lessons from ADR over the years about the importance of impartiality, the importance of transparency and the challenges of managing power imbalance.[141]

58. The second line of ODR derives from the urgent need to resolve large-in-volume but small-in-value disputes arising from e-commerce transactions[142]and the difficulties in communication due to geographical, cultural and linguistic differences.[143] In this respect, ODR owns some unique features that are different from ADR. Firstly, the parties in ODR do not meet in person but communicate with each other by means of electronic communications such as video-conference or other communication software. Secondly, parties can arrange meetings from any location at any time. This is especially convenient for parties from different part of the world with different time zones. Thirdly, ODR proceedings are entirely or partly conducted on the Internet depending on the nature and complexity of the disputes. These proceedings include but are not limited to the submission of evidence, examination and authentication of evidence, hearing and deliberation. Fourthly, ODR adopts technologies to ensure swift communication, fairness and confidentiality of the proceedings. For instances, the timestamp synchronization process is an authentication mechanism to prove that the electronic data are recorded at a certain time so that files cannot be easily modified and deleted.[144] Additionally, besides the traditional types of ADR (such as online arbitration and online mediation) that have been moved online, ODR has invented distinctive mechanisms such as internal complaint mechanism and blind bidding for automatic online negotiation. Last but not least, the function of ODR is not only dispute settlement but also dispute prevention. With the assistance of technology, communications between parties can be strengthened and therefore parties can work out to reduce their misunderstandings and build trust in it.

2.3.1.1. Development of ODR

59. The development of ODR keeps up with the prosperity of the Internet. The World Wide Web

[141] Colin Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance and Other Commercial Conflicts* (John Wiley & Sons 2002) 13.
[142] Ljiljana Biukovic, 'International Commercial Arbitration in Cyberspace: Recent Developments (2002) 22 Northwestern Journal of International Law and Business 319, 321-322.
[143] Orna Rabinovich-Einy and Ethan Katsh, 'Lessons From Online Dispute Resolution For Dispute Systems Design', *Online Dispute Resolution Theory and Practice* (Eleven International Publishing 2013) 52.
[144] Council Regulation (EU) No 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in Internal Market and Repealing Directive 1999/93/EC [2014] OJ L 257/73 (eIDAS Regulation), Article 3(33).

was invented in 1989.[145] In 1992, the National Science Foundation (NSF) of the United States started to allow commercial activities over the Internet. Before, the NSF network was mainly used for educational and academic purposes. Opening access to commercial usage leads to increased commercialization of the Internet, especially through the development of commercial products that utilized the Internet technology.[146] The development of interactions between sellers and buyers through the Internet inevitably lead to disputes. Scholars started to spot the ODR as a "Fourth Party" to describe the relations between technology and dispute resolution.[147] The function of the "Fourth Party" is to assist the neutral third party to conduct dispute resolution providing efficiency and convenience. The ODR applied communication capabilities to allow the dispute resolution process to be performed more efficiently and at a distance.[148]

60. The development of ODR can be divided into three stages: the pilot stage where ODR set off, the exploration phase where the development of ODR slowed down due to Internet bubbles and the development phase where ODR starts to revive.

A. Pilot phase (1995-1998)

61. ODR appeared with the launch of three pilot projects in 1996 funded and administrated by academic institutions: Virtual Magistrate, Mediate-Net, and the Online Ombuds Office. Virtual Magistrate was the first attempt for online arbitration using electronic communication. It was initiated by the National Conference of Automated Information Research (NCAIR) together with the American Arbitration Association.[149] Unlike many ODR service providers, Online Magistrate did not target online consumer disputes. The Mediate-Net project was launched by NCAIR and the University of Maryland Law School and used a mix of real-time meetings and video conferencing to resolve family disputes and health care disputes for Maryland residents via online mediation.[150] Online Ombuds Office was launched by NCAIR with Cyberspace Law Institute and the Center for Information Technology and Dispute Resolution at the

[145] Bing Liu, *Web Data Mining: Exploring Hyperlinks, Contents, and Usage Data* (Springer 2011, second edition) 2.
[146] Barry M. Leiner et al., 'Brief history of the Internet' < http://www.Internetsociety.org/Internet/what-Internet/history-Internet/brief-history-Internet > assessed 7 October 2015.
[147] The concept of "Fourth Party" was mentioned in *Online Dispute Resolution: Resolving Conflicts in Cyberspace* by Ethan Katsh and Janet Rifkin (n 2) in 2001.
[148] Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey, *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2013) 32.
[149] The Virtual Magistrate Project, Concept Paper (July 24, 1996).
[150] Richard Michael Victorio, 'Internet dispute resolution (IDR): Bringing ADR into the 21st century' (2000)1 Pepp Disp Resol LJ 279, 285.

University of Massachusetts.[151] The Online Ombuds Office provided both online ombudsman mechanism and online mediation services.

62. Although the pilot projects did not last for long either because of their limited application or because of the cease of the project, they formed the basis for ODR and provide experience in constructing ODR services. For example, the Online Ombuds Office has successfully partnered with eBay in 1999, the online auction website, in developing ODR to resolve disputes between sellers and buyers.[152]

B. Exploration phase (1998-2010)

63. With the establishment of e-commerce giants such as Amazon and eBay, more disputes arose from electronic transactions. Traditional offline dispute resolution mechanism was no longer sufficient to meet the low-cost and high-efficient requirements of dispute resolution. ODR entities such as Smartsettle, Cybersettle and the MediationRoom appeared to accommodate this demand.

64. However, during the Internet bubble of 1999-2000, many ODR start-ups were shut down.[153] The growth rate of ODR declined in the past decades not only because of the Internet bubble but also due to a lack of public awareness and slow technology advancement.

C. Development phase (2010 until now)

65. E-commerce has evolved from merely providing physical products to also selling digital products and services, from providing online services to online-to-offline services.[154] The collaborative economy,[155] as a new form of e-commerce, has extended the scope of dispute resolution from B2B and B2C to C2C or P2P (peer to peer) disputes, calling for a higher demand of ODR services.

66. Since 2010, new start-ups have appeared and taken leads in providing ODR services. Examples for these new ODR start-ups are for example Youstice, eJust, Resolver, Crowdjury,

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[151] *Ibid*, 284.
[152] Ethan Katsh, Janet Rifkin and Alan Gaitenby, 'E-commerce, E-disputes, and E-dispute resolution: in the shadow of eBay law' (1999)15 Ohio State Journal on Dispute Resolution 705, 709.
[153] Ethan Katsh, 'ODR: A Look at History' in Ethan Katsh, et al., *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2013) 27.
[154] Online-to-offline services refer to system which entice consumers with a digital environment to make purposes of goods of services from physical businesses.
[155] Collaborative economy (also called the sharing economy) refers to an economic model in which individuals are able to borrow or rent assets owned by someone else. Business models are for example Uber, Airbnb and TripAdvisor.

PeopleClaim, etc.[156] Meanwhile, government organizations also seek to resolve disputes in a more efficient and cost-effective manner. For example, the Dutch Legal Aid Board launched *Rechtwijzer 2.0* to help divorcing couples reach a separation plan online. Another pilot project *Burenrechter* was launched by the Dutch judiciary in settling neighboring disputes through the Internet. In Canada, the Consumer Protection Organization of British Columbia has launched an online platform for ODR to resolve small-claim consumer disputes online.[157]

67. The ODR development has entered into a new age, which is supplemented by policy support and increased public awareness. The United Nations Commission on International Trade Law (UNCITRAL) Working Group III has initiated a project to work out a set of legal standards on ODR for cross-border e-commerce transactions. The project has been accomplished in 2006 with non-binding Technical Notes on ODR.[158] In the EU, an ODR platform has been established since 15 February 2016, which provides consumers the access to ADR entities in various member states for disputes arising from e-commerce transactions.[159] In China, the Supreme People's Court required the people's courts to promote the application of information technology in diversified dispute resolution mechanism.[160] The traditional ADR community also starts to recognize the importance of information technology in dispute resolution.[161] The ODR has been assisted by the technology innovations in artificial intelligence, machine learning and virtual reality. In the past, there was a lack of ODR platform for dispute resolution. Nowadays, web-based applications developed by technology enterprises, such as Modria and Juripax,[162] can support the ODR to operate entirely online.

2.3.1.2. Forms of ODR

68. ODR can take various forms depending on the role of the third-party neutrals and the role of

[156] Youstice (www.youstice.com), eJust (www.ejust.fr), Resolver (www.resolver.co.uk), Crowdjury (www.crowdjury.org), PeopleClaim (www.resolver.co.uk).
[157] Consumers are able to file small claims up to $ 5,000 to the Civil Resolution Tribunal via <http://www.smallclaimsbc.ca/> since June 1, 2017.
[158] United Nations Commission on International Trade Law, Working Group III (Online dispute resolution) Thirty-third session, A/CN.9/WG. III/WP. 140, UNCITRAL Technical Notes on Online Dispute Resolution.
[159] ODR platform:< https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home.chooseLanguage> accessed 29 November 2017.
[160] Opinions of the Supreme People's Court on Further Deepening the Reform of Diversified Dispute Resolution Mechanism of the People's Courts (关于人民法院进一步深化多元化纠纷解决机制改革的意见), Fa Fa [2016] No. 14 (2016 Opinions on ADR) paragraph 15.
[161] Ethan Katsh, 'ODR: A Look at History' in Ethan Katsh, et al., *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2013) 28.
[162] Modria and Juripax are two software developers who design and establish ODR mechanisms for their clients.

technology in the ODR process.

A. By role of third-party neutral in ODR

69. The categorization of ODR by the role of third-party neutrals is similar to that in traditional ADR theories. Depending on the role the third-party neutral plays in ODR, ODR can be divided into online negotiation, online mediation, online arbitration and hybrid ODR.[163]

a. Online negotiation

70. Traditional negotiation can be very expensive. It takes up time, energy and resources, especially when it involves face-to-face meetings.[164] Online negotiation is the process that uses electronic communication to enable parties to reach an agreement on their own. Different from online mediation and online arbitration, there is no involvement of a third-party neutral in online negotiation. Depending on the extent to which technology is used in the negotiation process, online negotiation can also be divided into two types. There is automated negotiation[165] which is fully dependent on technology, and there is assisted negotiation which also involves face-to-face meetings if such meetings enhance the process.

b. Online mediation

71. Online mediation is a process that uses electronic communication where a third-party neutral is involved to facilitate dispute resolution between the parties. One of the most famous examples of online mediation is SquareTrade founded in 1999.[166] It offers online mediation services to e-commerce consumer disputes and cooperated with several online businesses such as eBay and PayPal.[167] A SquareTrade mediator is assigned to the case based on dispute type or specific expertise. Parties may log in anytime to the online mediation system to file their opinions. When consensus is reached, the mediator will prepare a resolution agreement, which both parties must click to accept. Mediated cases are on average solved within two weeks from

[163] There are other types of ODR which are not listed, such as online ombudsman, online adjudication, online mini-trial, etc.
[164] Ernest Thiessen, Paul Miniato & Bruce Hiebert, 'ODR and E-Negotiation' in Ethan Katsh, *et al., Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2013) 346.
[165] Examples of automated negotiation are for example: Cybersettle, Fair Outcomes and Smartsettle.
[166] Steve Abernethy, 'Building large-scale online dispute resolution & trustmark systems', Proceedings of the UNECE Forum on ODR 2003, <http://www.odr.info/unece2003> accessed 28 September 2017. SquareTrade shifted their services from online mediation to product guarantee services in 2008.
[167] Aashit Shah, 'Using ADR to Resolve Online Disputes' (2003)10 Rich JL & Tech 1.

the initial filing.[168] Online mediation lowers the barriers and facilitates access of the parties to dispute resolution.[169] It also reduces the cost and increases the flexibility of the mediation process.

c. Online arbitration

72. By the term "online arbitration," I refer to the application of information technology in the process which a third-party neutral makes a binding decision to settle disputes between the parties. Compared to offline arbitration, online arbitration is considered to provide a more cost-effective and efficient dispute resolution.[170] However, it also raises concerns that the well-established regulatory framework that governs offline arbitration is lagged behind in online arbitration.[171] The online arbitration services are provided by two distinct groups: professional ODR entities[172] and traditional arbitration institutions.[173]

d. Hybrid ODR

73. Hybrid ODR refers to a combination of various dispute resolution mechanisms in order to reach an efficient and effective dispute settlement. It is similar to the concept of "multi-tiered ADR" (or escalation clause) in traditional ADR theories.[174] Parties agree that if a dispute arises, they will follow several stages with different procedures such as online mediation, online mediation, or expert determination, and then if necessary, arbitration.

74. During the preparation of legal instruments on ODR, the UNCITRAL Working Group III on

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[168] Steve Abernethy, 'Building large-scale online dispute resolution & Trustmark systems', Proceedings of the UNECE Forum on ODR 2003, 14 <https://www.mediate.com/Integrating/docs/Abernethy.pdf> accessed 30 November 2018.

[169] As of mid-2002, SquareTrade dispute resolution has involved persons in over 120 countries in five languages. See Figure A, *ibid*.

[170] Karen Stewart and Joseph Matthews, 'Online arbitration of cross-border, business to consumer disputes' (2001)56 University of Miami Law Review 1111; Mohamad Salahudine Abdel Wahab, 'Online Arbitration: Tradition Conceptions and Innovative Trends' in Albert Janvan den Berg, International Arbitration: The Coming of a New Age? (Kluwer Law International 2013) 654-667.

[171] Mohamed S. Adbel Wahab, 'ODR and E-Arbitration: Trends & Challenges' in Ethan Katsh, *et al., Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2013) 403; Maud Piers and Christian Aschauer, *Arbitration in the Digital Age: The Brave New World of Arbitration* (Cambridge University Press 2018) 289.

[172] Examples of professional ODR entities are for example: eQuibbly (which ceased its operation in 2016) and eJust (https://www.ejust.fr/).

[173] Examples of traditional institutional providers are for example: China International Economic and Trade Arbitration Commission(http://www.cietac.org/index.php?m=Article&a=show&id=2770&l=en), Russian Arbitration Association (http://arbitrations.ru/en/dispute-resolution/online-arbitration.php), and Czech Arbitration Court (http://en.soud.cz/rules/additional-procedures-for-on-line-arbitration-1st-june-2004) .

[174] Klaus Peter Berger, 'Law and practice of escalation clauses' (2006)22 Arbitration International 1; Doug Jones, 'Dealing with multi-tiered dispute resolution process' (2009) Arbitration; Michael Pryles, 'Multi-tiered dispute resolution clauses' (2001)18 J Int'l Arb 159.

ODR also designs a three-step ODR proceeding.[175] The proposed ODR proceeding consists of three stages: negotiation, facilitated settlement and a final stage (depending on the jurisdiction, either a non-binding recommendation or a binding arbitral award).

B. By the role of technology in ODR

75. Depending on the role that technology plays in ODR, it can be divided into technology-assisted ODR and technology-based ODR.[176]

a. Technology-assisted ODR

76. Technology-assisted ODR refers to "the use of technology to augment ADR processes that exist independently of the technology".[177] Examples of technology-assisted ODR include online negotiation, online arbitration, online mediation and online ombudsman. The role of the human factor, represented by the parties and the neutral assisting them in resolving their dispute, is indispensable in technology-assisted ODR. The role of technology is to provide parties with adequate communication means (via e-mails, video conferences, chat-rooms, messengers, etc.), efficient electronic filing system, secured information exchange and data storage.[178]

b. Technology-based ODR

77. In technology-based ODR, technology is used to replace the human neutral or to minimize its role. Katsh and Rabinovich-Einy in the book *Digital Justice* have pointed out that the role of technology has been transformed from applications that focus on improving communication and convenience to software that employs algorithms and exploits the intelligence of machines.[179] They foresee that in the future there will be a shift in dispute resolution from technology-assisted ODR to technology-based ODR. Algorithms can be useful when an issue is able to be solved by a set of rules. An example is blind-bidding. This is a tool for automated negotiation that makes use of the machine's capability to calculate and communicate. This blind-bidding algorithm is programmed so as to decide whether there would be a settlement or not. Each party should give its own proposal with regard to the settlement and if the proposals are within a close range (normally within 30% or less), the settlement will be reached. The

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[175] Online dispute resolution for cross-border e-commerce transactions, Notes on a non-binding descriptive document reflecting elements and principles of an ODR process, A/CN.9/WG.III/WP. 137, paragraph 7.
[176] Mohamed Wahab, 'The global information society and online dispute resolution: A new dawn for dispute resolution' (2004)21 Journal of International Arbitration 143, 146; Frank Fowlie, 'Online Dispute Resolution and Ombudsmanship' in Ethan Katsh, et al., *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2013) 325.
[177] *Ibid*, Fowlie, 326.
[178] Wahab, (n 176) 147.
[179] Katsh and Rabinovich-Einy (n 21) 47.

blind-bidding service is especially appropriate for monetary disputes without any disagreements on the facts such as loan disputes.

2.3.1.3. Connections between ADR and ODR

78. E-commerce disputes arise out of electronic transactions and it is natural to resolve these disputes online by using the same type of medium. The roots of ODR lie within the alternative dispute resolution (ADR) but it gradually developed into a distinctive discipline by integrating information technology into ADR. This also brought about a number of issues. For instance, while ODR provides parties with more efficient procedures through effective communication tools, it also raises new ethical dilemmas that are not adequately addressed in ADR.[180] For instance, this is the case when parties are not properly notified of the time to hold hearings because it was sent to the parties' email address without any acknowledgement of receipt. Also, new skills and tools need to be developed to ensure the effectiveness of electronic communications and efficiency of ODR. Moreover, ODR processes are delivered online and are increasingly reliant on the intelligence and capabilities of machines.[181] This makes us wonder about the potential risk in data protection and confidentiality in dispute resolution. Finally, ODR has extended its function from dispute resolution to dispute prevention.[182] This is shown, for instance, by the product guarantee services developed by marketplaces.[183]

79. At the current stage, there are neither (uniform) ODR rules nor specific national legislation on ODR. This leaves the ODR theory and practice to be further explored. ADR, as the foundation of ODR, serves as an indispensable source of literature and legislation. It is essential to study also the influence of legal cultural and social value on ADR development in the EU and China. It is said that these differences may arise from "regional divergences, ethnics, social and religious background."[184] Consequently, the difference in cultural value between the EU and China will have an effect on both ADR and ODR.

2.3.2. ADR and ODR in the EU

[180] Colin Rule, 'Is ODR ADR? A Response to Carrie Menkel-Meadow' (2016)3 International Journal on Online Dispute Resolution, 10.
[181] Ethan Katsh and Colin Rule, 'What We Know and Need to Know About Online Dispute Resolution' (2015)67 South Carolina Law Review 329, 330.
[182] Katsh and Rabinovich-Einy (n 21) 51-54.
[183] See eBay Moneyback Guarantee, Amazon AtoZ Guarantee, and PayPal Buyer/Seller Protection.
[184] Henry J Brown and Arthur L Marriott, *ADR principles and practice* (Sweet & Maxwell 2011) 137.

2.3.2.1. ADR development in the EU

80. "Access to justice" is a fundamental right enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[185] ADR becomes an integral part of the EU policies aiming at improving access to justice.[186] The European Council has repeatedly stressed the importance of ADR in settling cross-border disputes.[187] At the Lisbon European Council held in March of 2000 on "Employment and the Information Society", the European Council invited the European Commission and the European Council to consider how to promote consumer confidence in e-commerce, in particular through ADR mechanism.[188] Such a policy consideration can also be proved by Article 17 of the E-commerce Directive, which requires member states not to hamper the use of out-of-court schemes for dispute settlement, including appropriate electronic means.[189]

81. According to the Impact Assessment for the Proposal for a Directive on Consumer ADR and a Regulation on Consumer ODR, there are three challenges to the development of ADR in the EU: the coverage, low awareness, and quality of ADR schemes and ODR for national and cross-border e-commerce transactions.[190] Moreover, due to the lack of effective ADR mechanism, businesses are reluctant to sell their products abroad and consumers have lost their confidence in making purchases abroad.[191] This requires the EU legislature to work on legal instruments in ADR to resolve cross-border consumer disputes.

2.3.2.2. Current legal instruments on ADR in the EU

82. There are three legal instruments on ADR available in the EU legal framework: Mediation Directive, Directive on Consumer ADR, and Regulation on Consumer ODR. The Mediation

[185] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms [1950], amended by protocol No. 14 on 1 June 2010.
[186] Tampere European Council of 15 and 16 October 1999, Presidency Conclusions, paragraph 30, called for, in relation to better access to justice, alternative, extra-judicial procedures to be created by the member states, < http://www.europarl.europa.eu/summits/tam_en.htm> accessed 21 November 2017.
[187] Green paper on alternative dispute resolution in civil and commercial law, COM (2002)196 final, paragraph 14.
[188] Lisbon European Council 23 and 24 March 2000, Presidency Conclusions, paragraph 11, < http://www.europarl.europa.eu/summits/lis1_en.htm> accessed 21 November 2017.
[189] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular e-commerce, in the Internal Market (E-commerce Directive), Article 17(1).
[190] *Ibid*, Impact Assessment for the Proposal for a Directive on Consumer ADR and Regulation on ODR, 23.
[191] Reportedly, 1 in 20 consumers faced problems with cross-border purchases of goods and services, while 59% of traders said that an important obstacle to them selling cross-border is the potentially highest cost in resolving complaints and conflicts cross-border compared to domestically.

Directive is applicable to cross-border mediation in civil and commercial matters whereas other ADR legal instruments are limited to consumer disputes only. Although the Directive on Consumer ADR is limited to consumer disputes, it embraces all types of ADR mechanism, regardless of their consensual or adjudicative, binding or non-binding nature.

A. Mediation Directive

83. The first EU level legislation instrument on ADR is the EU Mediation Directive2008/52/EC, which was promulgated by the European Parliament and Council in 2008.[192] The Mediation Directive has been taken as a measure in the field of judicial cooperation in civil and commercial matters that are necessary for the proper functioning of the internal market.[193] It aims to facilitate access to dispute resolution, to encourage mediation as an alternative and amicable form of resolution in cross-border disputes in the EU, and to ensure a sound relationship between mediation and judicial proceedings.[194]

84. The Mediation Directive tackles the minimum standards of procedures in Article 4 in two ways: the first way is to encourage member states to develop voluntary codes of conduct by mediators and organizations, as well as other quality control mechanisms; the second way is by encouraging the initial and further training of mediators. There are no detailed quality requirements for mediation in the Mediation Directive as specified in the Directive on Consumer ADR.

B. Directive on Consumer ADR

85. Two recommendations have been set out by the Commission in 1998 and 2001 to regulate the minimum quality requirements of ADR mechanisms in consumer disputes.[195] The first Recommendation 98/257/EC deals with the principles of ADR schemes, which either propose or impose a solution to resolve a dispute.[196] The second Recommendation 2001/310/EC has filled the gap left in 1998, which relates to the procedural requirements of the settlement of a dispute through consensual ADR.[197] As the second Recommendation applies to ADR

[192] Commission Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136/3 ("Mediation Directive").
[193] Mediation Directive, Recital 1.
[194] Mediation Directive, Article 1, paragraph 1.
[195] Recommendation 98/257/EC O.J. L 115 on the Principles Applicable to the Bodies Responsible for Out-of-court Settlement of Consumer Disputes, April 17, 1998; Recommendation 2001/310/EC O.J. L 109 on the Principles for out-of-court bodies involved in the Consensual Resolution of Consumer Disputes, 4 April 2001.
[196] These requirements are independence, transparency, adversarial principle, effectiveness, legality, liberty and representation.
[197] These requirements are impartiality, transparency, effectiveness and fairness.

procedures with a less interventional role, the requirements can be more flexible.[198]

86. However, the Commission Recommendations have limited results due to the disparities in ADR coverage, quality and awareness in member states: 40% of the existing ADR schemes are not notified to the European Commission either because they do not respect the principles set out in the Recommendations or because they are not aware of the notification procedure.[199] The Directive on Consumer ADR[200] has consolidated the minimum quality requirements from the two Commission Recommendations into one piece of legislation without differentiating between adjudicative ADR and consensual ADR.[201]

C. Regulation on Consumer ODR

87. According to the Digital Single Market strategy, legal actions are proposed to develop an EU-wide ODR system for e-commerce transactions.[202] The Regulation on Consumer ODR establishes a pan-European ODR platform, which provides traders and consumers channels to seek out-of-court resolution of disputes in other EU member states. It is applicable to disputes arising from e-commerce transactions between a consumer resident in the EU and a trader established through the intervention of an ADR entity.[203] First, a consumer involved in a dispute should submit a complaint via the ODR platform. The traders will then be notified about the complaint in one of the 23 official EU languages and they can choose an ADR entity within 10 calendar days.[204] Once the parties have agreed on the selection of an ADR entity, the dispute will be sent to the designated ADR entity.[205] If the parties fail to agree on an ADR entity within 30 calendar days after the submission of the complaint or if the ADR entity refuses to take the dispute, the complaint will not be processed further.[206]

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[198] Green paper on alternative dispute resolution in civil and commercial law, paragraph 74.
[199] Impact Assessment Accompanying the Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes and a Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes, SEC (2011) 408 final, 46-47 (Impact Assessment for the Proposal for a Directive on Consumer ADR and Regulation on ODR).
[200] Impact Assessment Accompanying the Proposal for a Directive on Alternative Dispute Resolution for Consumer Disputes and a Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes, SEC (2011) 408 final, 46-47 (Impact Assessment for the Proposal for a Directive on Consumer ADR and Regulation on ODR).
[201] See discussions in Section 3.2.2.2.B. .
[202] A Digital Agenda for Europe (n 42) 13.
[203] Council Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ("Regulation on Consumer ODR"), Article 2 (1).
[204] The Regulation on Consumer ODR, Article 9(3).
[205] The Regulation on Consumer ODR, Article 9(6).
[206] The Regulation on Consumer ODR, Article 9(8).

88. The EU ODR platform serves as a clearinghouse for ADR service providers who have been accredited under the standards set forth in the Directive on Consumer ADR in the EU. The ODR platform also enhances the parties' awareness of various certified ADR bodies in EU member states by a single entry point.[207] It provides a multi-language interface for ADR entities to accept disputes arising from parties in different EU member states. In the second year of launching the EU ODR platform from 15 February 2017 to 15 February 2018, more than 36,000 complaints were submitted to the platform.[208] The ODR development in the EU does add a layer of consumer protection to the resolution of disputes.[209]

89. Despite the legislative aim of improving consumer's redress in cross-border e-commerce transactions, the ODR platform has limited effect. Firstly, the ODR platform does not itself provide ODR services directly to the parties but instead refers parties to the ADR entities that are certified by national competent authorities. The disputes are instead handled by ADR entities that are not necessarily available online.[210] The ODR platform only serves merely the information function rather than providing ODR services to the parties. Secondly, the ODR Regulation does not provide any mechanism to ensure a trader's acceptance to use ADR services other than a general requirement for traders to provide a hyperlink to the ODR platform.[211] In some member states, sanctions are imposed if the traders fail to provide the hyperlink to ODR platform.[212] According to the Report on Functioning of the European ODR Platform, only 2% of cases reached an ADR body after an agreement between the consumer and the trader and 81% of complaints were automatically closed after the legal deadline.[213] Thirdly, the scope of the EU Regulation on Consumer ODR is restricted to contractual disputes

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[207] EU Regulation on Consumer ODR, Article 4(1) and 5.

[208] Functioning of the European ODR Platform (Statistics 2nd year), 2 <https://ec.europa.eu/info/sites/info/files/2nd_report_on_the_functioning_of_the_odr_platform_3.pdf > accessed 17 December 2018.

[209] Impact Assessment for the Proposal for a Directive on Consumer ADR and Regulation on ODR (n 190) 25.

[210] It is possible for the ADR entities to use the platform's case management system to conduct the ADR procedure entirely online. Regulation on Consumer ODR, Article 5(4)(d).

[211] Dusko Martic, 'Redress for free internet services under the scope of the EU and UNCITRAL's ODR regulations' (2014)1 Revista Democracia Digital e Governo Eletrônico 360, 369; Graham Ross, 'The possible unintended consequences of the european directive on alternative dispute resolution and the regulation on online dispute resolution' (2014)1 Revista Democracia Digital e Governo Eletrônico 206, 209-210.

[212] Irish Online Dispute Resolution for Consumer Disputes Regulations 2015, S.I. No. 500/2015, Article 4(2): a trader who failed to observe the information obligation will be subject to a "Class A Fine" or to imprisonment for a term not exceeding 12 months, or to both. In UK, the trader's failure to comply with the information obligation is subject to sanctions under Part 8 (community infringements) of the Enterprise Act 2002 (S.I. 2003/1374): Part 8 grants the Office of Fair Trading authority to apply for an enforcement order requiring the cessation of or prohibition of the infringement in court.

[213] Functioning of the European ODR Platform (Statistics 2nd year) (n 208) 4.

stemming from online sales or service contracts between EU consumers and traders.[214] Therefore, it excludes disputes that arise from offline transactions.

2.3.3. ADR and ODR in China

2.3.3.1. Cultural roots of harmonization and its important role in ADR

90. The development of ADR in China can be summarized into two major periods: ADR in ancient China and ADR in modern China. The ADR development in ancient China is only focused on "Tiao Jie" (mediation), while other types of ADR have been gradually developed in modern China.

A. ADR development in ancient China

91. Mediation has deep cultural roots in Chinese culture. Influenced by the advocates of Confucius' theory, who believe in resolving disputes peacefully,[215] disputes were settled out of court by the communities that are closely connected to the disputes, so as to avoid litigation in court. The concept of "mediation" in China has a broader and more profound meaning. The word "mediation" in Chinese is "Tiao Jie" (调解), which is composed of two words. "Tiao" means to harmonize and "Jie" means to resolve. Putting the two words together, it means to resolve disputes in a harmonized manner.[216]

92. While ADR is a recent development for several decades in the western world, ADR has its foundation in China, which can be tracked back in the West Zhou Dynasty.[217] However, "Tiao Chu" (调处), which was the term used in ancient China as a replacement of "Tiao Jie", has a different context to what "mediation" means in the modern world.[218] "Tiao Chu" in ancient China was not based completely on parties' consent but had a coercive feature.[219] The legal

[214] Regulation on Consumer ODR, Article 2(1).
[215] Confucius stands for the traditional Chinese cultural value that respects the moral duties and holds the view that disputes should not be resolved in court, but by mediation among the people. See Albert H.Y. Chen, 'Mediation, Litigation, and Justice: Confucius Reflections in a Modern Liberal Society' in Daniel A. Bell & Hahm Chaibong, *Confucianism for the Modern World* (Cambridge 2003) 259-270.
[216] Klaus J Hopt and Felix Steffek, *Mediation: Principles and regulation in comparative perspective* (Oxford University Press 2013) 965.
[217] "Tiao Chu" (调处), which was used instead of "Tiao Jie" (调解) first appeared in the bronze engravings in Xi Zhou Dynasty (1134-256 B.C.). See Zhang Jinfan, Traditional and Modern Transition of Chinese Law (Fa Lv Chu Ban She, 1999) 283. (张晋藩：《中国法律的传统与近代转型》法律出版社 1999 年)
[218] Donald C Clarke, 'Dispute resolution in China' (1991)5 J Chinese L 245, 294.
[219] Qiu Xingmei, *Retrospect & Prospect of Mediation* (China Political Science and Law Publisher 2013) 116.) (邱星美：《调解的回顾与展望》中国政法大学出版社 2013 年)

culture in ancient China is characterized by the essence of "He" ("和", harmonization) in human relationships, "Yan Song" ("厌讼", litigation aversion) and "Wu Song" ("无讼", no litigation). Confucianism was the prevailing philosophy ruling the feudal society in ancient China.[220] The rulers used Confucianism to prevent people from bringing disputes in court by using "Tiao Chu" instead to settle civil disputes or even small criminal cases. "Tiao Chu" can either be used by government authorities or honorable representatives from the family clan or the neighborhood to mediate cases.[221]

B. Three stages of ADR development in the People's Republic of China

93. After the founding of the People's Republic of China, all existing laws and regulations promulgated by the previous government (Republic of China) have been demolished. The ADR development in the People's Republic of China can be divided into three stages: 1949-1978 (Maoism and the establishment of people's mediation); 1978-2002 (judicial reform on the "Rule of Law"); 2002 until now (rediscovery of mediation and establishment of the diversified dispute resolution system).[222]

a. First stage: Maoism and the establishment of people's mediation

94. After the establishment of the People's Republic of China (PRC) in 1949, the Communist Party of China (CPC) has created the "people's mediation" in order to resolve disputes amongst people.[223] The CPC has reorganized the Chinese society by abolishing the traditional mediation based on Confucianism and replaced it by using the people's mediation.[224] The traditional mediation system based on family, clan, village and guild has torn apart and replaced by the people's mediation committees. It is based on the practice of people's justice in the "newly liberated areas" during Yan'An period by Mao Zedong[225] ("Maoism mediation") before the establishment of the PRC. Different from "Tiao Chu", the mediation committee of Maoism mediation was affiliated to the government and the police enforcement was essential

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[220] Xiaohong Wei and Qingyuan Li, 'The Confucian value of harmony and its influence on Chinese social interaction' (2013)9 Cross-Cultural Communication 60, 61.

[221] See Chang Yi, Mediation System in China (Fa Lü Chu Ban She 2013) 5-7. (常怡：《中国调解制度》法律出版社 2013 年)

[222] Li Buyun, 'Process of China Legal Reform: Retrospect and Perspective' (2007) Fa Xue 9, 27-28. (李步云：中国法治历史进程的回顾与展望)

[223] Knut Benjamin Pißler, 'Mediation in China: threat to the rule of law?' in *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2013) 963.

[224] *Ibid.*

[225] Mao Zedong, the former leader of Chinese Communist Party, introduced the ideology of mediation to "protect the democratic interests of the great mass of people."

to its operation. The members of the people's mediation committees were representatives of the residents, police officers, women's association or labor union, etc., who have a close relationship with the community.[226] These people's mediation committees were used to settle civil disputes and minor criminal cases and carry out educational function based on national policies and laws.[227] The people's mediation system established by the CPC between 1949 and 1978 was used to promote economic stability and keep the social order. Nevertheless, it has been criticized for over-emphasizing on control and neglecting the protection of individual rights.[228]

b. Second stage: judicial reform on the "Rule of Law"

95. After Mao's era, the judicial system was re-established by the reconstruction of the Chinese legal system. The "rule of law" (Yi Fa Zhi Guo, 依法治国) policy[229] was established by the CPC to accomplish a certain level of economic and social development as well as the stability of the society.[230] The judicial reform during the post-1978 era consisted of two parts: the enactment of the constitution and the promulgation of normal laws.[231] Whereas during the Mao period, the country was governed mainly by the CPC policies and administrative regulations, the country nowadays is ruled by law.[232]

96. Apart from passing numerous laws and regulations, efforts were made to rebuild the judiciary and legal profession and restore people's confidence in courts.[233] From 1978 to 2009, the case number taken by the people's courts has increased from 613,000 to 7,462,000 by 112,0%, among which, the civil case number has increased from 318,000 to 6,436,000 by 192,0%. [234]

97. With the increase of the caseload in the people's court, the number of cases by people's

[226] Chang (n 221) 18.
[227] Stanley Lubman, 'Mao and mediation: politics and dispute resolution in Communist China' (1967) California Law Review 1284, 1318.
[228] *Ibid*, 1325-1328; Clarke (n 218) 272. Judges frequently practiced and encouraged mediation in courts.
[229] The rule of law in China is referred in Article 5 of the Constitution Law: "The PRC practices ruling the country in accordance with the law and building a socialist country under the rule of law."
[230] Katrin Blasek, *Rule of law in China: A comparative approach* (Springer 2015) 16.
[231] Quanxi Gao, Wei Zhang and Feilong Tian, *The Road to the Rule of Law in Modern China* (Springer 2015) 102.
[232] Ronald C Keith, *China's Long March toward the Rule of Law* (JSTOR 2005) 7.
[233] *Ibid*, 57.
[234] Zhu Jingwen, Report on China Law Development 2011: Legal Implementation in a Diversified Way (Renmin University Press 2011). 朱景文：《2011 中国法律发展报告：走向多元化的法律实施》，人民大学出版社 2011 年版）

mediation has decreased.[235] From 1986 to 2001, the civil case number adjudicated by the people's court has increased from 1 million to 3.46 million while the number of civil cases resolved through mediation has dropped from 7.3 million to 4.86 million. The ratio between litigation and mediation has increased from 13.5% to 71.1%. It showed people's preference for litigation over mediation and the established confidence in judicial redress.

c. Third stage: the rediscovery of mediation and establishment of the diversified dispute resolution system

98. Since 2002, due to an overload of court cases, the Chinese legislature has restored the role of mediation and established a diversified dispute resolution mechanism connecting litigation with ADR mechanism.[236] The post-Maoism mediation rediscovers the traditional cultural value of compromise and integrates this value into the new construction of people's mediation.[237] It provides a good setting to develop a diversified dispute resolution system proposed by the government.[238] Unlike the Maoism mediation, the mediation during the third stage has emphasized on the voluntariness of the parties to mediation. This can be proved by the relationship between litigation and mediation,[239] in which the mediation needs to be mutually agreed by the parties, and no longer serves as a pre-condition to litigation.

99. Considering the rising number of civil cases and the limited capacity of the people's courts, the Supreme Peoples' Court has issued *Certain Opinions on the Establishment and Improvement of a Dispute Resolution Mechanism through a Combination of Litigation and Non-litigation* ("the ADR Opinions")[240] in 2009. The ADR Opinions address a wide range of ADR mechanisms and emphasize the interplay between court proceedings and ADR mechanisms in

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[235] Law Year Book of China from 1986-2001（中国法律年鉴 1986-2001）; Fu Hualing, 'Understanding people's mediation in post-Mao China' (1992)6 J Chinese L 211, 211.

[236] Certain Provisions of the Supreme People's Court Concerning Trial of Civil Cases Involving People's Mediation Agreements, Fa Shi [2002] No. 29, Article 1 has recognized the binding contractual effect of a mediated settlement agreement.

[237] Zeng Xianyi, 'Mediation in China–past and present' (2009)17 Asia Pacific Law Review 1, 25.

[238] In December 2014, the Central Committee of the Communist Party of China has issued "Several Major Issues Concerning Promoting the Rule of Law" which requires to establish a diversified dispute resolution system composed of mediation, arbitration, administrative decision, litigation, etc. In October 2015, the General Office of the CPC and the General Office of the State Council have jointly published an opinion on "Improving the diversified Dispute Resolution Mechanism" Zhong Ban Fa (2015) No. 60 and set out overall arrangements for the establishment of the diversified dispute resolution mechanism.

[239] Civil Procedure Law of the PRC, Article 9: During the court proceedings, the people's courts shall conduct mediation for the parties on a voluntary and lawful basis; if mediation fails, judgements shall be rendered without delay.

[240] Supreme People's Court, Certain Opinions on the Establishment and Improvement of a Dispute Resolution Mechanism through a Combination of Litigation and Non-litigation, Fa Fa [2009] No. 45 (ADR Opinion).

order to provide greater flexibility and efficiency in dispute resolution. Current available ADR mechanism includes arbitration (commercial arbitration, rural land arbitration and labor dispute arbitration), mediation (judicial mediation, administrative mediation, commercial mediation, people's mediation and industrial mediation) and other forms of out-of-court dispute resolution mechanism.[241]

100. The People's Mediation Law of the PRC[242] was finally enacted in 2010 and came into effect in 2011. It has established the legal framework of people's mediation in China and granted the mediated settlement agreement with binding effect.[243] The Supreme People's Court in 2016 has implemented the Opinions on Further Deepening the Reform of the Diversified Dispute Resolution Mechanism of the People's Courts (2016 Opinions)[244] to further promote the establishment of a legal regime that connects litigation and non-litigation. The 2016 Opinions recognize various ADR mechanisms and grant the judicially ratified mediated settlement agreements with enforceability.[245] Moreover, the 2016 Opinions have also taken into consideration the use of information technology in the diversified dispute resolution mechanism.[246]

2.3.3.2. Current ADR mechanism in China

A. Mediation mechanism

101. There are two major types of mediation in modern China: judicial mediation and extra-judicial mediation. Judicial mediation refers to the mediation conducted by judges during court proceedings.[247] Extra-judicial mediation can be further divided into people's mediation[248], commercial (institutional) mediation, labor dispute mediation, industrial mediation[249], and

[241] Id. The ADR Opinion, Article 1(2).
[242] People's Mediation Law of the People's Republic of China (PRC), (2010) Order No. 34 of the President of the People's Republic of China (PML).
[243] PML, Article 31.
[244] 2016 Opinions on ADR(n 160).
[245] 2016 Opinions on ADR (n 160), paragraph 31
[246] 2016 Opinions on ADR, (n 160) paragraph 15.
[247] Wang Liming, 'Characteristics of China's judicial mediation system' (2009)17 Asia Pacific Law Review 67, 67.
[248] People's mediation, as defined in Article 2 of the PML, refers to the activity of resolving private disputes whereby a people's mediation committee procures, by means such as persuasion and counsel, the reaching by concerned parties of a settlement agreement of their own free will on the basis of equality and negotiations.
[249] Industrial mediation, also named as "sectorial mediation", is conducted by the industrial mediation committee established by trade associations to solve disputes between members or between members and non-members that are relevant with a certain industry. It is now merged into the People's Mediation in practice. See Hong Dong Ying, 'Lun Ren Min Tiao Jie de Xin Qu Shi-Hang Ye Xie Hui Tiao Jie de Xing Qi' [The New Tendency of

administrative mediation[250]. For the relevance of e-commerce dispute resolution, the following discussion will be focused on people's mediation, industrial mediation and commercial mediation.

a. People's mediation

102. People's mediation is used to settle communal disputes arising from the community where people live. These are disputes between individual citizens concerning land, inheritance, family affairs, neighboring relations, as well as other small claims. Although the term "people's mediation" came long before the establishment of the PRC, the legal status of the people's mediation has not been confirmed in law until the Constitution of 1982.[251] Nevertheless, the Constitution of the PRC only designated the people's mediation committee to resolve disputes among people without laying down any rules on people's mediation. The first specialized legal instrument on people's mediation, People's Mediation Law of the PRC, came into effect in 2010.[252] It established three fundamental principles of people's mediation: voluntariness principle, legality principle and respect for parties' rights principle. [253]

103. People's mediation is conducted by the people's mediation committee (人民调解委员会) to resolve civil disputes of the general public, [254] which includes disputes among citizens and disputes between citizens and other entities. The members of the people's mediation committee are usually ordinary citizens without expertise.[255] Therefore, the majority of disputes that are resolved by people's mediation are simple and small civil disputes such as family disputes, or disputes related to the community's interests such as neighboring disputes and consumer disputes.[256]

People's Mediation-The Rise of Trade Association Mediation], (2015) 11 Fa Xue Yan Jiu 260. (洪冬英，论人民调解的新趋势：行业协会调解的兴起，《法学研究》2015 年第 11 期)

[250] Administrative mediation is conducted by governmental organizations for specific disputes, such as land disputes and traffic accidents disputes. See Chan (n 221) 162.

[251] Lubman, *supra* note (227) 1306. See also the Constitution Law of the People's Republic of China, 5th National People's Congress No.5 Meeting, 1982, Article 111.

[252] People's Mediation Law of the People's Republic of China (PRC), (2010) Order No. 34 of the President of the People's Republic of China (PML).

[253] PML, Article 3: The voluntary principle requires parties to mediate on the basis of voluntariness and equality. The legality principle requires the mediation shall not violate laws, regulations or national policies. The respect for parties' rights principle prevents parties from being deprived of other legal remedies to solve disputes.

[254] Jiaqi Liang, 'The Enforcement of Mediated settlement agreements in China' American Review of International Arbitration, Vol. 19, 2008, pp. 495-496.

[255] PML, Articles 7-9.

[256] Wang Wenying, 'The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective' (2005) *Ohio State Journal on Dispute Resolution*, Vol. 20, No. 2, 2005, p. 427.

b. Industrial mediation

104. In the past, people's mediation committees were mainly limited to village or neighborhood. The current trend is that people's mediation committees are established more often in different industries, professions and communities.[257] Both Article 8 and Article 34 of People's Mediation Law of the PRC have reserved the possibility for social groups or other entities to establish people's mediation committees to mediate specific types of disputes among people. The industrial mediation is therefore integrated into the people's mediation system.[258] This is also confirmed by the *Opinions of the Ministry of Justice on Strengthening the Building of Industry-based or Profession-based People's Mediation Committee*,[259] which recognizes industry-based mediation committee or profession-based mediation committee as part of the people's mediation system. Industrial mediation refers to mediation conducted by trade associations such as consumers' association, banking industrial association, insurance industrial association, securities industrial association, medical services industrial association, Internet industrial association, e-commerce industrial association or construction industrial association.[260] The incorporation of industrial mediation into people's mediation enlarges the scope of disputes that people's mediation can handle.

c. Commercial mediation (institutional mediation)

105. As the market economy grows, commercial mediation has been developing in China to meet the various needs of business parties. Commercial mediation is conducted by mediation institutions[261] to resolve commercial disputes between businesses. Unlike people's mediation, commercial mediation is highly professionalized with procedural rules and code of conduct for mediators. The ADR Opinions have confirmed that the mediated settlement agreement by commercial mediation can also be ratified by the court with enforceability.[262]

B. Arbitration mechanism

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[257] Aaron Halegua, 'Reforming the People's Mediation System in Urban China' (2005)35 Hong Kong LJ 715.
[258] See Hong Dong Ying, 'The New Tendency of People's Mediation-The Rise of Trade Association Mediation' Fa Xue Yan Jiu, Vol. 11, 2015, p. 260 (洪冬英：论人民调解的新趋势：行业协会调解的兴起，《法学研究》2015 年第 11 期).
[259] Opinions of the Ministry of Justice on Strengthening the Building of Industry-based or Profession-based People's Mediation Committee [2014] Si Fa Tong No. 109.
[260] See 'Zhong Guo Shang Shi Tiao Jie Nian Du Guan Cha' [2013 China Commercial Mediation Annual Observation], p. 33 (中国商事调解年度观察 2013).
[261] Mediation institutions in China are for example: Beijing Arbitration Commission Mediation Center and Shanghai Commercial Mediation Center.
[262] The ADR Opinions, Article 20.

106. Unlike mediation that has a deep cultural root in ancient China, the arbitration mechanism did not appear in China until the late Qing Dynasty and was influenced by the cross-border commercial transactions.[263] The development of domestic and foreign-related arbitration system[264] of China has grown since the early 1990s. After the enactment of the Arbitration Law of the PRC in 1995, the arbitration legal framework in modern China has been established. China has become a signatory state of the New York Convention[265] since 1986. Hence, an international commercial arbitral award rendered abroad shall be recognized and enforced in China.

107. In China, arbitration is divided into domestic arbitration, foreign-related arbitration and foreign arbitration. Domestic arbitration refers to commercial or civil disputes that arise from Chinese parties whereas foreign-related arbitration refers to commercial or civil disputes involving "foreign elements". These "foreign elements" include: i) either one of the parties is a foreign, stateless person, or a foreign legal person; or ii) the subject matter is located in a foreign country; or iii) the legal fact that the civil rights or obligations are established, changed, or terminated is in a foreign country.[266] A third category "foreign arbitration" refers to arbitration conducted by a foreign arbitration institution.[267] While the enforcement of the first two types of arbitration is regulated by the Civil Procedure Law of the PRC and Arbitration Law of the PRC, the enforcement of foreign arbitral awards is subject to the New York Convention.[268] Besides, types of arbitration in China can also be divided by the type of disputes (commercial disputes, labor disputes and rural land disputes). Commercial disputes refer to the disputes of economic rights and obligations arising from contracts, torts or other relevant legal provisions.[269] Labor

[263] The first commercial arbitration institution has been established by Chengdu Commercial Association in 1907. See Yu Qingsheng, 'System Transition and Legal Culture Change: Dispute Resolution Mechanism as an Example' (2017) 44 Journal of Henan Normal University 1, 60. （于庆生：《制度转型与法律文化变迁——以纠纷解决机制为例》，河南师范大学学报第 44 卷第 1 期）

[264] Foreign-related arbitration refers to the dispute in which either the subject matter, one of the parties or the legal facts that the rights or obligations of the parties are established, changed or terminated in a foreign country.

[265] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") entered into force on 7 June 1959.

[266] Judicial Interpretation of the Supreme People's Court on the Application of PRC Applicable Laws to Foreign-Related Civil Relations, FaShi [2012] No. 24, Article 1.

[267] Civil Procedure Law of the PRC, Article 283. Foreign arbitration institutions refer to arbitration institutions that are established outside of the PRC, such as the ICC, HKIAC, SIAC, DIS and LCIA. Chinese scholars hold the general view that "foreign arbitration" refers to arbitration where the seat of arbitration is located in a foreign country.

[268] China has joined the New York Convention since 1987. <http://www.newyorkconvention.org/countries> accessed 28 February 2019.

[269] Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China, No. 5 [1987] of the Supreme People's Court, Article 2.

disputes concern the disputes between employers and employees. Rural land disputes refer to disputes involving rural land contracts.

2.3.3.3. China ODR development towards a diversified dispute resolution mechanism

108. "Diversified dispute resolution" has been proposed by the Supreme People's Court referring to out-of-court dispute resolution mechanism in connection with litigation.[270] The latest legal reform in deepening the diversified dispute resolution mechanism of the people's court has also been focused on the innovation of ODR by applying the "Internet Plus Strategy".[271] It requires the people's court to establish an online platform integrated with functions of online mediation, online case filing, online judicial ratification, online trial, electronic supervisory procedure, and electronic delivery service of legal instruments in order to promote the digitalization of a diversified dispute resolution mechanism.[272]

109. Besides the judicial reform initiated by the Supreme People's Court, ODR in China has also been promoted by traditional ADR institutions. In order to accommodate e-commerce business, some domestic arbitration commissions such as Guangzhou Arbitration Commission and Shenzhen Arbitration Commission have established online arbitration rules and online platforms for the operation of online arbitration.[273]

110. The development of ODR in China has been initiated by judicial reform of the people's court under the "Internet Plus Strategy". However, the government-initiated ODR construction has not provided any requirements to assess the quality of ODR. The ADR institutions in China have moved forward to make online arbitration rules as a way to explore ODR. Still, the effectiveness of online arbitral awards needs to pass the scrutiny of judicial review during the enforcement stage.

2.3.4. Comparison of ADR and ODR development between the EU and China

[270] 2016 Opinions on ADR, (n 160). The Opinions use "diversified dispute resolution" to differentiate with ADR to reflect the importance of connecting mediation, arbitration and conciliation with litigation in the Chinese dispute resolution system.
[271] See (n 45).
[272] 2016 Opinions on ADR, (n 160) paragraph 15.
[273] Song Lianbin and others, 'Annual Review on Commercial Arbitration in China' 6-7; Online Arbitration Rules of Shenzhen Arbitration Commission, effective from 1 May 2017 < http://szac.org/rule/info/ac9f91d769e04055a06eb3239db9c9b4> accessed 13 December 2017.

111. From the study of the current ADR and ODR development in the EU and China, there are some common features shared by the two jurisdictions. First, both the EU and China have foreseen the importance of developing ADR and ODR as efficient dispute resolution to enhance trust and facilitate e-commerce transactions.[274] The development of EU ADR and ODR mechanism is initiated by the strategy of "A Digital Agenda for Europe" in 2010 to enhance consumer rights in e-commerce transactions.[275] The development of the ADR and ODR in China is influenced by the "Internet Plus" strategy to develop e-commerce. Second, the ODR development in the EU and China is both in a preliminary stage, serving as a tool to facilitate the dispute resolution process. This is due to a lack of study and understanding of the scope, form, and function of ODR. The establishment of the EU ODR platform is expected to provide consumers with a convenient dispute resolution platform that directs consumers to various ADR entities in respective EU member states. An online mediation platform has also been established by the Supreme People's court to incorporate people's courts and various ADR entities.

112. Although the EU and China have developed the ODR mechanism to accommodate the development of e-commerce, there are major differences in the application scope and ideology of the ODR mechanism in the EU and China. First, the application scope of ODR in the EU and China is different from each other. In the EU, ADR becomes a policy priority in resolving B2C disputes in the cross-border e-commerce transaction.[276] The EU legislation of an ODR platform is triggered by the harmonization of consumer protection policy for the proper functioning of the Internal Market, and therefore it is limited to B2C disputes. In China, the ADR and ODR development is promoted by the Supreme People's Court for its legal reform. The diversified dispute resolution mechanism has been established as a tool to supplement litigation and it is not limited to B2C disputes. The legal reform initiated and directed by the Supreme People's Court intends to establish a dispute resolution system combined with litigation and out-of-court dispute resolution mechanism to reduce the burden of national courts. Moreover, the Internet courts have been developed in China, integrated with the functions of online mediation, online case filing, online judicial ratification, online trial and electronic

[274] Impact Assessment for the Proposal for a Directive on Consumer ADR and Regulation on ODR (n 190) 25; He Qisheng and Song Jiping, 'A Global Chinese ODR System: Is China Ready to Join?' (2011)7 The Asian Business Lawyer 75, 89.
[275] A Digital Agenda for Europe (n 42) 13.
[276] Green paper on alternative dispute resolution in civil and commercial law, paragraph 16.

delivery service of legal instruments, to promote a diversified dispute resolution mechanism combined with information technology.[277]

113. Second, the EU and China have a different ideology in developing ADR. In the EU, ADR is developed to improve consumer's access to justice. The EU experience demonstrates how individual rights should be protected and how the party autonomy should be ensured in ADR. ADR theory is based on the principle of mutual consent of the parties and impartiality of the third-party neutrals. The purpose of the ADR is to reach a mutually acceptable settlement between the parties. Whereas, in China, the ADR has been built upon the cultural value of harmonization. The purpose of ADR is not only to settle disputes but also to educate people and prevent future disputes.[278] However, there was also criticism towards the coercive nature of ADR in China especially in people's mediation of Maoism.[279] With the legal reform and the construction of a diversified dispute resolution mechanism, the development of ADR in China has shifted its coercive nature towards ensuring parties' freedom in selecting the type of dispute resolution.

[277] 2016 Opinions on ADR, (n 160) paragraph 15.
[278] Yang Zhang, 'Mediation Model Differences between China and Australia and Their Possible Collaboration' (2015)1 Journal of Interdisciplinary Conflict Science 46, 50.
[279] Carl Minzner, 'China's turn against law' (2011)59 American Journal of Comparative Law 935; Clarke (n 218) 292.

Chapter 3. Validity of Electronic Alternative Dispute Resolution Agreements

114. This part aims to explore the validity requirements of alternative dispute resolution agreements ("ADR agreements or ADR clauses"[280]) in the electronic context and more specifically to determine if the requirements of online ADR agreements differ from the requirements of offline ADR agreements? This Chapter will explore the extent to which the use of e-ADR agreements may influence the validity of ADR agreements and whether there is adequate legislative protection to balance the conflicts between the party autonomy of the ADR agreements and the fairness of electronic contracts.

115. The jurisdictions selected for this study are China and the EU. China has a large market for electronic commerce (hereinafter "e-commerce") development. The annual trading volume of e-commerce in China reached to 16.39 trillion RMB (2.12 trillion EUR) in 2014 with an annual increase rate of 59.4%.[281] Such rapid e-commerce development calls for urgent development of dispute resolution mechanism. UK is selected to study the EU member state's implementation of EU legislation on ADR in e-commerce as it has the largest trading volume in e-commerce among the EU member states.[282] Also, as one of the few Common Law jurisdictions in the EU, it not only bears the Common Law features but is also influenced by the Civil Law rules embodied in EU legislation.[283] For reference to Civil Law jurisdictions in the EU, the legislation of other EU member states such as Germany and the Netherlands will also be used.

116. The formal validity requirement will deal with the connection between legislation in ADR agreements and legislation in electronic communications, which establishes the legal equivalence between e-ADR agreements and traditional ADR agreements that are concluded offline. In Section 3.1, the formal validity requirement of e-ADR agreements in the EU and China will be examined. Specifically, this Section will ascertain whether any special legal requirements in e-ADR agreements are implemented; and if not, will determine which elements

[280] ADR agreements are used interchangeably with ADR clauses. Although they may have different legal practices, in practice they overlap with each other in terms of their contents.
[281] National statistics bureau of the PRC, < http://www.stats.gov.cn/tjsj/zxfb/201508/t20150803_1224544.html> assessed 8 March, 2016.
[282] The e-commerce turnover of the UK is €127 billion in 2014, ranking the top among other EU member states. ("Europe 2014 Key B2C E-commerce Data of Goods and Services at a Glance", Ecommerce Foundation <http://www.ecommerce-europe.eu/facts-figures/infographics> accessed November 29, 2015.
[283] This, for example, is reflected in Article 3 of the Unfair Terms in Consumer Contracts Directive (93/13/EEC).

are missing.

117. The substantive validity requirement will be approached from contract law and consumer law perspective, where elements of consent, unfair terms and standard form contract will be discussed in evaluating e-ADR agreements. In Section 3.2, the substantive validity requirements of e-ADR agreement will be examined, placing a special focus on the role of consent in e-ADR agreements. The question to be answered is: (i) to what extent, can e-ADR agreements be recognized in cross-border transactions and (ii) what are the barriers to such recognition?

3.1. Formal validity requirements of e-ADR agreements

118. In this part, I will discuss whether and to what extent e-ADR agreements can meet the formal validity requirements applied to the offline ADR agreements. The formal validity requirements refer to the validity conditions of e-ADR agreements based on the forms in which they are presented. This study will first examine the formal requirements of ADR agreements as ascribed to arbitration agreements and mediation agreements, and secondly, apply the legislation in electronic communications to assess the validity of e-ADR agreements.

119. There are two different approaches to assess the validity of e-ADR agreements by referring to the legal framework of ADR agreements in paper form:

(i) Direct legislation which takes into account the presence of electronic communications and adjusts the substantive and procedural laws accordingly (such as incorporating electronic means into arbitration law, mediation law and contract law); and

(ii) Indirect legislation which refers to legal instruments regarding electronic communications, such as electronic signature law and e-commerce law, but which do not directly regulate ADR agreements but may be applied to assess the validity of ADR agreements in electronic forms.

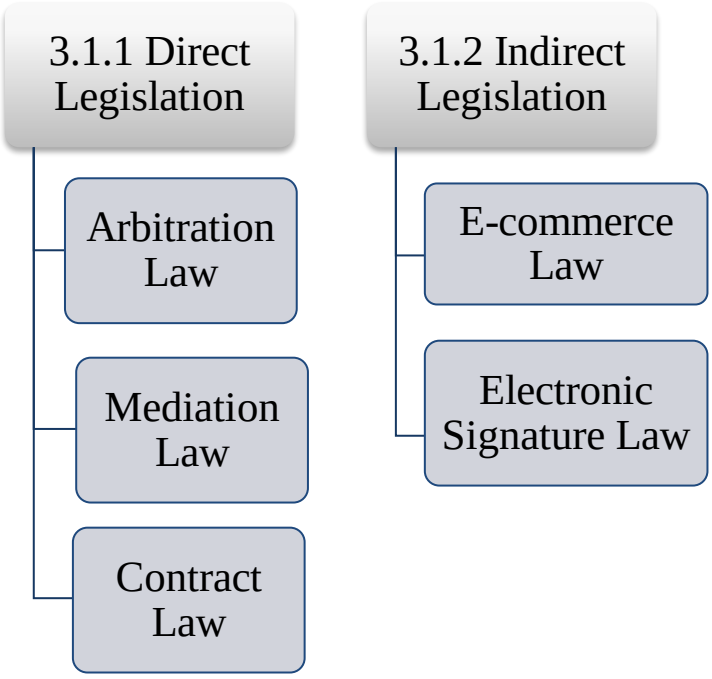
120. In the jurisdictions that are studied (EU, England and China), the formal validity requirements of e-ADR agreements shall be determined by a combination of direct formal requirements on ADR agreements and indirect formal requirements on electronic communications. The direct formal requirements of ADR agreements (Section 3.1.1) are regulated not only by specific procedural law (such as legislation on arbitration and mediation) but also by substantive contract rules in general. As no direct regulatory resources regarding the formal validity of ADR agreements are available, references are drawn from the two most regulated and most common types of ADR, being arbitration and mediation. This choice is justified primarily by

their regular and global use of these ADR forms as well as by the fact that relevant regulations for these forms of ADR have been adopted and accepted worldwide.

121. There are also laws and regulations on e-commerce that indirectly affect ADR agreements. The indirect legislation in electronic communications, which is more technology specific, established the connection between formal requirements of contracts in paper form and form requirement of contracts in electronic communications. There is, for instance, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on E-commerce that established the functional equivalence principle that propagates the same legal effect of data messages and paper documents so long as the information contained in the electronic message is accessible so as to be used for subsequent uses. This principle has limited effect because the UNCITRAL Model Law on E-commerce has no binding force and even if countries have adopted the functional equivalence principle in their national legislation, this is only a minimum requirement and does not ensure that contracts concluded in electronic communications have evidentiary value. This hiatus in the legislation has led to uncertainty regarding the validity of electronic data. That is why it was necessary for several jurisdictions to enact legal instruments to strengthen the credibility of electronic communication and enhance the legal certainty of electronic agreements. We see rules regarding electronic communication incorporated in both substantive contract law and procedural law.[284] These national/regional laws all *prima facie* recognize the validity of e-ADR agreements, as will be shown in the sections below. However, their evidentiary value should be determined in accordance with the indirect legislation of electronic communications to be discussed in Section 3.1.2. .

[284] See for example: Article 9 of E-commerce Directive, Article I(2)(a) of the European Convention of International Commercial Arbitration, Article 1 of Judicial Interpretation on PRC Arbitration Law; See also Christian Twigg-Flesner, 'Disruptive Technology-Disrupted Law? How the Digital Revolution Affects (Contract) Law' (2016) in Alberto De Franceschi, *European Contract Law and the Digital Single Market: The Implications of the Digital Revolution* (Intersentia 2016) 21.

Legal Framework of Electronic ADR Agreements



3.1.1. Direct formal validity requirements in ADR legislation

122. ADR refers to a general concept of different out-of-court dispute resolution methods. Overall, specific legislative regulation on ADR agreements is scarce as these ADR agreements are contracts in nature and therefore generally regulated by contract law principles. Nevertheless, this is not the case for two forms of ADR, namely arbitration and mediation. While arbitration is a form of adjudicative ADR in which a third-party neutral issues a binding decision for parties, mediation represents non-adjudicative ADR in which the third-party neutral may propose solutions that are not binding on the parties.[285] These two types of ADR are so widely used in practice that they become the subject of more detailed regulation, more specifically by institutional rules and legal instruments. Pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"),[286] an arbitration agreement concluded in one country may be recognized by other countries provided that some requirements are met as set out in Article II of the New York Convention.[287]

[285] See Susan Heather Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (Oxford University Press Oxford 2013): adjudicative ADR for example includes arbitration and expert determination, while non-adjudicative ADR may include negotiation, mediation, and conciliation.
[286] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") entered into force on 7 June 1959. It now has 156 member states which ensures the recognition and enforcement of international commercial arbitration.
[287] *Ibid*, New York Convention, Article II.

Moreover, mediation has gained increased international popularity as reflected in national and international legal instruments. Typical examples of these legal instruments are the EU Directive on Mediation, People's Mediation Law of the PRC, and the UNCITRAL Model Law on International Commercial Conciliation.[288] In addition, institutional rules on mediation (such as International Chamber of Commerce (ICC) Mediation Rules, World Intellectual Property Organization (WIPO) Mediation Rules, and London Court of International Arbitration (LCIA) Mediation Rules) provide practical guidance to the formal validity of electronic mediation agreement in the absence of legislation on mediation. In contrast, other types of ADR agreements lack regulation and are not commonly addressed in relevant case law.[289]

123. This section will be divided into five sections. First, in Section 3.1.1.1, a general landscape will be depicted on the international legal framework of the e-ADR agreement, focusing on the arbitration agreement and mediation agreement. Based on the examination of international legal instruments for arbitration agreements and mediation agreements, a more in-depth study on the regional (the EU) and national legislation (England and China) with regard to the formal validity of ADR agreements will be conducted. The following three sections will look into the detailed legislative framework and practices of both arbitration agreement and mediation agreement in the EU (Section 3.1.1.2), in England (Section 3.1.1.3) and in China (Section 3.1.1.4) to the extent relevant to their electronic equivalence on which this dissertation focuses. Finally, a sub-conclusion will be made with regard to the formal validity of the e-ADR agreement in Section 3.1.1.5.

3.1.1.1. International legal instruments on the direct formal validity of e-ADR agreements

124. There are a limited number of international legal instruments that are relevant to the formal validity of e-ADR agreements. With regard to arbitration, the New York Convention[290] and

[288] The Model Law on International Commercial Conciliation (2002) has been amended by the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (Report of the United Nations Commission on International Trade Law, Fifty-first session, 25 June-13 July 2018, Annex II).

[289] See Suzanne H. Holly and Margaret E. Juliano, 'Recent Developments Concerning Enforcement of ADR Provisions' (2014) 15 Delaware Law Review 1, 55.

[290] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)

the UNCITRAL Model Law on International Commercial Arbitration,[291] stand as important resources, providing guidance as to the formal validity requirements of arbitration agreements. With regard to mediation, the UNCITRAL Model Law on International Commercial Mediation, which is also soft law, merely provides rules on its procedure and does not touch upon the formal validity requirement of mediation agreements. Therefore, it is necessary to look at the international mediation practice as reflected in the international institutional rules to understand the formal requirements imposed on the mediation agreement.

A. Arbitration agreements "in writing"

125. Article II of the New York Convention stipulates a number of formal requirements for the arbitration agreements. The scope of the Convention is, however, limited to court proceedings dealing with the recognition and enforcement of an arbitration agreement and with the recognition and enforcement of the arbitral award.[292]

a. The "writing" requirement of the arbitration agreement

126. As an indicator for formal requirement, the New York Convention requires that the arbitration agreement is in writing form to be recognized and enforced in other countries. In some countries, the writing requirement serves merely an evidentiary function, whereas in other countries it is a validity requirement.[293] Under the New York Convention, the writing requirement is a pre-requisite to enforce the arbitration agreement and the arbitral award. However, such writing requirement has often been liberally interpreted[294] to be in line with business practices that rely on oral agreements.[295]

127. The writing requirements serve two purposes.[296]

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[291] UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006. Unlike the New York Convention, the UNCITRAL Model Law on International Commercial Arbitration is a soft law which can be adopted by nations of their choice.

[292] Klaus Peter Berger, *International Economic Arbitration* (Kluwer Law and Taxation Publishers 1993) 135.

[293] For example, the writing requirement merely serves as evidential function in Switzerland (Article 178(1) of the Swiss Federal Statute of Private International Law), the Netherlands (Article 1021 of the Dutch Civil Procedure Rule) and Germany (Section 1031(1) of the German Code of Civil Procedure) whereas the writing requirement is a validity requirement in Italy (Article 807 of the Italian Civil Code of Procedure).

[294] This liberal interpretation which refers to broaden the scope of arbitration agreements "in writing" (including two ways: first by reference to other legal instruments and second by relying on Article VII, paragraph 1 of the New York Convention) will be discussed in the following sub-section b.

[295] Julian D M Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 131.

[296] *Ibid*, 130. In some countries, the writing requirement serves as evidentiary purpose, whereas in other countries, it is a validity requirement.

First, it must help to ensure that parties have given their actual and conscious consent to an arbitration agreement. This is important as arbitration excludes parties' constitutional right[297] to have their disputes decided in court. Mutual consent serves the basis of this fundamental validity requirement.[298]

Second, it will help parties to prove the existence of an arbitration agreement in subsequent proceedings.[299] The writing requirement ensures that the arbitration agreement is recognized by national courts during arbitration proceedings and after the arbitral award has been issued. The court of a contractual state to the New York Convention, when seized of an action, shall refer parties to arbitration if there is an arbitration agreement in writing.[300] Also, after an arbitral award has been issued, Article IV of the New York Convention requires the parties to provide an original arbitration agreement or a duly certified copy of such agreement in order to achieve cross-border recognition and enforcement of the arbitral awards. Therefore, the formal requirement not only ensures the validity of an arbitration agreement on its own but is also an important precondition to recognize an arbitral award.

128. The following question then is what is understood by the New York Convention's formal requirements. Article II (1) and (2) of the New York Convention reads as follows:

> *"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*
>
> *2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or*

[297] The legislative instruments in some jurisdictions provide citizens with access to courts, such as Article 6 of the European Convention for the Protection of Human Rights and the Seventh Amendment of Bill of Rights in the U.S.

[298] Philippe Fouchard and Berthold Goldman, *Fouchard, Gaillard, Goldman on international commercial arbitration* (Kluwer law international 1999) 253.; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (Oxford Univ Press 2015) 71.

[299] In some countries, the writing requirement of arbitration agreements serves as evidentiary purpose which can be interpreted with a wide scope of form (such as English Arbitration Act 1996, Section 5(2)(c)), whereas in other countries, such writing requirement is a validity condition (such as Italy in *Robobar v Finncold* (Italy) 28 October 1993, (Yearbook Commercial Arbitration XX (1995), 739) which cannot be derogated from. See UNCITRAL Working Group II (Arbitration) forty-fourth session, 'Settlement of commercial disputes (Preparation of uniform provisions on written form for arbitration agreements)', A/CN.9/WG.II/WP.139, paragraphs 13-15 and Lew *et al* (n 296)134.

[300] New York Convention, Article II, paragraph 3.

telegrams."

This section shows us that an "arbitration agreement" includes either be an arbitration clause that is contained in a main contract or an arbitration agreement. Furthermore, these validity requirements are met in two types of situations:

(i) Arbitration agreements signed by the parties

129. The first situation is the one in which an arbitration clause is contained in a contract or an arbitration agreement that is signed by the parties. It not only requires a written text, but also the parties' signatures.[301] It can be envisaged that the New York Convention was open to the use of modern technologies such as electronic signatures, demonstrated by the inclusion of telegrams in the wording of the second situation.[302]

(ii) Arbitration agreements contained in an exchange of letters or telegrams

130. The second situation refers to when a general contract that contains an arbitration clause or an arbitration agreement is concluded through the exchange of letters or telegrams, without requiring any of these documents to be signed by the parties.[303] Enacted in 1958, the New York Convention took into consideration the electronic communication of telegrams which were, at the time, advanced technology. This left room for arbitration agreements to be concluded through other modern means of electronic communications so long as they help to record the content of the agreement for future proceedings and make the parties aware of the fact that they oust the jurisdiction of domestic courts.[304] The fact that this second scenario was envisaged early in 1958 left room for a broader interpretation of the writing requirement in the evolving modern times as discussed below.

b. Broader interpretation of arbitration agreement "in writing" in electronic communications

131. The writing requirement in Article II(1) and II(2) of the New York Convention is a mandatory and formal requirement for arbitration agreements. However, with the development of e-

[301] Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 153.
[302] Reinmar Wolff, 'E-Arbitration Agreements and E-Awards–Arbitration Agreements Concluded in an Electronic Environment and Digital Arbitral Awards' in Piers and Aschauer (n 171)169.
[303] Albert Jan van den Berg, 'Arbitration Agreement-Writing-Exchange of Letters or Telegrams' (1994) Yearbook Commercial Arbitration XXIX 510-511: 206.
[304] Berger, *International Economic Arbitration* (n 292) 137.

commerce, different forms of electronic communication such as emails, EDI,[305] and websites, have come into existence. The original two forms of the "writing" requirement as stipulated in the New York Convention can no longer deal sufficiently with arbitration agreements that are concluded via electronic means. It is important to incorporate these electronic communications into the framework of the New York Convention to facilitate the development of e-commerce. Considering the great success of the New York Convention, a direct amendment is unlikely as it not only requires the approval of all the member states but also incurs the risk of having the entire convention reopened for discussion.[306] The other possibility is to interpret the scope of written form requirement more broadly.

132. There are two opposing views with regard to the broader interpretation on the scope of "arbitration agreement in writing" of the New York Convention. Professor Van den Berg held that Article II(2) is an exclusive list of what constitutes writing and there should be a uniform interpretation because the written form requirement is both maximum and minimum, which one cannot deviate from.[307] A court may neither impose more stringent requirements nor go below the minimum on the form of the arbitration agreement. This perspective is also reflected in the case law.[308] A Norwegian court refused to enforce an arbitral award rendered in London based on an arbitration agreement formed by e-mail exchange without being signed. The Swiss court also held that "the issue of (formal) validity is determined solely according to the New York Convention and the requirement of the written form in Article II is to be interpreted independently, without the assistance of national law."[309] The restrictive interpretation is based on the French, Spanish, and Chinese version of the New York Convention, where it states that "*on entend par*; *acuerdo par escrito denotara, wei*…" (the term 'agreement in writing' means…).[310] It treats Article II(2) as a substantive rule to the arbitration agreement which prevails over any domestic substantive law rules[311] and disallows the application of any more

[305] Electronic data interchange (EDI) is a typical example of electronic agent which refers to the electronic transfer from computer to computer of information using an agreed standard to structure the information.
[306] April 2000 Working Group Report, A/CN.9/508, paragraph 92, 613; April 2002 Working Group Report, A/CN.9/08, paragraph 46, 645.
[307] Albert Jan van den Berg, 'The New York Convention Its Intended Effects, Its interpretation, Salient Problem Areas' in Marc Blessing (ed), *The New York Convention of 1958 (9)* (ASA 1996) 20. Similar opinion is held by Professor Klaus Peter Berger n (292) 326.
[308] Norway No. 1, *Charterer v. Shipowner*, Hålogaland Court of Appeal, 16 August 1999, reported in Yearbook Commercial Arbitration XXVII (2002) 519–23.
[309] Switzerland No. 29, Insurance Company v. Reinsurance Company, Tribunal Fédéral [Supreme Court], 21 March, Yearbook of Commercial Arbitration XXII (1997) 800-806.
[310] Gary B. Born, *International Commercial Arbitration: Commentary and Materials*, 2nd edition (Kluwer Law International 2001) 135.
[311] Fouchard & Goldman, (n 298) 373-375.

flexible national laws on the formal requirements.

133. Other scholars, on the contrary, held that the list of forms "in writing" in Article II(2) are only illustrative and non-exclusive.[312] This is influenced by the English and Russian version of the New York Convention where it says "the agreement in writing shall include," "письменное соглашение' включает арбитражную оговорку в договоре, или арбитражное соглашение, подписанное сторонами, или содержащееся в обмене письмами или телеграммами" (the agreement in writing includes an arbitration clause in the contract or an arbitration agreement signed by the parties, contained in an exchange of letters or telegrams), implying that the examples of writing forms are non-exhaustive and could be extended to cover a wide scope of other forms.[313] This perspective accords with the purpose of the New York Convention, which is to maximize the international enforceability of arbitral awards and agreements.[314] While the non-exclusive approach may endanger the uniform application of the New York Convention, the broader interpretation of "arbitration agreement in writing" in electronic communications is necessary in light of the wide use of electronic contracts in concluding electronic transactions.

134. In 2006, the General Assembly of UNCITRAL adopted the UNCITRAL Recommendation Regarding the Interpretation of Article II paragraph 2 and Article VII, paragraph 1 of the New York Convention (hereinafter the "UNCITRAL Recommendation")[315] to further enlarge the scope of "agreement in writing" in e-commerce. As an alternative to amend the New York Convention, the UNCITRAL Recommendation was used to modernize the UNCITRAL arbitration legislation to a much broader extent. According to this Recommendation, there are basically two ways to accommodate electronic communications into the writing requirements of the New York Convention. The first is to extend the scope of the "in writing" list to other electronic means. The second recommendation is to use the more-favorable-right provision in Article VII paragraph 2 of the New York Convention to grant arbitration agreements in electronic forms validity based on more favorable national laws. These two recommendations

[312] See Adam Samuel and Marie-Françoise Currat, *Jurisdictional problems in international commercial arbitration: a study of Belgian, Dutch, English, French, Swedish, Swiss, US, and West German law*, vol 11 (Schulthess 1989) 83-85; Poudret and Besson (n 301), *Comparative Law of International Arbitration*, 153.

[313] UNCITRAL Model Law, Chapter II, Article 7- as amended [Definition and form of arbitration agreement] in Howard M. Holtzmann, Joseph E. Neuhaus, et al., *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 2015) 69 paragraph 97.

[314] Born (n 310) 671.

[315] The Recommendation Regarding the Interpretation of Article II paragraph 2 and Article VII, paragraph 1 of the New York Convention was adopted on 7 July 2006 at its thirty-ninth session and appears as Annex II to the 2006 Commission Report, A/61/17 (14 July 2006). (UNCITRAL Recommandation)

will be explained below.

(i) Non-exhaustive interpretation of Article II paragraph 2 of the New York Convention

135. The UNCITRAL Recommendation suggests that "Article II paragraph 2 of the New York Convention shall be applied as recognizing the circumstances described therein are not exhaustive."[316] This opens up the scope of "arbitration agreements in writing" which is no longer restricted to the two stipulated written forms. This is in line with the jurisprudence of at least some national courts that had already started to interpret the arbitration agreement "in writing" to a broader extent in practice. For example, the Geneva Court of Appeal held in 1983[317]:

> *"It is clear that by treating an arbitration clause contained in an exchange of telegrams as an 'agreement in writing', Article II of the New York Convention contemplates in a general way the transmission by telecommunication of messages which are reproduced in a lasting format. In this respect, a telex produces messages whose senders and receivers can be identified in a better manner than was the case for the traditional telegrams."*

136. By accepting telexes as "agreements in writing", these courts[318] have taken the position that "the exchange of letters and telegrams" can be extended to other telecommunications such as telexes, facsimiles and telecopies. These modern means of electronic communications, according to this jurisprudence, should be included ultimately in the autonomous interpretation of Article II(2) of the New York Convention, since the text is adaptable to technological changes.[319] This position, which I believe is correct, is also reflected in Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration of 1985:[320]

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316 *Ibid*.

317 Cour de justice Canton de Genève, 14 April 1983, *Carbomin SA v Ekton Corporation*, XII YBCA 502-505 (1987).

318 France No. 12, *Bomar Oil N.V. v. Enterprise Tunisienne d'Activités Pétrolières-ETAP*, Cour d'appel of Paris 20 January 1987, Yearbook Commercial Arbitration XII (1988) 466-470; Switzerland No. 14, *Tracomin S.A. v. Sudan Oil Seeds Co. Ltd.*, Tribunal Fédéral [Federal Supreme Court] 2nd Civil Court, 5 November 1985, Yearbook Commercial Arbitration XII (1987) 511-513; Italy No. 68, *Dimitrios Varverakis v.Compañia de Navigacion Artico S.A.*, Court of First Instance of Savona, Mar. 26, 1981, Yearbook Commercial Arbitration X (1985) 455.

319 Berger, *International Economic Arbitration* (n 292) 139.

320 The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law on 21 June 1985 to assist states in reforming and modernizing their laws on arbitration procedures. It reflects worldwide consensus on key aspects of international arbitration practice. In 2006, amendments were adopted by UNCITRAL to Article 1(2), 7, 35(2) and a new Chapter IV A to replace Article 17 and a new Article 2 A. The revised Article 7 is intended to modernize the formal requirement of an arbitration agreement to better conform to international contract practices.

"*An arbitration is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another*."

Although the UNCITRAL Model Law on International Commercial Arbitration does not have any legal force, 70 national arbitration laws are established based on this model.[321]

137. The UNCITRAL Model Law on International Commercial Arbitration of 2006[322] provides two legislative options to modernize the written forms of an arbitration agreement by amending Article 7.

The first option directly incorporates electronic communication as a written form of an arbitration agreement.[323] Although the UNCITRAL Secretariat already concluded that the original provision in 1985 referring to "other means of telecommunication which provide a record of the agreement" was broad enough to cover "most common uses of electronic mail or electronic data interchange messaging,"[324] it decided to further incorporate the modern concepts of electronic communication. For this, it took inspiration from Article 6 of the UNCITRAL Model Law on E-commerce and Article 9(2) of the UN Convention on the Use of Electronic Communications in International Contracts[325]. This led Article 7, option 1, to state that any arbitration agreements in electronic communication may qualify as a written form if the content of the arbitration agreement can be retrieved for subsequent reference.[326] One could argue that countries that are both signatories of the New York Convention and the United Nations Electronic Communications Convention have included the arbitration agreements in electronic communications indirectly into the scope of "arbitration agreement in writing".

321 Many national arbitration laws (in total 70 states) are adopted based on the framework of UNCITRAL Model Law including countries like Australia, Austria, Belgium, Canada, Germany, etc. < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> assessed November 12, 2015.

322 UNCITRAL Model Law of International Commercial Arbitration (1985) with amendments as adopted in 2006.

323 *Ibid*, Option 1, Article 7(4).

324 January 2000 Secretariat Note, A/CN.9/WG.II/WP.108/Add.1, paragraph 35, 11.

325 UN Convention on Electronic Communications in International Contracts of 2007 ("Electronic Communications Convention), only Congo, Dominican Republic, Honduras, Montenegro, Russian Federation and Singapore have ratified Electronic Communications Convention. It has been effective since March 1, 2013. <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html> accessed April 5, 2015. ("Electronic Communications Convention")

326 UNCITRAL Model Law of International Commercial Arbitration of 2006, Article 7(4) option 1.

However, this extension is applicable to B2B arbitration agreements only.[327] This has been remedied by the UNCITRAL Model Law in this first option. Countries that have chosen the first option to accommodate electronic communications in the writing requirement of arbitration agreements are, for example, are UAE for the UAE Federal Arbitration Law[328] and Korea for the Korean Arbitration Law.[329]

The second option provided in the Model Law is a more radical version of Article 7. It defines an arbitration agreement in a manner that omits any formal requirement. The "requirement in writing" is directly taken out of the definition of the arbitration agreement. This implies that the arbitration agreement can be in any form chosen by the parties. This tackles the practical problems when the drafting of a written arbitration agreement is impractical or impossible. Where the parties' consent to arbitration is not in question, the validity of an arbitration agreement should be recognized. [330] Hence, under the second option, arbitration agreements concluded via electronic means of communication meet the formal validity so long as the content of the agreement is recorded.[331] Countries such as Sweden and Denmark have chosen the second option without limiting arbitration agreements in writing form.[332]

138. However, this broader interpretative approach is structured by reference to various legal instruments (UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL Model Law on E-commerce, the United Nations Electronic Communications Convention), some of which do not have binding legal effect (UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on E-commerce) and some of which (the United Nations Electronic Communications Convention) are applied in B2B contracts only. During the stage of referral to international arbitration or enforcement of a foreign arbitral award, the national courts need to examine the formal validity of the arbitration agreement in

[327] *Ibid*, Article 2(1) of Electronic Communications Convention, the Convention is only applicable in B2B disputes.
[328] UAE Federal Law No. (6) of 2018 on Arbitration, Article 7(2)(a): an arbitration agreement shall be deemed to be in writing if: it is contained in a document signed by the Parties or in an exchange of correspondence or other written means of communication or in the form of an electronic message in accordance with the applicable rules of the State concerning electronic transactions.
[329] Korean Arbitration Act, Article 8(3).
[330] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 28.
[331] 'UNCITRAL Model Law, Chapter II, Article 7 as amended Definition and form of arbitration agreement' *in* Howard M. Holtzmann, Joseph E. Neuhaus, et al., *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 2016) 155.
[332] See Swedish Arbitration Act, Section 1 and Danish Arbitration Act, Article 7(1). See also Gary Born, International Commercial Arbitration, Volume 1 (Kluwer Law International 2009) 582.

accordance with Article II (2) of the New York Convention and by reference to other applicable legal instruments.[333] Due to the silence of the New York Convention in this respect, an arbitration agreement that is regarded valid by an arbitral tribunal or a court in one country may not necessarily be similarly regarded by the courts of the country in which the arbitral award is enforced.[334] Therefore, international harmonization in recognizing the formal validity of electronic arbitration agreement would play an essential role in avoiding the uncertainty of arbitral awards and facilitating the use of arbitration in e-commerce.

(ii) Interpretation through Article VII paragraph 1 of the New York Convention

139. In what follows, I will discuss how the law in practice has evolved through the interpretation of the more-favorable-rights clause stipulated by Article VII paragraph 1. The purpose of the New York Convention is to enable the enforcement of foreign arbitral awards to the greatest extent. As indicated in Article VII paragraph 1, the New York Convention shall grant parties more favorable rights than they may have under the New York Convention and allow them to enforce an arbitral award pursuant to the more favorable law or treaties that apply to the recognition and enforcement of such an award. The UNCITRAL Recommendation proposes that with regard to the arbitral award, this rationale should also be applied to arbitration agreements if national arbitration laws provide for a broader interpretation on the writing forms than the two forms in Article II paragraph 2 of the New York Convention. This proposal is of course being challenged by other scholars because the original Article VII paragraph 1 of the New York Convention only covers the recognition and enforceability of arbitral awards and not arbitration agreements.[335]

140. However, in practice, this preferred approach has already been used by some national courts to justify a broader interpretation of the scope of the "arbitration agreement in writing". The Dutch court has supported arbitration clauses that are in writing but not signed by the parties and declined jurisdiction by referring the parties to arbitration based on the more-favorable-right

[333] For example, a country has adopted the UNCITRAL Model Law in respect of Article 7 to give a wide interpretation to writing requirement of arbitration agreements or such a country is a member states of the United Nations Electronic Communications Convention, which directly recognize arbitration agreements in electronic form.

[334] Although it is a general trend that countries accept arbitration agreements in electronic form, there is still a possibility when a country strictly conforms with the narrow interpretation of Article II(2) of the New York Convention.

[335] See Poudret & Besson (n 312) 151.

provision, in this instance, Cayman Islands Law.[336] A similar opinion has been shared by the German court when determining the formal validity of an arbitration clause.[337] The court held that the arbitration clause contained in an unsigned confirmation letter between two traders was valid under the less strict formal requirements of German law in accordance with the more-favorable-right provision although there was no arbitration agreement in writing under Article II of the New York Convention.

141. Despite being used by some national courts such as France, the Netherlands and Germany[338], this approach has not yet been accepted universally by national courts as it may generate negative jurisdictional conflicts,[339] hence depriving the parties of redress to both litigation and arbitration. Moreover, the application of the more-favorable-right provision depends largely on whether the forum where the referral or enforcement is sought has its own rules for referral to international arbitration and enforcement of foreign arbitral awards. [340] Where one party decides to rely on the more-favorable-provision in national laws when evaluating their arbitration agreement, the party shall be aware of the fact that an award might later fall outside the scope of the New York Convention.[341]

142. Above, I have discussed two alternatives for interpreting the scope of "arbitration agreement in writing" more broadly. The first option was to refer to interpret the writing requirement in the New York Convention by relying on other, more modern, legal instruments such as the UNCITRAL Model Law on International Commercial Arbitration and through the application of the UNCITRAL Model Laws on Electronic Signature and E-commerce. The second option was to accept a more favorable view of the formal validity requirements through the more-favorable-right provision in Article VII paragraph 1 of the New York Convention and thus by relying on more favorable national laws on the writing requirement of the arbitration

[336] Netherlands No. 33, *Not indicated v. Ocean International Marketing B.V.* (Netherlands), Not indicated and others, Rechtbank [Court of First Instance], Rotterdam, 194816/HAZA 03-025, 29 July 2009, Yearbook Commercial Arbitration XXXIV (2009) 722-732.
[337] Germany No. 139 *Claimant v. Defendant*, Bundesgerichtshof, 30 September 2010, Yearbook Commercial Arbitration XXXVI (2011) 282-283.
[338] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 2016, 298-299.
[339] Poudret and Besson (n 301) 151: While the foreign court may refuse the jurisdiction over the dispute by applying its more liberal national law on the formal requirements of an arbitration agreement, the arbitrator seized with an arbitration application may also set aside the application based on the more restrictive law of the seat. This would cause the disputes being rejected by both jurisdictions.
[340] Van den Berg (n 307) 44.
[341] Berger, *International Economic Arbitration* (n 292) 135. Once an enforcing party intends to rely on other laws or treaties, it must rely on such sources in their entirety and may not combine elements of such laws or treaties with the Convention.

agreements.

B. Formal requirement of mediation agreements

143. In contrast with the legislation on the arbitration agreement, the legislation on international mediation agreements is still in its infancy. Furthermore, only a few countries have national legislation on mediation. Professor Nadja Alexander summarized that while the Common Law jurisdictions (such as the United States, Australia, Canada, England and Wales) have encouraged the development of mediation, Civil Law jurisdictions (such as Germany, Australia, Denmark, Scotland, Italy, France and Switzerland) have displayed a reluctance to embrace the practice of mediation to settle legal disputes.[342] Legislation on mediation should preserve the flexible and democratic nature of the mediation. On the one hand, countries begin to adopt legislation on mediation as a response to concerns raised by practitioners that mediation agreements alone do not completely fulfill the needs of the parties and therefore some legislation on mediation agreements is required.[343] On the other hand, mediation is based on the consent of the parties and thus the legislation needs to preserve the flexibility of mediation.[344]

144. A mediation agreement (or "an agreement to mediate") can also take the form of a mediation clause in a main contract or of a separate mediation agreement before or after disputes arise.[345] In the absence of a national legal framework on mediation agreements, the form thereof is generally regulated by general contract law. Other forms of regulation of the mediation agreement can be found in the UNCITRAL Model Law on International Commercial Conciliation and in institutional mediation rules issued by international dispute resolution institutions.[346]

145. At the international level, the UNCITRAL Model Law on International Commercial Conciliation is an international instrument that harmonizes the procedural rules of alternative

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[342] Nadja Alexander, *Global Trends in Mediation* (Second Edition) Volume 1 of *Global Trends in Dispute Resolution*, 6-7.
[343] Guide to Enactment and Use of UNCITRAL Model Law on International Commercial Conciliations, paragraph 11.
[344] *Ibid*.
[345] 'Part II, 6th Scenario: The Proposal to Mediate (Getting to the Table)' in Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (Third Edition) (Kluwer Law International 2015), 127.
[346] Klaus J. Hopt and Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford 2013) 147.

dispute resolution by a third-party neutral such as a mediator or a conciliator.[347] It has only been adopted by 15 countries and therefore it has not achieved the same worldwide influence as the UNCITRAL Model Law on International Commercial Arbitration.[348] No stipulations can be found in the UNCITRAL Model Law on International Commercial Conciliation with regard to the formal requirements of a mediation agreement. The UNCITRAL Model Law on International Commercial Conciliation only recognizes the legal effect of the parties' agreement to mediate and not to initiate, during a specified period of time until a specific event occurred, arbitration or judicial proceeding, with respect to an existing or future dispute.[349] Therefore, the formal requirements to mediation agreements are instead prescribed by ADR institutional rules[350] and national legislation. Agreements to mediate can be concluded both the pre-dispute stage and post-dispute stage.

a. Pre-dispute agreement to mediate

146. If the parties have already agreed on an agreement to mediate before any dispute arises, the party/parties need to submit a written request to the mediation institution to initiate the mediation proceedings when the disputes arise. The institutional rules do not provide any formal requirements to the mediation agreement so long as the existence of such an agreement can be proved by the parties.[351] Although it is not mandatory to have the mediation agreement in writing, it is a good practice to have a written agreement that records the terms and bases of mediation to avoid any possible misunderstanding about the basis on which the mediation was undertaken.[352]

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[347] "Conciliation" is used here as a broader concept including conciliation, mediation, neutral evaluation, mini-trial or similar terms. It refers to parties request a third party or persons to assist them in their attempt to reach an amicable settlement of their disputes and such third party or persons do not have the authority to impose upon the parties a solution to the disputes. (Article 1(3) of UNCITRAL Model Law on International Commercial Conciliation, 2002). Note that the UNCITRAL Model Law on International Commercial Conciliation has been amended in 2018 and the term "mediation" is now used instead of "conciliation".

[348] The status in enactment of UNCITRAL Model Law on International Commercial Conciliation 2002, < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html>.

[349] UNCITRAL Model Law on International Commercial Conciliation 2002, Article 13 (which turns into Article 14 in the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation).

[350] LCIA Mediation Rules: Article 1 & 2, ICC Mediation Rules: Article 2 & 3, and CEA Mediation Rules: Article 1, Mediation Rules of Singapore International Mediation Center, Article 3; Singapore Law Society Mediation Rules, Article 2&3.

[351] Similar requirements can be found in Article 3.1 of Mediation Rules of Singapore International Mediation Centre of 2014, where the evidence of the mediation agreement shall be attached with the request for mediation without any stipulation to the formal requirements to the agreement.

[352] Brown and Marriott (n 184) 178.

b. Post-dispute agreement to mediate

147. Institutional rules provide alternatives to parties when there is no agreement to mediate before disputes arise.[353] In cases where there is no prior agreement to mediate, the party/parties who would like to resolve disputes through mediation must submit a written request to the mediation institution and a post-dispute agreement to mediate will be concluded. The mediation institution will contact the other parties and provide them with a time limit to see whether they agree to use mediation. If all the parties agree to submit their disputes to mediation by a mediation agreement or if the other parties notify the mediation institutions with an affirmative approval to mediation, the mediation proceeding will commence on the date when the mediation institution sends written confirmation to the parties that an agreement to mediate has been reached[354] or when the mediation institution has received the consent of the other party to mediate.[355] If on the contrary, there is no agreement to mediate reached by the parties, the proceedings will not commence.

148. It is not surprising that with the development of information technology, mediation agreements can be concluded via electronic communications. For example, it is accepted that the submission of a mediation request is to be conducted in electronic form and signed by the authorized representative.[356] The legal systems offer parties a significant degree of autonomy as far as the agreement to mediate is concerned so that the legal practice in this area is shaped less by legislation but rather by legal practices.[357]

3.1.1.2. European legal instruments on ADR agreements

A. European Convention of International Commercial Arbitration [358] ("Geneva Convention")

149. Besides all being members of the New York Convention, most EU member states are also

[353] See ICC Mediation Rules, Article 2 and 3; CEA International Mediation Rules, Article 1; SIMC Mediation Rules, Article 3.
[354] ICC Mediation Rules, Article 3.3; Mediation Rules of Singapore International Mediation Center, Article 3.4.
[355] LCIA Mediation Rules, Article 2.5; Singapore Law Society Mediation Rules, Article 3.3.
[356] See Article 1 of the CEPANI (Centre belge d'arbitrage et de médiation, Belgian Arbitration and Mediation Center) Mediation Rules of 2013.
[357] Klaus J. Hopt & Felix Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford 2013) 55.
[358] European Convention of International Commercial Arbitration of 1961, Geneva, April 21, 1961, United Nations, Treaty Series, vol. 484, 364 No. 7041 ("Geneva Convention").

signatories of the Geneva Convention.[359] Compared with the New York Convention, the scope of the formal requirements for the arbitration agreement in the Geneva Convention is defined more extensively. Besides legitimizing the writing agreement by signature and through the exchange of letters and telegrams, Article I(2)(a) of the Geneva Convention has added two other forms: a communication by tele-printer and any other forms authorized by member states provided that the national laws among these states do not require an arbitration agreement in writing. The language of Article I(2)(a) should be construed broadly as comprising other modes of communications, provided that the transmission of messages can prove the parties' consent to arbitration.[360] The Austrian court has confirmed the formal validity of an arbitration agreement between a Swiss seller and an Austrian buyer through the exchange of telexes based on Article II(2) of the New York Convention by reference to the Geneva Convention.[361] The court held that the exchange of telegrams should be considered similar to an exchange of telexes as is done explicitly in the Geneva Convention. The Geneva Convention, in addition to the New York Convention, has provided a supplementary interpretation on the arbitration agreement by giving a wider scope of formal requirements if the parties to the arbitration agreements are both residents of the signatories of the Geneva Convention.

B. EU Mediation Directive

150. Mediation, as a means of ADR, has been harmonized at the EU level to resolve cross-border civil and commercial disputes. Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters ("EU Mediation Directive") aims "to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings."[362] The EU Mediation Directive sets out basic procedural requirements (such as the requirement on the extension of the limitation period and the confidentiality requirement)

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[359] Except for Cyprus, Estonia and Lithuania, see status on the signatories of the European Convention on International Commercial Arbitration.
<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en> assessed February 9, 2016.

[360] Dominique Hascher, "European Convention on International Commercial Arbitration of 1961: Commentary" (Yearbook Commercial Arbitration Volume XXXVI (2011) 515.

[361] Austria No. 2 / *E1, P.-A.G. v. V.*, Oberster Gerichtshof, 17 November 1971 in Pieter Sanders (ed), Yearbook Commercial Arbitration (1976) Volume I, 183. Similar opinions were expressed in Spain No. 30bis / E13, *Thyssen Haniel Logistic International GmbH v. Barna Consignataria SL*, Tribunal Supremo [Supreme Court], 14 July 1998 (2001), Yearbook Commercial Arbitration Volume XXVI 851-853 and Italy No. E16, *Agrò di Reolfi Piera & C snc v. Ro Koproduct oour Produktiva*, Corte di Cassazione [Supreme Court], 11261, 15 October 1992, Yearbook Commercial Arbitration (1995) Volume XX 1061-1066.

[362] Commission Directive 2008/52/EC of 21 May, 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136/3 ("Mediation Directive") Article 1.

to ensure the quality of the mediation in cross-border disputes. The EU Mediation Directive helps facilitate mediation in cross-border disputes, though leaving member states the freedom to develop their own national mediation system. The EU Mediation Directive does not provide any formal requirements regarding the mediation agreements, which can be viewed as providing flexibility to mediation agreements and encouraging the development of mediation in different jurisdictions. Instead, mediation agreements are regulated by the member states within the legal framework of national contract laws. It is specifically mentioned in Recital 9 that the EU Mediation Directive should not prevent the use of modern communication technologies in the mediation process, thus encouraging the use of electronic communication to facilitate mediation.

3.1.1.3. The English legislation on the formal validity of e-ADR agreements

151. I will conduct a study of the formal validity of ADR agreements in national legal systems, by examining the English law. More specifically, I will conduct an analysis of the arbitration agreement and the mediation agreement, respectively representing the adjudicative and non-adjudicative (consensual) ADR agreements. I will start with the arbitration agreement.

152. In England, the arbitration agreement is regulated by the Arbitration Act 1996.[363] The English Arbitration Act has not followed the UNCITRAL Model Law on International Commercial Arbitration with respect to the writing requirement, instead, the writing requirement is a must if parties want to exercise their rights under the Arbitration Act 1996.[364] An arbitration agreement that is not in writing might, however, be valid under Common Law, which falls out of the scope of the Arbitration Act 1996.[365] Section 5 (2) of the Arbitration Act 1996 has stipulated the writing requirement as an obligatory requirement to the arbitration agreement. According to the Act, an arbitration agreement is in writing:

> *"(i) if the agreement is made in writing (whether or not it is signed by the parties),*
> *(ii) if the agreement is made by exchange of communications in writing, or*
> *(iii) if the agreement is evidenced in writing."*

153. The Arbitration Act 1996 gives a broad interpretation of the concept "agreement in writing."

[363] Arbitration Act 1996, Chapter 23 (17th June 1996).
[364] Arbitration Act 1996, Section 5(1) and Section 81(2)(a). In Common Law, writing is not a pre-requisite condition for contract. Part I Arbitration Pursuant to an Arbitration Agreement of the Arbitration Act 1996 does not apply if the agreement is not in writing.
[365] Neil Andrews, *Arbitration and Contract Law: Common Law Perspectives* (Springer 2016) 25.

It does not even require signatures in a written agreement, and thus deviates from the strict interpretation of Article II (2) of the New York Convention.[366] Arbitration agreements that are "incorporated by reference," "evidenced in writing," and came into existence through the "exchange of written submissions" are also recognized as an "agreement in writing."[367] This broad interpretation of an agreement in writing also takes into consideration the evolving development of recording and therefore "writing" includes recording by any means.[368] Through this broad interpretation, as well as from relevant cases[369], arbitration agreements in electronic communications are also recognized in England.

154. In England, the EU Mediation Directive is transposed by the amendments to the Rules of Civil Procedure[370] and by the adoption of the Cross-Border Mediation Regulations 2011 ("Regulations 2011").[371] Both the Rules of Civil Procedure and the Regulations 2011 are related to the procedural matters within the scope of the Mediation Directive without specifying any formal requirements of a mediation agreement. The mediation agreement is not regulated by other specific statutes, following instead the rules of contract law.[372] In general, English contract law does not provide for specific formal requirements.[373] Instead, contracts can be concluded in different forms without complying with special formalities.[374] However, there are certain exceptions in which contracts are required to be in writing such as a deed of pledge, a consumer credit agreement or an agreement for the sale or disposition of land.[375] Therefore mediation agreements can be concluded in any form (in writing or orally) in English law as

[366] See DAC (Department Advisory Committee) Report on Arbitration Bill 1996, paragraph 34. The UK legislator agrees with the non-exclusive interpretation of the arbitration agreement in writing from the wording "shall include".
[367] Arbitration Act 1996, Section 5 (3)-(5).
[368] DAC Report on Arbitration Bill 1996, paragraph 34; Arbitration Act 1996, Section 5(6).
[369] Arbitral awards that are made by English tribunals give electronic arbitration clauses definite legal effect. See *Charterer v. Shipowner*, note (308); *Hong Kong Shipping Company v Dubai Company*, May 2015, where a London arbitration tribunal rendered an arbitral award based on an arbitration agreement by exchange of emails between the parties in the absence of a signed agreement that was later supported by the UAE Court of Appeal. ("Dubai court issues landmark judgment recognizing and enforcing a foreign arbitral award" <http://www.hfw.com/Dubai-court-issues-landmark-judgment-recognising-and-enforcing-a-foreign-arbitral-award-September-2015> accessed February 12, 2016.
[370] The Civil Procedure (Amendments) Rules 2011, SI 2011/88, Practice Direction 78-European Procedures, Rules 78.23-78.28.
[371] Giuseppe de Palo & Mary B. Trevor, EU Mediation Law and Practice (Oxford 2012) 378.
[372] 'Chapter 4: Pre-Mediation II: Mediation Clauses and Agreements to Mediate' in Nadja Alexander, *International and Comparative Mediation, Global Trends in Dispute Resolution*, Volume 4 (Kluwer Law International 2009) 174.
[373] Edwin Peel, *The Law of Contract*, thirteenth edition (Sweet & Maxwell 2011) 188.
[374] Neil Andrews, *Contract law* (Cambridge University Press 2011) 8.
[375] Statute of Frauds 1677, CHAPTER 3 29 Cha 2 provides requirements for the written contracts: "No Action against Executors, upon a special Promise, or upon any Agreement, or Contract for Sale of Lands, unless Agreement, be in Writing and signed."

long as the intention of the parties can be proved. The same is true for a mediation agreement formed through electronic communication.

155. As a conclusion, as regard the arbitration agreements, the written form is still required although such requirement can be interpreted in a broad way including any other means that can be recorded. As far as the mediation agreement is concerned, there is no formal writing requirement if there is evidence to prove the mutual consent of the parties to enter into such agreements. Although electronic communications have not been specifically stipulated in legislation, English laws use a pragmatic approach to assimilate e-ADR agreements into the contract law regime by admitting their effectiveness in practice.

3.1.1.4. Formal validity requirement of e-ADR agreement in China

156. There is no legislative instrument regarding ADR in general, however, China has recently reformed and improved its ADR system to overcome the conflict between the growing number of disputes and the limited judicial resources. The Supreme People's Court has issued a judicial interpretation in the document called "Several Opinions on the Relationship between Litigation and ADR" (the ADR Opinion).[376] The ADR Opinion addresses a wide range of ADR mechanisms and emphasizes the interplay between court proceedings and ADR mechanisms in order to provide greater flexibility and efficiency in dispute resolution. The Electronic Signature Law of the PRC has established a "writing requirement" in the electronic environment, that any data message being able to show the content in a specific form and that is accessible for subsequent uses at any time shall be regarded as complying with the writing formal requirement as prescribed by laws and regulations.[377]

A. Arbitration agreement

157. In China, Article 16 of the Arbitration Law of the PRC[378] stipulates that the arbitration agreements shall be in the form either of an arbitration clause in an underlying contract or in the form of a submission agreement in written forms before or after disputes arise. A valid arbitration agreement shall be composed of three essential elements: the consent of the parties

[376] Certain Opinions of the Supreme People's Court on the Establishment and Improvement of a Mechanism for Dispute Resolution through a Combination of Litigation and Non-Litigation Strategies Opinion, Fa Fa [2009] No. 45 (ADR Opinion).
[377] Electronic Signature Law of the People's Republic of China, Order No. 18 of the President of the PRC, effective from April 1, 2005 and amended on April 24, 2015, Article 4.
[378] Arbitration Law of the People's Republic of China, Order No. 31 of the President of the PRC, effective from September 1, 1995, Article 16 (PRC Arbitration Law).

to arbitration, the matters to be referred for arbitration, and a designated arbitration institution. The third element, a designated arbitration institution, imposes an extra formal requirement on the parties and is criticized by commentators and practitioners as being inconsistent with the party autonomy of the arbitration.[379] Those who criticize the extra formal requirement believe that as long as the parties have expressed their consent to arbitration, the arbitration agreement should be upheld. In order to mitigate the strict validity requirement on "designation of an arbitration institution", if an arbitration institution is not correctly designated in the arbitration agreement but a specific arbitration institution can be determined, such specific arbitration institution shall be deemed to have been designated.[380]

158. The scope of "other written forms" in the Arbitration Law of the PRC is further defined as: "including arbitration agreements concluded in forms as a written agreement, a letter, or electronic data text (including telegram, telex, facsimile, electronic data interchange, and e-mail)."[381] This is in accordance with the writing requirements in the Contract Law of the PRC and the Electronic Signature Law of the PRC.[382] The Chinese legislators have incorporated electronic communications into the writing requirements on arbitration agreements by the Judicial Interpretation on PRC Arbitration Law. Case law[383] has also confirmed that electronic arbitration agreements are accepted by the people's court. In *Ningbo Hegao Magnetic Technology Co., Ltd. v. Google Inc.*, Zhejiang Higher People's Court recognized an arbitration clause in click-wrap agreements between Ningbo Hegao Magnetic Technology Co., Ltd. ("the plaintiff") and Google Inc. and Google Ireland Limited ("the defendants"), therefore rejecting the jurisdiction and referring the parties to arbitration. In *H & C S Holdings Pte Ltd v. Ri Zhao Zhong Rui Wu Chan Co., Ltd.*, Shandong Province Higher People's Court has also upheld an arbitration agreement exchanged via emails between the parties.

159. Guangzhou Arbitration Commission's Online Arbitration Rule provides a wide range of formal

[379] Wei Sun & Melanie Willems, *Arbitration in China* (Kluwer Law International 2015) 26. In the absence of a designation arbitration institution in the arbitration agreement, people's court will not give judicial support to the arbitration agreement even if parties give their consent to arbitration.
[380] Judicial Interpretation of the Supreme People's Court on Several Issues with respect to the Application of the PRC Arbitration Law, Fa Shi [2006] No. 7, Article 3. ("Judicial Interpretation on PRC Arbitration Law")
[381] Judicial Interpretation on PRC Arbitration Law, Article 1.
[382] Contract Law of the People's Republic of China, Order No. 15 of the President of the PRC, effective from October 1, 1999 (PRC Contract Law); Electronic Signature Law of the PRC (n 377).
[383] *Ningbo Hegao Magnetic Technology Co., Ltd. v. Google Inc., et al.*, (2012) Zhe Xia Zhong Zi No. 21; *H & C S Holdings Pte Ltd v Ri Zhao Zhong Rui Wu Chan Co., Ltd*. (2015) Lu Min Xia Zhong Zi No. 199.

requirement for the arbitration agreements,[384] including both arbitration agreements in paper form or in electronic form, and arbitration agreements signed before or after the dispute arises. It also allows parties to conclude an arbitration clause in the terms of service agreement of a website.

160. In China, B2C arbitration agreements follow the same formal requirements as B2B arbitration agreements, as stipulated by Article 16 of the Arbitration Law of the PRC. Although arbitration is recognized as a redress for consumers to resolve disputes with traders,[385] in reality, it is not widely used by the parties.[386] In China, parties are reluctant to use arbitration in consumer disputes because of the strict formal requirement on arbitration agreements and the high cost of the arbitration.[387]

B. Mediation agreement

161. Although there are different types of mediation in China,[388] in the context of e-commerce disputes, the mediation agreement of people's mediation (especially with regard to industrial mediation) and commercial mediation will be mainly discussed hereunder in the subsections. While people's mediation is regulated by the People's Mediation Law, commercial mediation is unregulated and left to the institutional rules and general contract law rules.

a. Formal requirement of mediation agreement in people's mediation

162. People's mediation is conducted by the people's mediation committee to resolve civil disputes of the general public,[389] including communal disputes such as consumer disputes, neighboring disputes or family disputes.[390] People's mediation is regulated by the People's Mediation Law of the PRC ("PML"), effective from 2011. PML does not indicate any formal validity

[384] Guangzhou Arbitration Commission's Online Arbitration Rules, Article 4, <. http://www.gzac.org/WEB_CN/AboutInfo.aspx?AboutType=4&KeyID=100b1ae3-9f15-4bfc-bf59-a90273778fa5> accessed 25 November 2016.
[385] PRC Law on the Protection of Consumer Rights and Interests, Order No. 7 of the President of the PRC, effective from March 15, 2014, Article 39 (PRC Consumer Protection Law).
[386] Zhixiong Liao, 'The Recent Amendment to China's Consumer Law: An Imperfect Improvement and Proposal for Future Changes' (2014) Beijing Law Review 5, 167.
[387] Unless some arbitration institutions that have designate special charge rate for consumer disputes, most arbitration institutions in China have adopted same charge rate for consumer disputes. For example, the minimum case handling fee of a claim with the amount of less than RMB 1,000 is 3,100 RMB per case and the litigation handling fee for similar disputes is 50 RMB per case.
[388] See Section 2.3.3.2.A. .
[389] Jiaqi Liang, 'The Enforcement of Mediated settlement agreements in China' (2008) 19 American Review of International Arbitration 489, 495-496. The "mass public" is a concept referring to citizens of the PRC.
[390] Peter C.H. Chan, *Mediation in Contemporary Chinese Civil Justice* (BRILL 2017) 73. See also Section 2.3.3.2 A a.

requirement on the mediation agreement. The people's mediation proceedings can be initiated by the application of parties or be ordered *ex officio* by the people's mediation committee as long as no party rejects the mediation.[391]

163. With societal advancement and economic development, disputes have been extended to corporate entities and social organizations. The scope of people's mediation has also been expanded to include industrial mediation. Industrial mediation refers to mediation conducted by trade associations within certain business sectors. For example, there are industrial mediation committees established within banking, insurance, securities, medical services, transportation, Internet or construction industries.[392] In e-commerce disputes, various people's mediation committees are established to tackle disputes arising from e-commerce transactions.[393] The Association of E-commerce has established Electronic Commerce Association Mediation Center to handle disputes among members of the association.[394] Industrial mediation committees have laid down detailed procedural rules with regard to the proceedings, taking into account of modern communications. For example, the Mediation Rules of Beijing Mediation Committee on Insurance Contract Disputes[395] stipulates that parties can submit mediation applications in writing, by telephone, emails or in other ways. It is similarly indicated in the Mediation Rules of Chinese Securities Trade Association Disputes Mediation Center that the mediation applications can be submitted online through the Mediation Center's online platform, by telephone, postal mails, faxes, emails or other manners that are accepted by the Center.[396]

b. Formal requirement of mediation agreements in commercial (institutional) mediation

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[391] PML (n 252), Article 17.

[392] See 'Zhong Guo Shang Shi Tiao Jie Nian Du Guan Cha' [China Commercial Mediation Annual Observation] (2013) 33. （中国商事调解年度观察 2013 年）

[393] For example, Shenzhen Zhongxin People's Mediation Committee for e-commerce disputes， < http://odr.ebs.org.cn/> accessed December 29, 2018.（深圳众信电子商务纠纷人民调解委员会）

[394] China Electronic Commerce Association Mediation Center, <http://www.chinaodr.com/#page1> accessed 30 December 2018.

[395] Beijing Bao Xian He Tong Jiu Fen Tiao Jie Wei Yuan Hui Tiao Jie Gui Ze [Mediation Rules of Beijing Mediation Committee on Insurance Contract Disputes] < Beijing Mediation Committee on Insurance Contract Disputes>, Article 5, < http://wwww.biabii.org.cn/bjita_webmap/bjita_jftj/2008/07/24/cf3b9c1799cb48cdbc2972eb95b566df.html> accessed 21December, 2015. （北京保险合同纠纷调解委员会调解规则）

[396] Mediation Rules of Zhong Guo Zheng Quan Ye Xie Hui Zheng Quan Jiu Fen Tiao Jie Gui Ze [Chinese Securities Trade association Disputes Mediation Center], Article 5, < http://www.sac.net.cn/hyfw/zqjftj/tjgz/201602/t20160201_127044.html> accessed 18 February 2016. (中国证券业协会证券纠纷调解规则)

164. While people's mediation is used by the government as an effective tool to settle communal disputes, commercial mediation is completely based on party autonomy without any intervention by the government.[397] Commercial mediation agreement is not regulated by the PML but instead by the institutional rules of each selected commercial mediation institution and by the general principles of the PRC Contract Law. Commercial (institutional) mediation refers to the mediation conducted by private mediation institutions. The major types of disputes that Chinese commercial mediation institutions resolve are trade and contract disputes regarding investment, finance, intellectual property, technology transfer, real estate, transportation, insurance and other commercial and maritime matters.[398] The mediation agreement refers to a mediation clause clearly inserted in a contract or an agreement in any other forms by the parties to resolve disputes through mediation.[399] In commercial mediation, parties can either jointly submit an application based on a mediation agreement to the mediation institution or upon the application of one party and upon the consent of the other party.[400] In PRC Contract Law, the contracts can be concluded in written form, verbal form or any other form.[401] As the written form in PRC Contract Law already covers electronic communications, electronic mediation agreements have legal effect in China.

165. As a conclusion, the arbitration agreement in China is only valid in writing, as stipulated by the *Judicial Interpretation on PRC Arbitration Law*, including the modern electronic communications. There is no formal validity requirement to a mediation agreement in people's mediation.[402] While people's mediation allows parties to initiate the mediation by application in any form, commercial mediation requires a mediation agreement or a submission agreement, either in paper or electronic form.

3.1.1.5. Sub-conclusion

[397] Note that people's mediation committees may in some cases start the people's mediation without the objection of the parties.
[398] These commercial mediation institutions are for example, China Council for the Promotion of International Trade (CCPIT)/China Chamber of International Commerce (CCOIC) Mediation Center, Shanghai Commercial Mediation Center (SCMC), and Maritime Mediation Centers of China Maritime Arbitration Commission (CMAC).
[399] CCPIT/CCOIC Mediation Rules, Article 11 paragraph 2.
[400] CCPIT/CCOIC Mediation Rules, Article 11-15; BAC Mediation Rules, Article 5-11; SCMC Mediation Rules, Article 13.
[401] PRC Contract Law, Article 10.
[402] Carlos Esplugues, Louise Marquis, *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives* (2015) 6 Ius Comparatum-Global Studies in Comparative Law: Yuanshi Bu and Xuyang Huo, 'The Revival of ADR in China: The Path to Rule of Law or the Turn Against Law?' 207.

166. In arbitration agreements, the New York Convention and most national arbitration laws have a writing requirement on arbitration agreements. The interpretation of the scope of the writing requirement can be rather broad that it also embraces arbitration agreements concluded by electronic means. Countries have also enlarged the scope of "agreement in writing" by giving context to the non-exhaustive list of the writing requirements. Some UNCITRAL Model Law countries, such as Germany and Belgium, have discarded the writing requirement of arbitration agreements to allow flexibility in the form of arbitration agreements. Countries like Germany, the Netherlands and China have already incorporated electronic communications into the formal requirements of arbitration agreement.[403] Others such as England, have also accepted electronic arbitration agreements through broad interpretative notes on the writing requirements including recording by any means.

167. Given that no international legal instrument exists for the harmonization or cross-border recognition of mediation agreements, the formal validity requirements of the mediation agreements are provided by national contract laws and various institutional rules on mediation.[404] In national contract law regimes, the mediation agreement is left with room to develop without any formal restrictions. England, as a Common Law jurisdiction, adopts a functional approach that does not provide specific provisions in electronic contracts but instead assumes that electronic contracts are capable of fulfilling the statutory requirements in writing if they can be recorded and prove the consent of the parties. Chinese contract law, on the other hand, like other Civil Law jurisdictions, has accepted that contracts are validly concluded through electronic means.[405] In institutional mediation rules, to meet the due process requirement and serve the evidentiary purpose in practice, the written form of a mediation agreement is normally required regardless of whether a mediation agreement or a submission agreement is reached before or after disputes arise.

168. It is generally accepted that ADR agreements can be concluded in electronic form. In the absence of any stipulation regarding electronic communication in ADR legislation, e-ADR agreements can be recognized by national laws if such agreements use secured electronic communications (such as digital signatures, encrypted emails or platforms that are provided by ADR entities) and are recorded in a form that can be retrieved for subsequent purposes.

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[403] German Code of Civil Procedure (ZPO), Section 1031 (1)(5); Dutch Code of Civil Procedure, Article 4: 1021; Judicial Interpretation on PRC Arbitration Law, Article 1.

[404] Alexander (n 372) 174.

[405] PRC Contract Law, Article 10; German Civil Code (BGB), Section 126(3) and section 126(a), Dutch Civil Code, Article 6: 227 a(1).

3.1.2. Indirect formal validity requirements: ADR agreements concluded in electronic contexts

169. While direct legislation regulates e-ADR agreements through legislation on ADR, indirect legislation regulates e-ADR agreements through legislation on electronic communications. After analyzing the current legal framework on the regulation of formal validity of ADR agreements, this section will examine whether the formal requirements on ADR agreements under the current legal framework are sufficiently met in electronic communications.

170. Electronic communication means any communications that the parties make by means of data messages.[406] ADR agreements can be formed via means of electronic communication such as emails, website agreements or automated systems (such as electronic data interchange). These electronic data, to some extent, have the same function as paper documents recording the parties' intention and can also be used as evidence in legal proceedings. However, due to the fact that electronic documents are easily replicated and revised,[407] various authentication means (such as electronic signature, electronic seal and electronic time stamps) and regulations have been developed to ensure the integrity and authenticity of electronic data.

171. The UNCITRAL Model Law on E-commerce has established basic principles of non-discrimination, functional equivalence and technological neutrality to ensure the legal effects of data messages.[408] These principles are used to fill in the gap between the legal requirements of paper documents and electronic communications. A conservative view holds that "the written formal requirement of the New York Convention is fulfilled in electronic communications provided that 'signatures are electronically reliable or the effective exchange of electronic communications can be evidenced through other trustworthy means."[409] This section intends to discover how current legislation accommodates electronic communications to their legal framework which was adopted in the era of paper documents and how this impacts the development of e-commerce.

172. The electronic signature is one of the authentication means widely used to prove a person's

[406] United Nations Commission on International Trade Law, United Nations Electronic Communications Convention in International Contracts, Article 4(b).
[407] Changes to paper documents requires to rewrite the whole documents while the amendment to electronic documents does not need to retype the contents again.
[408] See section 2.2.1. Legal principles of electronic contract for details.
[409] International Council for Commercial Arbitration, 'Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges', 2011, 50 <www.arbitration-icca.org>. ("ICCA Guide to the Interpretation of the 1958 New York Convention")

approval to the content of a contract in electronic communication. The adoption of the electronic signature can improve the certainty and validity of electronic agreements. However, due to divergent national legislation on electronic signatures in each country, the validity of electronic agreements may also encounter challenges in cross-border transactions.[410] These challenges are due to the lack of a cross-border recognition scheme that applies to the electronic signature. In light of this deficiency, I will draw lessons from current legislation on electronic signature to reveal common elements in evaluating whether a certain type of authentication means is sufficient to prove the authenticity and integrity of electronic agreements.

173. Electronic signatures are used to prove both the identity of the parties and their consent to the information contained in electronic data. The electronic signature therefore plays an important role in authenticating the formal validity of e-ADR agreements. The following section will be structured as follows: First, a study of currently available legal instruments on electronic communication will be conducted in Section 3.1.2.1 to reveal the extent to which electronic communications are regulated. Second, the legal study will be focused on electronic signature legislation in the EU (Section 3.1.2.2), England (Section 3.1.2.3) and China (Section 3.1.2.4) respectively. The examination of different national legislation on electronic signature proves the need for common standards in cross-border recognition of electronic authentication means. Lastly, Section 3.1.2.5 indicates the current obstacles in the cross-border recognition of electronic signatures and provides guidance for the cross-border recognition of authentication means (in general) that are used to determine the authenticity and integrity of e-ADR agreements.

3.1.2.1. Legal framework of electronic communications

174. First of all, in Part A, the international legal instruments on electronic communications will be examined to establish the link between contracts in paper and contracts by electronic means. Secondly, in Part B, the concept of "data messages" will be introduced as electronic contracts are regulated in the form of data messages. Thirdly, in Part C, various authentication means are introduced to prove the evidentiary value of electronic contracts. Lastly, the legislation of electronic signature, which is one of the most widely used and regulated authentication means, will be explored to demonstrate how authentication means can be harmonized in law.

[410] Electronic agreements that are recognized in one country may not be accepted in another country due to various authentication requirements and evidential rules.

A. Indirect legislation on e-ADR agreements at the international level

175. There are several reasons to develop indirect legislation on electronic communications to assess the formal validity of e-ADR agreements. First of all, it is possible that the legislation on relevant substantive and procedural law is lagging behind the rapid development of technology. For instance, the international legal instruments such as the New York Convention were established in the context of the traditional forms of communications. An amendment of the New York Convention that would include other electronic forms seems unrealistic or at the very least inefficient as it would require the approval of all the member states. Similarly, the Italian Civil Code of Procedure, prior to its amendment in 2006, [411] did not explicitly accept electronic arbitration agreements, permitting arbitration agreements by telegrams and telefaxes. [412] Moreover, Common Law jurisdictions, such as England, use a functional approach to assess the validity of electronic contracts. Therefore, the English legislature found it was not necessary to amend their national legislation to specifically incorporate electronic contracts.[413] The use of indirect legislation could assist national courts in determining the evidentiary value of electronic documents. Finally, the indirect legislation promotes the standardization and harmonization of cross-border recognition of electronic agreements in electronic communications, enhancing the validity of e-ADR agreements.

176. In order to accommodate electronic communication means into the regulatory framework of ADR agreements, international legislation on electronic communications such as UNCITRAL Model Law on E-commerce, UNCITRAL Model Law on E-signatures and UN Electronic Communications Convention, as is shown below, has been established. In the absence of adaptations in direct legislation regarding electronic communications as a valid form for ADR agreements, indirect legislation on electronic communications offers conditions under which e-ADR agreements are perceived as legally equivalent to ADR agreements in paper form.

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[411] Poudret & Besson (n 301) 159.

[412] Italian Civil Code of Procedure of 2004 (Title VII of Book IV), Article 807: "The written formal requirement is considered complied with when the intention of the parties is expressed by telegram or telex." < http://www.arbitrations.ru/userfiles/file/Law/Arbitration%20acts/Italian%20Code%20of%20Civil%20Procedure.pdf> accessed 23February 2016. See Giuditta Cordero Moss, 'Risk of Conflict Between the New York Convention and Newer Arbitration-Friendly National Legislation?' (2003)2 Stockholm Arbitration Report 1, 11.

[413] See W. Harry Thurlow, 'Electronic Contracts in the United States and the European Union: Varying Approaches to the Elimination of Paper and Pen' 5 (2001) Electronic Journal of Comparative Law. See also the Law Commission Consultation Paper No. 237, 'Electronic execution of documents', 21 August 2018, 24. The Law Commission held that case laws have confirmed that electronic documents in general satisfy a statutory requirement for writing.

a. General regulation in the UNCITRAL Model Law on E-commerce

177. The UNCITRAL Model Law on E-commerce is used to remedy disadvantages stemming from the fact that inadequate national legislation for governing communication and storage of information at the national level created obstacles to international trade.[414] This law provides general principles and criteria to evaluate the legal nature and validity of information presented in electronic form. For example, in order for electronic communications to conform to the legal requirements set to regular contracts (in other words, the requirement that is traditionally stipulated in paper form), the Model Law has set out legal criteria for electronic contracts based on the principle of functional equivalence. [415] Electronic contracts must also meet the formal rules of "writing", "signature", and "original" to paper contracts.[416] Countries that have adopted the UNCITRAL Model Law on E-commerce[417] apply the functional equivalence principle when assessing the validity of electronic contracts, thereby filling the void in the law.

b. Specific regulation in the UNCITRAL Model Law on Electronic Signatures

178. The electronic signature is an effective tool available in most developed technology that can serve the functions of both party identification and electronic document authentication. The UNCITRAL Model Law on Electronic Signatures is a specific legal instrument that targets the electronic authentication method based on the connection between the signatories and the content of the data messages. Legislation based on the UNCITRAL Model Law on Electronic Signature has been adopted by 32 countries,[418] establishing a legal framework of electronic signatures to provide legal certainty for electronic contracts.

179. The UNCITRAL Model Law on Electronic Signatures, built on the fundamental principles underlying Article 7(1) of the UNCITRAL Model Law on E-commerce, establishes practical standards against which the reliability requirement for the electronic signatures can be measured. [419] Moreover, it provides for the cross-border recognition of electronic signatures

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[414] Guide to Enactment of the UNCITRAL Model Law on E-commerce, paragraph 3.
[415] See Section 45 for the explanations of these requirements.
[416] UNCITRAL Model Law on E-commerce, Article 6,7,8.
[417] See status of the UNCITRAL Model Law on E-commerce (1996), < http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html> accessed February 25, 2016.
[418] See status of the UNCITRAL Model Law on Electronic Signatures (2001), <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html> accessed February 25, 2016.
[419] UNCITRAL Model Law on Electronic Signatures (2001), Article 6(3); UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001, paragraph 4.

certified by a foreign certification service provider on the condition that a substantially equivalent level of reliability is provided.[420]

c. United Nations Electronic Communications Convention

180. As an alternative to the reliability requirement on electronic signatures, the United Nations Electronic Communications Convention sets out a functional approach in Article 9(3)(b)(ii). This article grants electronic signature the same legal effect as a handwritten signature if the identity of the party and its intention in respect of the information contained in electronic communication can be proven. The reliability requirement should not lead a court or a tribunal to invalidate the entire contract on the ground that the electronic signature was not appropriately reliable if there is no question as to the authenticity of the electronic signature.[421]

B. "Data messages" as carriers of electronic agreements

181. "Data message" refers to "information generated, sent, received or stored by electronic, optical or similar means including but not limited to electronic data interchange (EDI), electronic mail, telegram, telex, or telecopy."[422] Data messages are the carriers of electronic agreements as the offer and acceptance are both expressed in the form of data messages.[423]

182. Article 11 of the UNCITRAL Model Law on E-commerce indicates that the information contained therein shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.[424] It requires that "where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose." Giving legal effect to data messages does not mean that data messages will automatically acquire the same evidentiary value as the ones contained in a paper form document. A data message, in and of itself, cannot be regarded as an equivalent to a paper document because it is of a different nature and does not necessarily perform all the functions of a paper document.[425] Therefore, various authentication means have been applied to electronic data to fulfill a level of formal requirements distinct from paper documents.

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[420] UNCITRAL Model Law on Electronic Signatures (2001), Article 12 (2).
[421] Explanatory note on the United Nations Electronic Communications Convention, paragraph 164.
[422] UNCITRAL Model Law on E-commerce, Article 2(a).
[423] UNCITRAL Model Law on E-commerce, Article 11(1).
[424] UNCITRAL Model Law on E-commerce, Article 5. See Section 2.2.2.1.
[425] Guide to UNCITRAL Model Law on E-commerce, paragraph 17.

C. Authentication means of electronic agreements

183. Electronic authentication is the application of various secure electronic technologies to enable the electronic identification of a natural or legal person or establish the validity and assurance of data messages in electronic communications.[426] It has been used to establish the functional equivalence[427] between electronic agreements which carry data messages and paper contracts. Various authentication means can be used to prove the validity of e-ADR agreements due to the difficulties in proving the identity of the parties, the integrity of data messages, and time of contract conclusion in electronic contracts. Various authentication means are applied to prove the document is the original support of the information that it contains, in the form it was recorded and without any alternation.[428]

184. Although the electronic signature is the most well-known authentication means, there are other means used to verify the authenticity of data messages. Some focus on the identity of parties who produce data messages (such as password identification) and the relationship between the signatory and the data messages[429] (such as an electronic signature), while others emphasize the delivery time of the data messages (such as electronic timestamps). There is a tendency to use a combination of several electronic authentication means to ensure the security and validity of data messages.[430] Authentication mechanisms should be continuously upgraded to match the latest technological development so as to prevent fraud or other cybercrimes. The authentication means listed hereunder are selected from current technology in use[431] and can be applied to prove the authenticity of e-ADR agreements and parties' consent to the agreements.

a. Electronic signature and electronic seal[432]

185. Electronic signatures are used to demonstrate the intent of the signatories and to authenticate

[426] Council Regulation (EU) No 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in Internal Market and Repealing Directive 1999/93/EC [2014] OJ L 257/73, Article 3(5).
[427] See Section 2.2.2.3.
[428] United Nations, 'Promoting Confidence in E-commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods' (2009) 5.
[429] The relationship refers to the signatory has made declaration of accepting a statement which constitutes consent in contracts.
[430] *Ibid*, OECD Recommendation on Electronic Authentication and OECD Guidance for Electronic Authentication, 18.
[431] These authentication means have been stipulated by Council Regulation (EU) No 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in Internal Market and Repealing Directive 1999/93/EC [2014] OJ L 257/73.
[432] For example, Adobe Sign and GlobalSign provide electronic signature services to users.

data messages.[433] The electronic seal, which is based on a similar concept to the electronic signature, is used by legal entities. As a counterparty to the company stamp, electronic seals are used to authenticate data messages issued by a legal entity. Both electronic signatures and electronic seals are used to authenticate the identity of parties or information associated with a sender of the documents, be it a natural person or a legal entity.

186. In electronic agreements, the electronic signature and electronic seal can identify the parties to the agreement and prove that the parties have given their consent to the agreement by an authenticated signature or seal. The electronic signature, as the currently most effective authentication method, has been widely used and regulated in many countries.[434]

b. Electronic timestamp[435]

187. An electronic timestamp records the point-in-time of when an electronic document was created and ensures that it has not been changed since that point-in-time.[436] In other words, an electronic timestamp gives the electronic document a secure point-in-time. The time factor is an important pillar to the trustworthiness of the electronic documents. The electronic timestamp, in combination with the electronic signature or electronic seal, can be applied together to verify the contract conclusion time and ensure the integrity of an electronic agreement.

c. Website authentication[437]

188. Website authentication is to authenticate a website owner with a certificate and links such an authenticated website to the owner to whom the certificate is issued.[438] Website authentication assures visitors that the website is authentic and that there is a legitimate entity operating the website.[439] In electronic agreements that are concluded on a website,[440] website

[433] Stephen Mason, *Electronic Signatures in Law* (Cambridge University Press2012) 189.
[434] Summary of Responses to the Survey of Legal and Policy Frameworks for Electronic Authentication Services and E-signatures in OECD Member Countries of 15 July 2014 ("OECD Survey on Electronic Authentication Services and E-signature"), Annex B: virtually all OECD member countries have some form of legislative framework to provide for the legal effect of electronic signatures.
[435] For example, Universign <https://www.universign.eu/en/timestamp/ > provides timestamping services in all types of electronic files.
[436] European Commission Memo 12/403, Electronic Identification, Signatures and Trust Services: Questions & Answers, 4 June 2012.
[437] Major website authentication certificate issuers are for example: Comodo, Symantec, GoDaddy and GlobalSign.
[438] European Union Agency for Network and Information Security (ENISA), 'Security guidelines on the appropriate use of qualified website authentication certificates guidance for users' (version 2.0 December 2016) paragraph 3.1.
[439] See Electronic Identification, Signatures and Trust Services: Questions & Answers (n 436).
[440] Examples are click-wrap agreements and browse-wrap agreements.

authentication is essential for verifying the authenticity of the website and the identity of the website owner, who is usually a party to the agreement.

d. Electronic registered delivery service[441]

189. An electronic registered delivery service transmits data messages between parties by electronic means, provides evidence relating to the handling of the transmitted data including proof of sending and receiving the data messages, and protects transmitted data messages against the risk of loss, theft, damage or any unauthorized alternations.[442] Similar to registered mail in an offline environment, the registered electronic delivery service can provide parties with verifiable proof that the data messages have been delivered and received by the recipient in the electronic environment. In e-ADR agreements, an electronic registered delivery service can be used when parties sign the agreement not in different places and at different times.

D. The use of an electronic signature as a means to authenticate e-ADR agreements

190. There are different formal requirements stipulated by statutory contract law. The UNCITRAL Model Law on E-commerce stipulated three levels of formal requirements in paper documents (the writing requirement, the signature requirement and the originality requirement) and establishes the connection between the electronic formal requirement and paper formal requirement through the functional equivalence principle. The electronic signature is an effective authentication means which is often used to prove parties' consent to e-ADR agreements. The following analysis will be focused mainly on electronic signatures for several reasons.

191. First, many countries have already developed a legislative framework for electronic signatures based on the UNCITRAL Model Law on Electronic Signatures. A study on various legislative regimes for electronic signatures is especially helpful to assess how e-ADR agreements can be authenticated and what obstacles exist in the cross-border recognition of e-ADR agreements with electronic signatures. Second, the electronic signatures serve an evidentiary function[443] to indicate parties' consent to e-ADR agreements.

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[441] LaPoste (La Lettre recommandée en ligne) in France and De-Mail in Germany provide electronic registered services.

[442] Council Regulation (EU) No 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in Internal Market and Repealing Directive 1999/93/EC [2014] OJ L 257/73 (eIDAS Regulation), Article 3(36).

[443] United Nations, 'Promoting Confidence in E-commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods' (2009) 4.

a. Definition of electronic signature

192. Electronic signature means "data in electronic form, affixed to or logically associated with a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message."[444] Electronic signatures have different forms and are attached to data messages to prove that the owner of an electronic signature approves of the content of that data message.

b. Types of electronic signature

193. Electronic signatures can be categorized into different types depending on the authentication technologies that are used to validate the data messages. The forms of electronic signatures that are listed hereunder are not exhaustive. Different types of electronic signatures can be used in combination to enhance the security and reliability of electronic documents.

(i). Scanned or typed signatures

194. A scanned signature is a manuscript signature to be scanned from the paper carrier and transformed into digital form.[445] It is widely used in commercial activities where marketing documents are sent to potential customers with a scanned signature of the manager.

195. A typed signature is a signature being typed in an electronic form, such as in email correspondence or website agreements. It allows signatories to be distinguished by the typed names. However, both scanned and typed signatures are simple forms of electronic signatures which can be easily copied and used by others without the authorization of the name owners.

(ii). Biometric authentication

196. Biometric authentication is to identify the person through his or her physical and behavioral characters such as fingerprints, hand geometry or facial characteristics, voice or handwriting. These methods enable the recipient of data messages to verify the identity of the originator by comparing data regarding the physical characters of that person with the data previously stored by the recipient.[446]

(iii). Password or Personal ID number (PIN)

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[444] UNCITRAL Model Law on Electronic Signatures (2001), Article 2.
[445] Mason, n (433) 253.
[446] Rob van Esch, 'Electronic signatures: A survey of the directive and the legislation in the United Kingdom and the Netherlands' 30 in Henk Snijders and Stephen Weatherill, *E-Commerce Law: National and Transnational Topics and Perspectives* (Kluwer Law International 2003).

197. The users who have the password or the PIN provide a form of assurance that he/she is the authorized person. Password and PIN are both used to control the access to information and to sign in electronic communications. It is more commonly used for authentication, for instance, in online banking, cash withdrawals, and credit card transactions.[447] Entering the username and password to access a website is also a way to sign if agreements are formed on a website. Once the username and password match the corresponding pair stored in the server, the user will have access to the website.

(iv). SMS based authentication

198. The SMS (Short Message Service) based authentication uses mobile phones to verify the identity of the signatories. A text message with a random and one-time password will be sent to the signatory's mobile phone and once the signatory has entered the correct password, the authentication is accomplished.

(v). Cryptographic authentication

199. "Cryptographic technology," as defined by Adikesavan, is "the science of converting the 'original text' into 'encoded text' by using algorithms."[448] It is used to prevent information from being discovered by other unauthorized parties. There are two types of cryptography: the symmetric and asymmetric cryptography. The symmetric cryptography (secret key cryptosystem) uses the same type of key codes to encrypt and decrypt data messages. The key codes need to be kept the secret to ensure security. The symmetric cryptography is usually fast and efficient, but not as secure as the asymmetric cryptography. The asymmetric cryptography (public key cryptosystem), on the other hand, uses different key codes (a private key to encrypt and a public key to decrypt) data messages.

200. A digital signature is a certain type of electronic signature, which uses public key cryptography technology to generate two different but mathematically related keys. [449] One such key is used to create a digital signature or transform data into an unintelligible form, and the other is used to verify a digital signature or convert the unintelligible form to its readable form.[450] There is a third party (certificate authority) who acts as a trusted intermediary in the digital signature

[447] Promoting Confidence in E-commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods, (n 443) 29.
[448] T.A. Adikesavan, *Management Information System: Best Practices and Applications in Business*, second edition, (PUI Learning Private Limited 2014) 250.
[449] Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures (2001) paragraph 36.
[450] *Ibid.*

authentication process between the signatory creating the signature and the recipient verifying the signature.[451] The certificate authority is the entity that issues certificates to the recipients.[452] Such certificates associate a public key with a particular signatory. The recipient of the certificate who relies on a digital signature created by the signatory can use the public key listed in the certificate to verify if the digital signature was created by the signatory and whether the data has been modified.[453]

c. "Electronic signature" as an analogy to "handwritten signature"

201. There are three basic functions of a handwritten signature: (i) to identify the signatory; (ii) to be used as evidence; and (iii) to attribute the signatory to the content of the documents.[454] The legal requirements on electronic signature are provided to ensure that these functions can also be performed by electronic signatures.[455]

202. The UNCITRAL Model Law on E-commerce has established general conditions for authenticating data messages with electronic signatures: to identify the person, to indicate his/her approval of the content of the data messages, and to be as reliable as appropriate for the purpose for which the data message was created or communicated.[456] These general conditions, however, cannot provide electronic signatures with evidentiary value but general validity. In contrast with the UNCITRAL Model Law on E-commerce, the Model Law on Electronic Signatures is expected to create a preference over certain techniques, which are recognized as particularly reliable and are presumably equivalent to handwritten signatures.[457] These requirements fill in the gap between electronic signatures and handwritten signatures. Electronic signatures are as reliable as appropriate for the purpose for which the data message was generated or communicated if the following four conditions are met[458]:

(i). The signature creation data are, within the context in which they are used, linked to the signatory and no other person;

203. This requirement is in line with the identification function of a handwritten signature. It

[451] Per Kaijser, 'On Authentication, Digital Signatures and Signature Laws' (1999) Joint Working Conference on Secure Information Networks: Communications and Multimedia Security 117, 120.
[452] UNCITRAL Model Law on Electronic Signatures, Article 2 (e).
[453] Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures (n 449) paragraph 53.
[454] Promoting Confidence in E-commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods (443) 5.
[455] This is in accordance with the functional equivalence principle. See Section 2.2.2.3.B. .
[456] UNCITRAL Model Law on E-commerce, Article 7(1).
[457] Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures (n 449) paragraph 118.
[458] UNCITRAL Model Law on Electronic Signatures, Article 6 paragraph 3.

requires that their linkage between the signatory and the signature is unique. While electronic creation data are shared by several persons, the data must be capable of identifying one user unambiguously in the context of each electronic signature.[459]

(ii). The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

204. The handwritten signature provides certainty as to the personal involvement of that person in the act of signing. This requirement is to ensure the electronic signature is associated with the signatories only.

(iii). Any alteration to the electronic signature, made after the time of signing, is detectable; and

205. This is the integrity requirement on the electronic signature. It is used to ensure that the electronic signature serves the same function as a handwritten signature to prove the integrity of the signature.

(iv). Where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

206. This is an additional requirement related to the integrity of the information to which the electronic signature is attached as the handwritten signature does not have such a similar function. This is intended for the use of electronic signatures in those countries where existing rules could not accommodate a distinction between the integrity of the signature and the integrity of the information being signed. [460]

207. These four conditions serve as the legal basis for national legislators to establish the linkage between certain types of electronic signatures with technical characteristics and handwritten signatures. Digital signatures, for instances, are granted with the legal presumption that they are equivalent to handwritten signatures in many countries.[461]

d. Legislative approach to electronic signature

208. Depending on the requirements established for electronic signatures, the national legislation

[459] Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures (n 449) paragraph 121.
[460] Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures (n 449) paragraph 125.
[461] All the EU member states have adopted this legal presumption. See Mason (n 433) 166.

system regarding electronic signatures has been divided into three branches by scholars:[462] the minimalist approach, the prescriptive approach, and the two-tiered approach.[463]

(i). Minimalist approach

209. With the minimalist approach, countries do not accord any particular technology preference for electronic signatures and set forth only minimum requirements on electronic signatures. This approach applies both the principle of technological neutrality and the principle of non-discrimination so that a certain type of electronic signature shall not be deprived of legal effect solely because of its electronic form.

210. The UNCITRAL Model Law on E-commerce also takes this approach in Article 7 which sets forth only general principles of electronic signatures. The minimalist approach does not prescribe any rights or obligations to the parties involved in electronic signatures (the signatories, the recipients, and the certificate authorities). It is for the national courts or other adjudicative bodies to determine whether certain types of electronic signatures have legal effects equal to those of handwritten signatures.[464] Countries that follow the minimalist approach are mostly the Common Law countries, such as the United Kingdom (before 2002),[465] the U.S., Australia, and Canada.[466] The minimalist approach focuses on the intent of the signatories rather than developing detailed rules on the forms of electronic signatures.[467]

211. As there are no restrictions among different types of electronic signatures, this approach promotes the development of different types of electronic signatures in practice. Nevertheless, the minimalist approach has been criticized for its lack of certainty and predictability. Brazell sees this approach as the barrier to cross-border transactions as the convergence of consistent

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[462] Stephen Mason, *Electronic signatures in law* (Cambridge University Press 2012) 154; Babette P Aalberts and Simone Van Der Hof, 'Digital signature blindness analysis of legislative approaches to electronic authentication' (2000)7 EDI Law Review 1, 15-29; Susanna Frederick Fischer, 'Saving Rosencrantz and Guildenstern in a Virtual World--A Comparative Look at Recent Global Electronic Signature Legislation' (2001)7 BUJ Sci & Tech L 229, 229; Maurice HM Schellekens, 'Electronic Signatures. Authentication technology from a legal perspective' (2004) IT&Law, 56-57.

[463]Promoting Confidence in E-commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods (n 443), 36-41.

[464]Promoting Confidence in E-commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods (n 443), paragraph 88.

[465] In 2002, Electronic Signatures Regulations 2002 was adopted to implement the EU Electronic Signatures Directive, taking a two-tiered legislative approach.

[466] Mason (n 433) 159-161.

[467] Chris Kuner et al, 'An Analysis of International Electronic and Digital Signature Implementation Initiatives: A Study Prepared for the Internet Law & Policy Forum (ILPF)', September 2000, < http://www.ilpf.org/groups/analysis_IEDSII.htm> accessed 25 February 2016.

guidance on the validity of electronic signatures by the courts is a slow process.[468] Moreover, even if such guidance has been developed, it may vary from jurisdiction to jurisdiction.

(ii). Prescriptive approach

212. The prescriptive legislation requires the use of a specified technology (asymmetric cryptography) for electronic signatures. This approach generally provides that only digital signatures are acceptable as a form of electronic signature and it excludes other means of electronic signatures. Digital signatures were seen as the most widely used and universally accepted means for authenticating electronic documents.[469] The legislation following the prescriptive approach also imposes obligations and liabilities on the certification authorities. Countries that adopt the prescriptive approach are usually Civil Law jurisdictions such as Germany (before 2001),[470] Italy,[471] and Argentina.

213. Although the prescriptive approach brings more certainty to the requirements for electronic signatures and enhances the security of electronic signatures, it lacks flexibility and restricts the use of other types of electronic signatures. Also, the application of digital signature has encountered challenges due to the complexity of the public key cryptosystem.[472] Therefore, other types of electronic signatures such as passwords and PINs, have gained popularity in the market.[473] In 2010, only 29% of enterprises in the EU made use of digital signatures for their computerized activities according to EUROSTAT statistics with the use of digital electronic signatures appearing much less than expected.[474] Therefore, the prescriptive approach that is reliant solely on the digital signature is not sufficient for meeting the various demands of electronic transactions. Depending on the nature, frequency and value of the commercial

[468] Lorna Brazell, *Electronic Signatures and Identities: Law and Regulation*, 2nd ed, (Sweet & Maxwell 2008) 3.
[469] Minyan Wang, 'Do the regulations on electronic signatures facilitate international e-commerce? A critical review' (2007) 23 Computer Law & Security Report 35.
[470] German Digital Signature Act 1997 (Signaturgesetz). German Electronic Signatures Act (2001) was adopted to implement EU Electronic Signatures Directive which recognizes three types of signatures: electronic signatures, advanced electronic signatures and qualified electronic signatures. The Act on Adaptation of Civil Law Formal requirements and other Statues to Modern Legal Transactions (2001) recognizes the validity of qualified electronic signatures to satisfy the legal requirement of a handwritten signature, which has been materialized in Section 126a of the German Civil Code.
[471] Italian Digital Signature Law No. 59 of 15 March 1997. Both the German and Italian legislation on electronic signature changed after the Directive on Electronic Signature came into effect.
[472] The reluctance to use the public key cryptosystem is due to the difficulty in the process of obtaining a digital signature certificate. See Aashish Srivastava, *Electronic Signatures for B2B Contracts: Evidence from Australia* (Springer Science & Business Media 2012) 72.
[473] Commission Report on the Operation of Directive 1999/93/EC on a Community Framework for Electronic Signatures, COM(2006), paragraph 3.3.2.
[474] Impact assessment on electronic identification and trust services for electronic transactions in the internal market, COM(2012) 238, 65; Commission Report on a Community Framework for Electronic Signatures (n 473), paragraph 5.2.

transactions, digital signature can be replaced by other types of electronic transactions.

(iii). Two-tiered approach

214. The two-tiered legislation creates a legal presumption in favor of one technology (mostly asymmetric cryptosystems) but also admits other means of electronic signatures. It combines the characters of both the minimalist approach and the prescriptive approach. The UNCITRAL Model Law on Electronic Signatures is a typical legal instrument that adopts the two-tiered approach. Article 6 paragraph 1 has established the general rule of electronic signatures by granting electronic signatures general legal effects. Article 6 paragraph 3 has added provisions relating to the reliability of electronic signatures and has indicated a preference for digital signatures. Digital signatures are provided with higher legal effects than other types of electronic signatures. Countries that have adopted a two-tiered approach include, for example, China and EU member states. The two-tiered approach is a preferred one and widely accepted legislative approach because it not only takes into account the need to give the legal equivalent of a specific type of electronic signatures to the handwritten signature that is specified by statutes but also allows the use of other types of electronic signatures.

3.1.2.2. The EU legislative framework of electronic communications

215. At the EU level, there are two legal instruments that are relevant to the validity of electronic communications in cross-border transactions. The EU Directive 2000/31/EC on Certain Legal Aspects of Information Society Services[475] ("ECD") provides general principles on the regulation of information society services that partly regulate contracts concluded by electronic means. The Commission Directive 1999/03/EC on a Community Framework of Electronic Signatures ("ESD") intended to regulate electronic signatures in order to reduce the barriers to electronic transactions in the EU internal market. Given the development of other new authentication technologies and the interoperability problem in the ESD,[476] a new legal instrument (Regulation on Electronic Identification and Trust Services for Electronic Transactions in Internal Market, hereinafter "eIDAS Regulation") has been introduced to

[475] Commission Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular e-commerce, in the Internal Market [2000] OJ L 178 ("Directive on E-commerce").

[476] Although the ESD establishes a legal framework to promote the interoperability of electronic signatures within the EU, there are no specific technical standards to establish such interoperability. Interoperability of electronic signatures encounter challenges such as differences in legal recognition, missing quality criteria and lack of trust in implementations of different member states. See Study on Cross-Border Interoperability of eSignatures, 7 (CROBIES) (A report to the European Commission from SEALED, time.lex and Siemens (Version 1.0, 2010)).

replace the ESD. The following section will first approach the EU legislation on ECD and ESD (repealed by the eIDAS Regulation)[477] and then explore the cross-border recognition of qualified trust services in the EU.

A. ECD

216. As indicated in recital 8, the ECD aims to promote the free movement of information society services in the internal market. The EU member states may not restrict the freedom of electronic service providers to provide information society services from another member state. Information society service includes any services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.[478] This broad category includes not only the online sale of products but also the provision of services through the Internet. It covers both B2B and B2C information society transactions. E-ADR agreements as part of electronic sales contracts or service contracts are also regulated by the ECD.

217. The ECD does not provide specific rules on electronic formal requirements but leaves the member states to set their own formal requirements on electronic contracts. This is due to the reluctance of the European legislators to interfere with national contract laws.[479] Article 9 of the ECD requires that the Member States ensure that their legal system allows contracts to be concluded by electronic means with permitted exceptions in certain contracts.[480] The legal requirements applicable to the contractual process shall neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity because of their electronic means.[481] Thus, electronic contracts are granted equal legal effects as other contracts.

B. ESD and eIDAS Regulation

a. ESD

[477] Both the ESD and eIDAS Regulation will be discussed as eIDAS Regulation is established based on the ESD. It also shows how the EU legislation develops from electronic signatures to other types of trust services that can be used to authenticate data messages in electronic form.
[478] Commission Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services [1998] OJ L 204, Article 1(2).
[479] Jane Kaufman Winn & Jens Haubold, 'Electronic Promises: Contract Law Reform and E-Commerce in a Comparative Perspective' 27(5) (2002) European Law Review 567, 579.
[480] The permitted exception is indicated in the list of Article 9 (2) of the Directive on E-commerce which includes real estate contract, rental contract, contract involving public authorities, contract of suretyship and on collateral securities furnished by persons outside of his trade, contract of family law or succession law.
[481] Directive on E-commerce, Article 9.

218. The ESD aimed to facilitate the use of electronic signatures by allowing the free movement of electronic products and services across the border and ensuring a basic legal recognition of electronic signatures.[482] Electronic signatures were divided into three categories in ESD: the (simple) electronic signature, the advanced electronic signature and the qualified electronic signature.[483] According to the non-discrimination principle, none of these three types of electronic signatures shall be denied legal effects or held inadmissible simply because of their electronic forms.[484]

219. The electronic signature was generally defined in the ESD as: "data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication."[485] This constituted the basic requirement of all types of electronic signatures including the (simple) electronic signature (such as a scanned copy of handwritten signature) and served to identify and authenticate data messages without any further secured technology requirements.

220. The advanced electronic signature had stricter requirements than the (simple) electronic signature as the following requirements were added:

"*(i) it is uniquely linked to the signatory;*

(ii) it is capable of identifying the signatory;

(iii) it is created using means that the signatory can maintain under his sole control; and

(iv) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable."[486]

The criterion of "advanced electronic signature" was similar to the reliability requirement stipulated in Article 6 paragraph 3 of the UNCITRAL Model Law on Electronic Signatures. This definition referred mainly to electronic signatures based on a public key infrastructure that uses encryption technology to sign electronic data.[487] The use of asymmetric encryption

[482] Commission Report on the Operation of Directive 1999/93/EC on a Community framework for Electronic Signatures, COM (2006) 120, paragraph 2.3.1. ("Commission Report 2006 on the Operation of ESD")
[483] Note that these three categories of electronic signatures have been kept in the eIDAS Regulation which repeals the ESD.
[484] ESD, Article 5(1).
[485] ESD, Article 2.
[486] ESD, Article 2 paragraph 2.
[487] Commission Report 2006 on the Operation of ESD, paragraph 2.3.3.

technology ensures higher security of the electronic signature.

221. The qualified electronic signature, for which the ESD did not provide a term of its own,[488] was the advanced electronic signature based on a qualified certificate and created by a secure-signature-creation device complying with the requirements in Annexes I, II and III of the ESD. The legal effect of a qualified electronic signature was greater than other types of electronic signatures because it was presumed to meet the same requirements of a handwritten signature and was admissible as evidence in legal proceedings.[489] The practical problem of the qualified electronic signature was due to its high cost.[490] Nevertheless, the qualified electronic signature can save parties costs and efforts in proving the evidentiary value of electronic signature before a court while other types of electronic signatures are not granted the same legal effect as handwritten signatures.[491]

222. Apart from giving legal effect to electronic signatures, the ESD also facilitated the free movement of certification services and certification-service-providers. It was stipulated in the ESD that the certification services provided by certification-service-providers in one member state shall not be restricted in another member state so long as these services were covered by the ESD.[492] It showed the EU's determination to promote the free movement of electronic signatures. However, due to a divergence on the certification requirements of electronic signatures in different member states, the cross-border recognition of electronic signatures has encountered difficulties. According to the Commission Report 2006 on the Operation of the ESD, it was found that although the national transposition of the ESD confirmed the legal recognition of electronic signatures in general, problems of mutual recognition and the interoperability have influenced the cross-border movement of electronic signatures.[493] The accreditation scheme established at the national level has enhanced trust at the expense of interoperability.[494] The foreign certification-service-providers were less likely to seek

[488] Qualified electronic signature is a term used to refer to electronic signatures that are based on qualified certificates and are created by a secure-signature-creation device. This term is used by the eIDAS Regulation instead.
[489] ESD, Article 5 paragraph 1.
[490] Pawel Krawczyk, 'When the EU Qualified Electronic Signature Becomes an Information Service Preventer' (2010) 7 Digital Evidence and Electronic Signature Law Review 7, 13.
[491] ENISA, 'Security guidelines on the appropriate use of qualified website authentication certificates guidance for users' (n 438) 21.
[492] ESD, Article 4.
[493] Commission Report 2006 on the Operation of ESD, paragraph 3.3.2.
[494] Feasibility Study on an Electronic Identification, Authentication and Signature Policy, SMART 2010/0008, 49.

voluntary accreditation in other member states. At the EU level, there were initiatives[495] to tackle the interoperability problems in technical standards of electronic signatures. However, these initiatives were insufficient to completely resolve the interoperability problem given the increasing number and complexity of the technical standards.[496]

b. eIDAS Regulation repealing the ESD

223. Although the ESD established common standards for cross-border electronic signatures, it was difficult to achieve the goal of a free circulation of electronic signatures in the EU market due to a lack of uniform assurance level for qualified electronic signatures. Moreover, the ESD was limited to electronic signatures and therefore did not include other types of trust services (website authentication, electronic seals or timestamp, etc.), which are also used to authenticate electronic documents.[497] Given the use of other types of trust services and in the absence of harmonized rules on these trust services, a new barrier to cross-border trade in the internal market has appeared. The Regulation on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market (eIDAS Regulation)[498] was drafted in 2012 to tackle the barrier in the mutual recognition of e-identification and authentication in the EU Digital Agenda.[499] It has been adopted by the EU legislature on 23 July 2014 and repealed the ESD.

224. The new regulation has three innovations. Firstly, the eIDAS Regulation has used the legislative form of "regulation" instead of "directive" to enact a directly applicable effect.[500] When the EU legal instruments serve as directives setting out the general objectives of the action, member states have discretions over implementation. The EU regulations, in contrast, come into effect immediately and member states do not have the power to alter the contents of the regulation.

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[495] The Commission issued a mandate to the European Standards Organizations to carry out the standardization work. European Electronic Signature Standardization Initiative (EESSI) was set up and produced standards for electronic signature products and services.

[496] Study on Cross-border Interoperability of eSignatures (n 476) 13-14.

[497] Feasibility Study on an Electronic Identification, Authentication and Signature Policy, SMART 2010/0008, 44-46.

[498] Council Regulation (EU) No 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in Internal Market and Repealing Directive 1999/93/EC [2014] OJ L 257/73 (eIDAS Regulation).

[499] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, 'A Digital Agenda for Europe' COM (2010)245 final. Key Action 16 of the Digital Agenda is to ensure mutual recognition of e-identification and e-authentication across EU based on online authentication services to be offered in all member states.

[500] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/172, Article 288 paragraph 2 and 3.

225. Secondly, in view of the existence of other authentication services, the EU legislature broadens the legal framework on electronic signatures.[501] With regard to electronic signature, the eIDAS Regulation does not change much the existing rules in the ESD with respect to the three types of electronic signatures.[502] The eIDAS Regulation creates a legal framework of trust services including electronic signatures[503] and seals, time stamps, electronic documents as well as electronic registered delivery services and certificate services for website authentication. The term "trust-service-providers" is used to replace "certificate-service-providers" which was only applicable to electronic signature. The eIDAS Regulation is more technology neutral as it integrates electronic signature with other authentication technologies into the legislative regime.

226. Thirdly, the mutual recognition of trust services has been enhanced in the eIDAS Regulation to promote the use of electronic trust services in cross-border transactions. In the ESD, although a qualified electronic signature has equal legal effect as a handwritten signature at the national level,[504] there was no mechanism to recognize qualified electronic signatures in cross-border transactions at the EU level. The eIDAS Regulation includes the mutual recognition of electronic identification and electronic trust services, which are key enablers for secured cross-border electronic transactions.[505] The eIDAS Regulation has established minimum requirements on electronic trust services and the mutual recognition principle to ensure a cross-border recognition of qualified trust services. The mutual recognition principle of qualified trust services will facilitate the formal validity assessment of cross-border e-ADR agreements. An e-ADR agreement that is authenticated by the qualified trust services in one member state shall also be automatically recognized in another member state if such trust services have met the minimum requirements in the eIDAS Regulation. However, the recognition of qualified trust services from third countries is not included in the mutual recognition mechanism of the eIDAS Regulation and therefore a recognition agreement between the EU member state and the third country is still required.[506]

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[501] Jos Dumortier and Niels Vandezande, 'Trust in the proposed EU regulation on trust services?' (2012)28 Computer Law & Security Review 568, 571.
[502] Jos Dumortier, 'Regulation (EU) No 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market (eIDAS Regulation)' in Arno R. Lodder and Andrew D. Murray (eds), *EU Regulation of E-commerce: A Commentary* (Edward Elgar 2017) 279.
[503] Note that electronic signature may now only be used by individuals while in the ESD it can be used by both individuals and legal entities. See Article 3(9) of the eIDAS Regulation.
[504] ESD, Article 4.
[505] Gert Heynderickx, 'Next Step to Create the Digital Single Market: EU Lawmakers Adopt the New Regulation on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market', European Payments Council Newsletter, 31October, 2014.
[506] eIDAS Regulation, Article 14.

c. Cross-border recognition of qualified trust services

227. In the eIDAS Regulation, the three types of electronic signatures are preserved from the ESD: the (simple) electronic signature, the advanced electronic signature, and the qualified electronic signature. Before the eIDAS Regulation, the names of various types of electronic signatures in different member states are not uniformed due to the various transposition of the ESD. In England, for example, electronic signatures have wide coverage, regardless of the kind of forms and types of technologies used. In Germany, there is a fourth type of "qualified electronic signature with accreditation" (*qualifizierte elektronische Signaturen mit Anbieter-Akkreditierung*).[507] As the eIDAS Regulation is now directly applicable in the EU member states, it replaces the inconsistent national laws and uniforms the regulation of electronic signatures in the EU.

228. Moreover, the eIDAS Regulation has established the cross-border recognition scheme of qualified trust services including electronic signatures, seals, time stamps, registered delivery services, and website authentication services. Before the eIDAS Regulation, although the ESD ensured that a qualified electronic signature has the equivalent effect of a handwritten signature, it did not touch upon the technical standards of a qualified electronic signature.[508] The legal consequence of a qualified electronic signature was determined in accordance with the technical standards in national law, resulting in interoperability problems.[509] However, the divergent legal recognition of foreign electronic signatures can be harmonized through the application of the eIDAS Regulation. An interoperability framework has been established by the eIDAS Regulation at the EU level to ensure the security assessment of qualified electronic signature and seal creation services is conducted under common standards.[510] A qualified electronic signature has the legal equivalence of a handwritten signature and is admissible as evidence in legal proceedings. Accordingly, e-ADR agreements with qualified electronic signatures or other qualified trusted services will be able to obtain cross-border recognition in the EU under the eIDAS Regulation.

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[507] German Electronic Signature Act, Section 15.1: "Qualified electronic signature with accreditation" refers to the qualified signature which is issued by a certification-service-provider who has been accredited to a voluntary accreditation scheme.

[508] Feasibility Study on Electronic Identification Authentication and Signature Policy, 53.

[509] Carolina M Laborde, *Electronic signatures in international contracts* (Peter Lang 2010) 75.

[510] eIDAS Regulation, Article 12; Commission Implementing Decision (EU) 2016/650 of 25 April 2016 laying down standards for the security assessment of qualified signature and seal creation devices pursuant to Article 30(3) and 39(2) of the eIDAS Regulation, OJ L 109/40.

3.1.2.3. The English legislation in electronic communications

229. The following study will be conducted on the transposition of the ECD, ESD and eIDAS in England to assess how the indirect legislation in electronic communications may influence the formal validity of e-ADR agreements. England is an interesting example for the study due to its implementation of the EU law and the fact that it uses a functional approach, which focuses on the signatory's intent, to authenticate the document rather than the form in which electronic documents are made.

A. Implementation of EU legal instruments in England

a. Implementation of ECD

230. The E-commerce Regulations[511] were enacted in England to implement ECD. E-commerce Regulations apply to online activities with a commercial nature, but do not apply to taxation, data protection, competition, and public services such as notaries, legal services and activities wagering a stake with monetary value such as a lottery.[512]

231. The E-commerce Regulations did not transpose Article 9(1) of the E-Commerce Directive, which requires member states to ensure that their law allows contracts to be concluded by electronic means. England believed that the majority of their legislation for the formal requirements of writing or signature is already capable of being fulfilled by electronic communications.[513] Section 8 of the Electronic Communications Act permits statutory provisions to be amended in order to authorize or facilitate the use of electronic communications. However, there are rare amendments to relevant statutory instruments under Section 8 probably because the functional approach is sufficient to embrace electronic communications in the existing statutory formal requirements.[514]

b. Legislative framework of electronic signatures in England

232. In England, two legal instruments are used to implement the ESD: Electronic Communications Act 2000 and Electronic Signatures Regulations 2002. The Electronic Communications Act 2000 adopts a minimalist approach to electronic signature and enables the appropriate Minister

511 The E-commerce (EC Directive) Regulations 2002 No. 2013 ("E-commerce Regulations").
512 E-commerce Regulations, Regulation 3 (1).
513 A Guide for Business to the Electronic-Commerce Regulations 2002 (SI 2002/2013), paragraph 5.15.
514 English Law Commission, E-commerce: Formal Requirements in Commercial Transactions (2001), 19 <http://www.lawcom.gov.uk/wp-content/uploads/2015/09/electronic_commerce_advice.pdf> accessed April 26, 2017; Mehta v. J. Pereira Fernades S.A. [2006] EWHC 813 (Ch) paragraph 30.

to make orders modifying legislation to authorize or facilitate the use of electronic communications.[515] The Electronic Signatures Regulations 2002 implements the advanced signature requirement by particularizing the liability of certification-service-providers.

233. The Electronic Communications Act 2000 ("ECA") has regulated the admissibility of electronic signatures as evidence in court proceedings in Section 7 but it does not deal with the validity of electronic signatures. However, the legal effectiveness and evidentiary value of electronic signature shall be determined by the court on a case-by-case basis.[516] Electronic signatures are not delineated into different forms in the ECA.

234. "Electronic signature" is defined broadly including anything in electronic forms[517]:

(i) that are incorporated in or associated with an electronic communication or electronic data and;

(ii)that can be used to establish the authenticity[518] or the integrity[519] of the electronic communication or data.

The first requirement indicates the function of the electronic signature and the second requirement illustrates the purpose of the electronic signature.

235. The Electronic Signatures Regulations 2002 ("ESR")[520] implemented the ESD with regard to the requirements of advanced signatures. The ESR imposed duties on a registry to supervise over certification-service-providers and listed liabilities of these certification-service-providers in certain circumstances.[521] The ESR implemented the framework of digital signatures in the ESD.

236. Departed from other EU member states, both the ECA and the ESR have not implemented the concept of "qualified signature" as stipulated in Article 5.1 (a) of the ESD. In the English law, a handwritten signature is already capable of being satisfied by an electronic signature,

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[515] Electronic Communications Act 2000 (Chapter 7) (ECA), Section 8 (1).
[516] Dr O. A. Orifowomo and J. O. Agbana ESQ., 'Manual signature and electronic signature: significance of forging a functional equivalence in electronic transactions' (2013)24 International Company and Commercial Law Review, 366.
[517] Electronic Communications Act 2000 (Chapter 7) (ECA), Section 7 (2).
[518] ECA, Section 15(2): The authenticity standard requires that the communication or data comes from a particular person, accurately timed and dated and intended to have legal effect.
[519] ECA, Section 15(2): The integrity standard requires there have been no tampering with or other modification of the communication or data.
[520] Electronic Signatures Regulations 2002, No. 318.
[521] Explanatory note to Electronic Signatures Regulations 2002, Regulation 3 and 4.

including an advanced electronic signature.[522] Neither ESR nor ECA has established the cross-border legal recognition regime of foreign electronic signatures.

c. Implementation of eIDAS Regulation

237. The Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 (the "new regulations") have been promulgated to implement the eIDAS Regulation of the EU level.[523] The new regulations have repealed the ESR and amended the ECA.[524] Qualified certificates issued before 1 July 2016, under the ESR, are considered qualified certificates for electronic signatures under the new regulation until their expiry.

238. Owing to the direct legal effect of eIDAS Regulation, a qualified electronic signature based on a qualified certificate issued in one member state shall be directly recognized in all other member states. The new regulation has broadened the scope of Section 7 of the ECA by adding other trust services (electronic seal, electronic timestamp, electronic delivery service and website authentication) in addition to electronic signature.

B. Functional approach in the admissibility of electronic signatures by English courts

239. Electronic signatures that are incorporated into or logically associated with a particular electronic communication or particular electronic data and that possess certification by any person of such a signature are admissible as evidence with respect to any question regarding the authenticity or integrity of an electronic communication or data.[525] The ECA covers all types of electronic signatures, regardless of what type of technologies are used (such as typing the name into an email containing terms of a contract, pasting a scanned signature, or using a touchscreen to write the name electronically). However, the ECA does not provide to what extent the electronic signatures will satisfy the statutory signature requirement because it is up to the court to determine the evidentiary weight of electronic signatures in England.[526] This is due to the fact that the Common Law jurisdiction takes a functional approach towards the forms of the contract, focusing on the intention of the parties rather than on the form of their acts.[527] It will be for the court to decide in the case before it whether an electronic signature has been

[522] Department for Business Innovation & Skills, Electronic Signatures Guide, September 2014, 5.
[523] The Electronic Identification and Trust Services for Electronic Transactions Regulations, 2016 No. 696, S.I. 2015/1770.
[524] *Ibid*, Regulation 4.
[525] ECA, Section 7(1).
[526] Mason (n 433) 144.
[527] Promoting Confidence in E-commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods (n 443) 48-49.

correctly used and what legal effect should be given to it (e.g. the authenticity or integrity of a message).[528] Case laws also confirmed that electronic signatures can serve the same function as handwritten signatures even in cases where statutory requirements of signatures are imposed.[529] In what follows, I will discuss how these different forms of electronic signatures have met the statutory signature requirements in a guarantee agreement and a consumer credit agreement respectively.

a. Mehta v. J. Pereira Fernades S.A.[530]

240. Mr. Mehta, the director of Bedcare Company, asked a member of his staff to send an email to JPF company's solicitors for a personal guarantee on Bedcare's debt owed to JPF. JPF accepted and agreed to the proposal by telephone. A claim was brought against Mr. Mehta for the guarantee. Mr. Mehta argued against the claim as JPF failed to produce any signed agreement (because such an agreement did not exist). According to Section 4 of the Statute of Frauds,[531] a guarantee agreement shall be valid in writing and signed by the guarantor. Judge Pelling QC held that a party can sign a document for the purpose of Section 4 by using his full name or his last name prefixed by some or all of his initials or using his initials and possibly by using a pseudonym or a combination of letters and numbers, if provided with the intention to give authenticity to it.[532]

241. There was no name or initial appearing at the end of the email or anywhere else in the body of the email. Although emails can meet the purpose of Section 4 of the Statutes of Frauds 1677, no valid guarantee agreement was concluded because an automatically inserted email address did not demonstrate the sender's intention to be bound by the terms of the correspondence and did not constitute the signature requirement of guarantee agreement in the Statue of Frauds. However, based on this decision, it was still not clear as to what kind of email meets the statutory signature requirements. It was not until *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd.* that this issue was clarified.

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[528] Explanatory Notes on ECA, paragraph 43.
[529] Section 4 of the Statute of Frauds 1677 requires a guarantee to be in writing and signed by the guarantor; Section 2 of the Law of Property Act 1989 requires a contract for the sale or other disposition of an interest in land to be in writing and signed; under Section 83 of the Bills of Exchange Act 1882, a promissory note must be in wring and signed by the maker; etc.
[530] *Mehta v. J. Pereira Fernades S.A.* [2006] EWHC 813 (Ch).
[531] Statutes of Frauds, 1677 CHAPTER 3 29 Cha 2.
[532] *Mehta v. J. Pereira Fernades S.A.* (n 530) paragraph 26.

b. Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd.[533]

242. In the following case, a dispute arose from a charterparty between Golden Ocean Group Limited (owner of the vessel) and Trustworth Shipping Pte Ltd (charterer). The charterparty did not include a guarantee clause. According to Golden Ocean, Salgaocar Mining Industries Ltd (SMI) was the guarantor of the charterer based on a series of documents authenticated by the signature of the guarantor. When Trustworth repudiated the charterparty, Golden Ocean sought to recover from SMI under the guarantee contract. SMI contended that the guarantee was unenforceable under the Statute of Frauds. SMI denied the guarantee contract claiming that there was no agreement in writing or with signatures indicating assent to that agreement. Lord Justice Tomlinson denied the claim, holding that a series of electronic messages could lead to the conclusion of an agreement in writing for the purposes of the Statute of Frauds although it was not contained in a single document. Lord Justice Tomlinson also concluded the guarantee contract was signed simply by the fact that the email by which the guarantee contract was concluded contained the name "Guy" (as the chartering broker of the transaction).[534] The broker put his name on the email so as to indicate that it came with his authority and that he took responsibility for the contents. Thus, the typing of a name in an email can satisfy the requirement of signature in Section 4 of the Statute of Frauds.

243. The above two cases demonstrated that English courts take a functional approach when assessing the validity of electronic signatures. The validity of an electronic signature depends on whether it has satisfied the functions of a signature (demonstrating an authenticating intention), rather than whether the form of such a signature has been recognized by law.[535] Even if certain types of agreements are regulated by various statutes (the Statute of Frauds, Consumer Credit Act, etc.) with a formal requirement, these agreements can still be satisfied by an electronic signature provided that such an electronic signature can attribute a particular person to the contents of the agreement and indicate the person's approval of the contents. It does not matter how the electronic signature is inserted, nor does it matter in what form that signature was inserted.[536] This is in accordance with Article 9(3)(b)(i) of the UN Electronic Communication Convention on the functional value of the electronic signature. The preference

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[533] *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265 (Golden v Salgaocar).
[534] *Ibid*, *Golden v Salgaocar*, paragraph 31.
[535] E-commerce: Formal Requirements in Commercial Transactions (n 514) 15.
[536] The Law Society, 'Execution of a document using an electronic signature', 21 July 2016 < https://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-a-document-using-an-electronic-signature/#esi4> accessed April 25, 2017.

of function over forms of electronic signature can promote the use of different types of electronic signatures and facilitate electronic transactions as the use of advanced electronic signatures with certificates is too costly for small value contracts. However, there is also a security concern with (simple) electronic signatures and therefore a case-by-case functional analysis is required.

3.1.2.4. Chinese legislative framework of electronic communications

A. Legislative framework in electronic signature

244. By 2013, the e-commerce revenue of the Chinese B2C market had reached 301 billion U.S. dollars according to the statistics published by the United Nations Conference on Trade and Development in 2015.[537] Due to the fast-growing e-commerce market, it is necessary for the legislation on e-commerce and electronic signature. The legal framework of electronic communications in China is composed of Electronic Signature Law of the PRC (PESL),[538] and the Administrative Measure on Electronic Certification Service (AMECS) .[539] In the following section, I will examine the legal status, scope of application, type and cross-border recognition of electronic signature in China.

a. Validity of electronic signatures

245. The PRC Contract Law[540] allows for different forms of contracts: contracts can be formed in written, verbal or any other forms.[541] Besides the statutory requirements, the written form can also be agreed by the parties in contracts.[542] Parties may also agree to use the electronic signature to conclude contracts. The PESL acknowledged that the legal effect of electronic signature shall not be denied simply based on its form.[543] This is in line with the functional equivalence principle (equivalent to writing) in the UNCITRAL Model Law on E-commerce.

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[537] UNCTAD, 'Information Economy Report 2015: Unlocking the Potential of E-commerce for Developing Countries', < http://unctad.org/en/PublicationsLibrary/ier2015_en.pdf> accessed April 15, 2015.
[538] Electronic Signature Law of the People's Republic of China, Order No. 18 of the President of the PRC, effective from April 1, 2005 and amended on April 24, 2015. ("PESL")
[539] Administrative Measures for Electronic Certification Services, Order No. 29 of Ministry of Industry and Information Technology, effective from March 31, 2009 and amended on April 29, 2015.
[540] The PRC Contract Law was enacted in 1999 by integrating three former contract laws covering domestic economic contracts, foreign-related[540] economic contracts and technology contracts.
[541] PRC Contract Law, Article 10.
[542] The written formal requirements are imposed, for example, in loan contract, lease contract with a term of over 6 months, financial lease contract, construction contract, technology development contract, guarantee contract, etc.
[543] PESL, Article 3, paragraph 2.

246. The evidentiary value of an electronic signature is established by the *Judicial Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC.* Electronic data is defined as "information generated or stored in an electronic medium through emails, electronic data interchange, online chatting records, blogs, micro-blogs, mobile phone short text messages, electronic signatures, domain names, etc."[544]

b. Application scope of electronic signatures

247. The first legal instrument regulating the legal requirements of electronic data is the PESL. The PESL adopted the two-tiered legislation approach and established its law based on the UNCITRAL Model Law on Electronic Signatures. [545] Electronic signature in the PESL is defined as "data in electronic form in or affixed to a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message."[546] The PESL underlines the basic functions of an electronic signature, which are to those stipulated in the UNCITRAL Model Law on Electronic Signatures. However, restrictions are made to the application scope of electronic signatures in China.[547] Such restrictions reveal the conservative attitude of Chinese legislators towards electronic signatures with special considerations for certain types of contracts.

c. Types of electronic signatures in China

248. Although electronic signatures are not divided explicitly into different forms in the PESL, a distinction has been made between legal effects of the "(simple) electronic signature" and the "reliable electronic signature" based on Article 13 and Article 14 of the PESL. "Reliable" electronic signatures are given the same legal effect as handwritten signatures or company seals.[548] Therefore, the legal effect of a reliable electronic signature is higher than that of a (simple) electronic signature. There are two types of reliable electronic signatures stipulated by the PESL: the statutory reliable electronic signature and the reliable electronic signature agreed by the parties.

249. The statutory requirements of "reliable electronic signatures" are stipulated in Article 13 of the

[544] Judicial Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC, Article 116.
[545] Mason (n 433) 165.
[546] PESL, Article 2.
[547] PESL, Article 3, paragraph 3: Electronic signatures are excluded to be used in documents concerning personal relations, transfer of properties, land or houses, terminating energy supply agreement and any other circumstances prescribed by laws or regulations.
[548] PESL, Article 14. In China, seal is also a valid form to authenticate a contract.

PESL, which are in accordance with Article 6 paragraph 3 of the UNCITRAL Model Law on Electronic Signatures.[549] Besides the statutory requirement on reliable electronic signatures, parties are also free to agree on the reliability conditions of electronic signatures by agreement.[550]

250. Different from the ESD, the PESL does not grant any special legal effect to electronic signatures with certificates issued by the certification-service-providers. However, electronic signatures that are certified are normally also reliable electronic signatures defined by Article 13 of the PESL, having the same legal effect as handwritten signatures. In order to provide certification services for electronic signatures in China, the certification-service-providers need to obtain prior authorization from the Ministry of Industry and Information Technology (MIIT).[551] The prior authorization mechanism has been adopted by the PESL to ensure the reliability of certification-service-providers.[552]

d. Cross-border recognition of foreign electronic signatures

251. China has not established a system for the cross-border recognition of foreign electronic signatures. In order to facilitate cross-border transactions, an electronic signature certificate issued by a foreign certification-service-provider can have the same legal effect as a certificate issued by a domestic certificate-service-provider on the condition that such certification certificate is approved by MIIT in accordance with the relevant international treaty or based on the principle of reciprocity.[553] This creates uncertainty as to the validity of electronic contracts bearing electronic signatures carrying foreign certificates.

252. In China, there is a mutual legal recognition mechanism established between Guangdong province and Hong Kong[554]. Based on the Guangdong-Hong Kong Working Group on Pilot Applications of Mutual Recognition of Electronic Signature Certificates of 2008, certification-service-providers of Hong Kong SAR and Guangdong Province may submit applications to

[549] See (n 458).
[550] PESL, Article 13.
[551] AMECS, the conditions are stipulated in Article 5 and the application documents are indicated in Article 6. MIIT will conduct a substantive examination on the submitted documents.
[552] Zhang Chu & Lingfei Lei, 'The Chinese Approach to Electronic Transactions Legislation' (2005) 9 Computer Law Review and Technology Journal 333, 348.
[553] PESL, Article 26.
[554] Hong Kong Special Administrative Region (SAR) and Macau Special Administrative Region use different legal system as the rest part of China, leading to their own rules on electronic signatures.

participate in the mutual recognition scheme.[555] Those certificate types recognized in the "Trust List of Certificates Types with Mutual Recognition Status"[556] are granted mutual recognition status between Hong Kong SAR and Guangdong Province. This regional mutual recognition of the electronic signature certificate mechanism enhances the e-commerce transactions between the two regions[557] and establishes a workable example for the mutual recognition of electronic signatures between China and other foreign countries.

B. Application of electronic signatures in practice

253. The following section will deal with the application of electronic signatures in practice. First, I will discuss the issue related to the reliability of electronic signatures that are created by an agreement. Second, I will use a case to illustrate how People's Court recognizes electronic signatures in online loan contracts without assessing whether the reliability requirement of electronic signature has been met. Third, I will propose suggestions to improve the security level of electronic signatures in various electronic contracts.

a. Issues with reliable electronic signatures by agreement

254. Article 13 paragraph 2 of the PESL creates freedom for the parties to agree on reliable conditions of an electronic signature which is granted the same legal effect as a handwritten signature. In China, with the rise of peer-to-peer (P2P) lending platforms[558], more and more financial loan contracts are concluded online by the parties with electronic signatures. Financial or quasi-financial institutes such as the P2P lending platforms[559], banks or securities companies have used "reliable electronic signatures" to conclude contracts with customers via "electronic signature agreements"[560]. These electronic signature agreements typically state that:

"By logging into the specific account of the website via the designated account and password,

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[555] Mutual Recognition of Electronic Signatures Certificates issued by Hong Kong and Guangdong <http://www.ogcio.gov.hk/en/business/mainland/cepa/mr_ecert/index.htm> assessed March 7, 2016.

[556] Trust List of Certificate Types with Mutual Recognition Status, dated 10 July 2015 <https://secure1.info.gov.hk/ogcionew/en/business/mainland/cepa/mr_ecert/trust_list/hk_guangdong_ecert_trust.htm> accessed 12 March, 2016.

[557] A cross-border electronic trade declaration platform is established to facilitate e-commerce. The electronic trade declaration service is based on mutual recognition of electronic signature certificates issued by Hong Kong and Guangdong certification-service-providers.

[558] In 2014, there were 1,575 P2P lending platforms operating in China, some 103.6 billion Yuan ($16.72 billion) worth of loans issued by online finance platforms were outstanding in China in 2014. < http://www.wsj.com/articles/peer-to-peer-lending-takes-off-in-china-1433320681> accessed December 9, 2015.

[559] Examples of online loan platforms are for example, ppdai.com, creditease.cn, dianrong.com, jimubox.com, renrendai.com.

[560] Electronic Signature Agreement (电子签名约定书) refers to electronic agreement that is signed between parties by electronic signatures.

the users are deemed to confirm the relevant contract and conclude the contract with the traders by electronic signatures. The electronic signature has the same legal effect as handwritten signatures. The users should keep their own passwords safe. The users shall take responsibility for any transactions that have been conducted via the account of the users."[561]

In this way, a reliable electronic signature has been created between the financial institutions and the users via the online loan contract. However, the "reliable electronic signatures" that the parties have agreed to shall at least be capable of proving that agreements are actually signed by the parties and not by someone else. Otherwise, granting parties (especially businesses) the possibility to derogate from the statutory reliability requirement of paragraph 1 of Article 13 might be dangerous to the security of electronic transactions. The agreements on "reliable electronic signatures" are not necessarily secure such as the combination of account and password. Such an agreement of "reliable electronic signature" has, on the one hand, increased the burden of users to securely keep their passwords within their sole control, and, on the other hand, relieved businesses from any liabilities arising from the users' losses due to unauthorized access to their account.

b. The recognition of contracts with electronic signatures in court

255. The case of *Zhejiang Alibaba Small Loan Co., Ltd. v Zheng Guohua*[562] demonstrates how electronic signatures are recognized in the People's Court. This case concerns a typical online loan contract that adopted a simple electronic signature for authentication. Zhejiang Alibaba Small Loan Co., Ltd. (Plaintiff: Alibaba), the plaintiff, had concluded an online loan contract with Zheng Guohua (Defendant: the borrower who is an individual debtor). The loan contract allowed the defendant to borrow a line of credit of 350,000 RMB from 29 June 2010 to 29 December 2010 (the loan period). The parties agreed that the loan was to be issued by Alibaba and transferred to the borrower's Alipay account upon his request.[563] It was stipulated in the contract that by using the borrower's Alipay account and password to request the loan, the borrower agreed to be bound by the loan contract. During the loan contract period, the borrower consecutively withdrew 350,000 RMB in total from the borrower's Alipay's account. Disputes

[561]CITIC Securities Electronic Signature Agreement (中信证券电子签名约定书), <http://pic.bankofchina.com/bocappd/agreement/201411/P020141128604785147507.pdf> accessed December 9, 2015.

[562] *Zhejiang Alibaba Small Loan Co., Ltd. v Zheng Guohua* (2011) Hang Bing Shang Chu Zi No. 178 (*Alibaba v ZGH*)

[563] Alipay is an online payment service provider in China similar to PayPal.

arose when the loan was due, and the borrower failed to pay back the loan and interests. Alibaba brought the case to court and sought recovery for the overdue loan and the interest incurring thereof.

256. According to Article 3 of the PESL, electronic documents using electronic signatures and data messages shall not be denied legal effect solely because they take the form of electronic signatures or data messages. The court therefore held that the parties had concluded a valid contract in electronic form. The electronic loan contract, as well as the payment slip, and the electronic payment record that were notarized by the Public Notary Office were accepted as original evidence as they are legally equivalent to the original documents. The identity of the borrower could be confirmed by the real name authentication[564] of his Alipay's account. Moreover, the electronic data were accessible so as to be useable for subsequent reference. The borrower could access the online loan contract through his account at any time. The defendant neither attended the hearings nor provided any evidence proving the electronic data had any signs of alternations. Therefore, the court accepted that the electronic data also met the authenticity requirement of evidence.

257. The People's Court continued with the validity assessment of the online loan contract. The fact that Alibaba made the online loan available to the defendant constituted an offer made to the defendant. The defendant, by logging into his Alipay's account, confirmed through his electronic signature that he agreed on the terms of the loan contract with his electronic signature. However, the borrower failed to fulfill his obligation to repay the loan. The court therefore ordered the borrower to repay the outstanding loan with interests to Alibaba.

258. The court discussed briefly that by entering the username and password of his Alipay's account, the borrower agreed to the online loan contract with his electronic signature. However, the court did not analyze the type of electronic signature and its legal effectiveness. The People's Court could have examined the creation, transmission and verification process of electronic signature pursuant to the reliability requirement in Article 13 paragraph 1 of the PESL and determine then whether such type of electronic signature constituted sufficient evidence to prove the defendant's consent to the loan contract.

c. Necessity to improve the security level of electronic signatures

[564] "Real name authentication" refers to the identity verification requirement which links the username of an account with the real identity of the user.

259. There is a series of similar cases arising from online loan and guarantee contracts between financial companies and borrowers.[565] The People's Courts have recognized the validity of electronic loan and guarantee contracts with electronic signatures based on Article 3 of the PESL [566] and the non-discrimination principle. However, the People's Court did not distinguish between the (simple) electronic signature and the reliable electronic signature. Based on available case law, the People's Court accepts different types of electronic signatures such as bank card plus password; token plus bank card; and username and password, etc.[567] The question remains as to whether a certain type of electronic signature can meet the reliability requirement of Article 13 and thus be equivalent to handwritten signatures or seals as stipulated in Article 14 of PESL.

260. The legislature could provide concrete guidance for parties to use electronic signatures to ensure the security of electronic transactions in at least two ways.

First, the legislature could impose stricter requirements on certain types of contracts such as high value online financial contracts. For example, some of the traders (mostly banks and securities companies) use digital signatures that are issued by specific certificate authorities (CA) (such as China Financial Certification Authority) to ensure the security and authenticity of the contract.[568] Digital signatures meet the reliability standard by ensuring the integrity of the data messages and attributing signatories to the contents of the data messages.[569] In 2015, the MIIT (authority who authorizes the activities of certification-service-providers in China) has organized a seminar on the tenth anniversary of the implementation of electronic signature which revealed some important figures.[570] By the end of 2014, there were 37 authorized and registered certification-service-providers in China. In 2014, about 15,310,000 issued certificates were used in the public domain and 6,581 issued certificates were used in the

[565] See *Suzhou Wujiang Jing Guo Village Small Loan Co., Ltd. v Zhu Xiu Rao, Ye Xia Niu, al.(*2014) Wu Jiang Sheng Shang Chu Zi No. 00923; *China Construction Bank of China X Branch v Zhejiang X Co., Ltd.* (2012) Jin Yi Shang Chu Zi No. 3007.

[566] The parties may stipulate to use or not to use electronic signature in the contract or other documents.

[567] Peng Ya, 'Electronic Signature to Online Financial Dispute Resolution' (2015) < http://www.kwm.com/zh/cn/knowledge/insights/electronic-signatures-what-should-we-know-20150701> accessed 7 March, 2016.

[568] China Financial Certification Authority provide certification services for electronic signatures used by banks and other financial institutions. < http://www.cfca.com.cn> assessed 3 March 2016.

[569] See *Shen Zhen Lan De Rong Zi Dan Bao Group Co., Ltd. v Lin Da Wei et al* (2015) Shen Fu Fa Min Er Chu Zi No. 1164; *He Zhen v China Minsheng Bank Co., Ltd. Guangzhou Yue Hua Branch* (2014) Sui Yue Fa Min Er Chu Zi No, 2507. The courts have recognized digital signatures as reliable electronic signatures.

[570] China Electronics News, '《电子签名法》实施十周年 电子认证服务业规模超百亿' [Tenth anniversary on the implementation of PESL, the scale of electronic certification service has exceeded 100 billion]' June 3, 2015 (in Chinese) <http://www.cac.gov.cn/2015-06/06/c_1115532257.htm> accessed November 10, 2015.

financial domain, mainly for online banking services. In the area of e-commerce, there were 1,760,000 validly issued certificates. These figures reveal that digital signatures are still not widely used in the e-commerce market compared to the public domain. This disparity is due to the high cost, inconvenient operation and lack of common standards in cross-border recognition of certified electronic signatures.[571]

Second, the legislature should encourage a combined use of various electronic signatures to enhance the security and reliability of electronic signatures. With the implementation of *Administrative Measures for the Online Payment Business of Non-bank Payment Institutions*[572], the non-bank online payment institutions are required to use at least two types of authentication means,[573] including digital certificates or digital signatures in combination with other types of authentication means for the online transaction with the amount of over RMB 5,000 (around EUR 700) starting from 1 July, 2016. This requirement encourages non-bank online payment institutions such as Alipay to enhance their security protection by using digital signatures. Other certification service providers such as Fadada[574] have been developed to provide third-party trust services on their online platform. Parties can sign electronic contracts on such third-party online platforms. The online platforms preserve the signed electronic contracts for evidentiary purposes.

C. PESL and its influence on agreements in electronic communications

261. It is worth noting that the PESL uses "electronic signature" instead of "digital signature", leaving space for the future development of different types of electronic signatures. While the ESD gives qualified electronic signatures equivalent legal effect as handwritten ones, PESL does not grant electronic signatures with certificates issued by CAs (digital signature) any higher legal effect than other types of reliable electronic signatures. This probably explains why CAs are slow to develop in China. On the one hand, this gives traders incentives to develop other types of authentication means, which are cheaper than certificates-based authentication.

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[571] Jane K. Winn & Song Yuping, 'Can China Promote E-commerce Through Law Reform? Some Preliminary Case Study Evidence' (2007) 20 Columbia Journal of Asian Law 415, 435-445.

[572] Online Payment Business of Non-Bank Payment Institutions, Article 24, Announcement [2015] No. 43 of the People's Bank of China (PBOC), valid from 1 July 2015.

[573] There are three types of authentication means indicated by Article 22: the authentication means that is only known to the clients such as static password, the biometric authentication such as fingerprint and the authentication method that is uniquely held by the clients, irreproducible and non-reusable, such as digital certificates, electronic signatures or one-time passwords.

[574] Fadada combines the legal services of the signature, authentication and preservation of electronic contracts on its platforms. There is already a case in which Shanghai Arbitration Commission recognized the validity of electronic arbitration clause signed by the parties through Fadada. < https://www.fadada.com/portal/index.action>.

On the other hand, it creates uncertainty regarding the types of electronic signatures that are reliable and have equivalent legal effect as handwritten signatures and seals. Moreover, the prior authorization requirements on certification-service-providers have generated barriers to the development of electronic signatures with certificates in the private sector. In addition, the legal barrier to the cross-border recognition of electronic signatures still exists as the legal recognition of the electronic signature certificate issued by foreign certification-service-provider requires verification of MIIT with unclear conditions. Finally, since the PESL (which limits its application scope to electronic signatures) no longer sufficiently accommodates the rapid development of authentication technologies,[575] a new legal framework for other types of electronic authentication means is needed.

3.1.2.5. Sub-conclusion

A. Divergent national legislation on electronic signature

262. The regulation of the electronic signature is a starting point for the legislature and national courts to determine the formal validity of e-ADR agreements. With the occurrence of new authentication means that can be used to verify the validity of electronic contracts, the regulation of electronic communications in other fields will also follow.[576]

263. At the international level, international legal instruments such as UNCITRAL model laws on E-commerce and Electronic Signatures attempt to establish evidentiary standards for electronic data. Nevertheless, as these international instruments are non-binding in nature, national legislation may deviate from these model laws. At the national level, there is a wide divergence regarding the legal effect and legislative approach of electronic signatures. These differences arise from the legal cultures and evidentiary rules in various jurisdictions. Common Law jurisdictions apply a functional approach to examine whether the conduct of the signatory indicates an intention to authenticate documents.[577] Therefore, English legislators did not significantly adapt the statutory requirements on formalities to electronic forms because these requirements are tested functionally in each individual case.[578] Civil Law jurisdictions apply

[575] For example, electronic time stamps is already be in use in the protection of intellectual property rights in China. This service is provided by National Time Service Center < http://www.tsa.cn>.
[576] An example of this trend is the EU legislation transformed from ESD to the eIDAS Regulation.
[577] English Law Commission, 'E-commerce: Formal Requirements in Commercial Transactions' (2001) 13 <http://www.lawcom.gov.uk/wp-content/uploads/2015/09/electronic_commerce_advice.pdf> accessed April 26, 2017.
[578] *Mehta v Pereira Fernancles SA*, note (530), paragraph 30; *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd*., note (533); *Bassano v Toft and others* [2014] EWHC 377 (QB).

a formalist approach to provide for detailed requirements and legal effects of a valid electronic signature. German legislators, for example, have granted qualified electronic signatures the same legal effect as the handwritten signatures unless contrary evidence can prove that parties have not attributed themselves to the content of the agreements.[579] This contrasts with English rules that no validity requirement has been specified for a certain type of electronic signature in domestic statutory laws.

264. The divergent legal effect attributed to electronic communication and the different legislative approaches of each country may create legal uncertainties as to the formal validity of e-ADR agreements. This is especially the case in cross-border transactions. With no common rules on the cross-border recognition of electronic communications, parties who are unfamiliar with foreign laws may have difficulties determining the validity of e-ADR agreements. This divergence may even distort cross-border trade and have a negative impact on e-commerce.[580]

265. In the EU, in order to establish an internal market that allows for the free circulation of digital products and services, measures are taken to eliminate these barriers in cross-border electronic communications. In the ESD, electronic signatures are divided into different forms (simple electronic signature, advanced electronic signature and qualified electronic signature) and mutual recognition scheme of qualified electronic signatures was established at the EU level.[581] However, the interoperability problem arose during the cross-border recognition of these qualified electronic signatures as each member state has established their own supervisory regime and accreditation system. Electronic signatures with qualified certificates issued in one member state may not be directly recognized in another member state. Moreover, the sole reliance on the electronic signature is insufficient to meet the demands of authentication in electronic documents. The Regulations on Electronic Identification and Trust Services for Electronic Transactions in Internal Market (eIDAS Regulation) has broadened the scope of authentication measures by incorporating other types of electronic trust services (including electronic signature, electronic seal, electronic time stamp, electronic registered delivery, and website authentication) to facilitate cross-border recognition of electronic documents. The electronic documents authenticated by a qualified trust service can be recognized across the

[579] German Civil Code (BGB), Section 126(a)(1).

[580] See Minyan Wang, 'Do the regulations on electronic signatures facilitate international e-commerce? A critical review' (2007) 23 Computer Law & Security Report 32.

[581] EU Trusted Lists of Certification Service Providers <https://ec.europa.eu/digital-agenda/en/eu-trusted-lists-certification-service-providers> accessed December 13, 2015. The EU has established a website with a trusted list containing information related to the certification-service-providers of each member state who issue qualified certificates for electronic signatures

border with the same standards that are set forth in eIDAS Regulation.

266. In China, the Electronic Signature Law of the PRC (PESL) is the legal instrument that is directly relevant to electronic communications. The limited regulation of electronic signature can no longer meet the requirements of e-commerce development in China. Moreover, the reliability standard of electronic signatures in the PESL is not as clear and specified as the standard of "qualified electronic signature" in the EU legislation. Prior authorization is required for CAs to provide certification services in China, and legal recognition of foreign issued electronic signature certificate is conditional upon the approval of the MITT. This has created obstacles to electronic signatures used in cross-border electronic communications. If reliable electronic signatures provided with certificates are granted greater legal effect than other reliable electronic signatures in China, it is possible to establish a mutual recognition mechanism of electronic signatures with foreign certificates without the approval procedures of the MITT.

B. Lessons from the legislation on electronic signatures

267. There are three lessons that can be learned from the study of electronic signature legislation in different legal regimes: the tension between technological neutrality and legal certainty, multiple demands of various electronic signatures and the difficulty in cross-border recognition of foreign electronic signatures. These lessons can contribute to improving future legislation on electronic communications.

a. The tension between technological neutrality and legal certainty

268. The legislative history of electronic signatures is in accordance with the development of authentication technologies. As indicated by the reports of the Internet Law and Policy Forum, there is a tension between legislation that seeks to be technologically neutral and the establishment of legal rules to provide predictable and secured electronic authentication.[582] On the one hand, the technological neutrality principle requires that legislation shall not treat a certain technology more favorably than others. On the other hand, legislators tend to rely on the security and reliability of certain secured authentication mechanisms by allowing them to have greater legal benefits and presumptions than other technologies.[583] The two-tiered legislative approach is a compromise between the technological neutrality principle and the

[582] Mason, (n 433) 153.
[583] Stewart Baker and Matthew Yeo, 'Survey of International Electronic and Digital Signature Initiatives' Internet Law & Policy Forum < http://www.ilpf.org/groups/survey.htm> assessed 8 March, 2016.

legal certainty requirement.

b. Multiple demands of various electronic signatures

269. The study of the legislative approach on electronic signature revealed that reliance on one certain type of electronic signature may be insufficient to serve various needs from electronic transactions. There is a practical demand to use electronic signatures of different security level for transactions with various value.

270. For example, the authentication rules of *Administrative Measures for the Online Payment Business of Non-bank Payment Institutions*[584] (the "Measures") by People's Bank of China (PBOC) have set different authentication requirements based on the value of transactions in Article 24. This establishes the link between the security level of authentication means and the value amount of transactions. There are three types of authentication means as indicated in Article 22 of the Measures including the authentication method that is only accessible to clients such as static passwords, biometric authentication means such as fingerprint or face recognition, and the authentication method that is uniquely held by the clients, which cannot be duplicated or repeatedly used, such as digital certificates, electronic signatures or one-time passwords. The *Administrative Measures for the Online Payment Business of Non-bank Payment Institution*s by PBOC sets a good example of how different type of electronic signatures can be applied to ensure the security and authenticity in electronic transactions.

c. Cross-border recognition of foreign electronic signatures

271. The OECD Survey on Electronic Authentication Services and E-signature has shown that while national legislation focuses on establishing frameworks of domestic certification services, mechanisms to recognize foreign certification services are not well developed.[585] Although both the EU and China have provided schemes[586] for the recognition of certificates that are issued by foreign certification-service-providers, such provisions only set forth general requirements of international mutual recognition agreements or are based on the reciprocity principle for the recognition of foreign certificates. There are still uncertainties when assessing the validity of cross-border electronic contracts that are concluded with electronic signatures

[584] Administrative Measures for the Online Payment Business of Non-bank Payment Institution, Announcement [2015] No. 43 of the People's Bank of China, effective on July 1, 2016. The online non-bank payment institutions refer to non-bank financial institutions that have obtained a Payment Business permit which are allowed to provide online payment services, such as Alipay and Wechat Pay.
[585] OECD Survey on Electronic Authentication Services and E-signature (n 434) 7.
[586] eIDAS Regulation, Article 14; PESL, Article 26.

issued by foreign certification-service-providers.

272. In practice, the cross-border recognition of foreign certificates can be achieved by establishing a trust list of qualified certification-service-providers in a worldwide network. In the EU, a trusted list scheme of certification-service-providers issuing qualified certificates is established by the Commission Implementing Decision (EU) 2015/1505 and can be accessed via Trusted List Browser.[587] In China, the Trust List of Certificates Types with Mutual Recognition Status between Guangdong and Hong Kong SAR is another example.[588] By establishing a trust list of certification-service-providers or certificates to recognize electronic signatures with foreign certificates in cross-border transactions, these examples have shown how international cooperation on the mutual recognition of electronic signatures with qualified certificates is possible. There are industry organizations (such as WebTrust in North America and ETSI in Europe) that provide for standards and an accreditation mechanism to certification-service-providers. Despite the fact that national legislation on certification-service-providers is largely varied,[589] international cooperation and mutual recognition through the establishment of an international trust list of certification-service-providers is a useful tool to facilitate the recognition of foreign electronic signatures.

C. Authentication of e-ADR agreements in cross-border e-commerce transactions

273. The electronic signature is currently the most effective authentication means for proving the formal validity of e-ADR agreements as they can not only identify the signatories but also attribute the signatories to the contents of the agreements. However, with the development of authentication technology and considering the complexity of e-commerce transactions, the sole reliance on an electronic signature to authenticate electronic contracts may be insufficient for the authentication of e-ADR agreements. E-ADR agreements can be concluded via emails, websites (click-wrap agreement and browse-wrap agreements) and other electronic communications. For example, the electronic signature cannot tackle the authentication of agreements concluded over the website. More importantly, it cannot prove or record when a

[587] Commission Implementing Decision (EU) 2015/1505 of 8 September 2015 laying down technical specifications and formats relating to trusted lists pursuant to Article 22(5) of Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market (OJ L 235); eIDAS Regulation, Article 22. See Trusted List Browser, available at :< https://webgate.ec.europa.eu/tl-browser/#/> accessed 16 October 2018.
[588] See (n 555) Mutual Recognition of Electronic Signatures Certificates issued by Hong Kong and Guangdong.
[589] Countries such as China, Argentina and Malaysia require prior authorization of certification-service providers are. Countries such as the EU member states use voluntary accreditation systems.

party has received the data message during the electronic contract conclusion. In fact, there are other authentication means that can prove the authenticity and integrity of electronic agreements.[590] For example, the electronic timestamp is a useful tool to record the time the agreement is created and to ensure the integrity of the document.[591] An electronic registered delivery service can be used to prove when a document has been received by another party. Website authentication can be used to identify the owner of a website when a contract is concluded via a website.

274. Electronic contracts can save time and money for the parties during electronic transactions. Electronic authentication, on the other hand, can ensure the integrity and authenticity of electronic contracts. It is important to strike a balance when it comes to the security, efficiency and cost of e-ADR agreements. Depending on the value of an electronic transaction and the way in which electronic contracts are concluded, different levels of security and authentication means are required.[592] For example, for low-value transactions that are concluded in a third-party marketplace, a (simple) electronic signature might be sufficient to identify the parties and prove the contractual relations between the parties. In other cases, for high-value transactions that are concluded via emails, a combination of several electronic authentication means (such as timestamp, electronic signature and electronic registered delivery) are needed to prove the authenticity and integrity of electronic contracts.

275. The legislature should provide a legal framework in the cross-border recognition of various authentication methods that can be used to assess the formal validity of e-ADR agreements. In accordance with Article 9 of the UNCITRAL Model Law on E-commerce, when assessing the evidentiary weight of the information contained in a data message, regards shall be given to the reliability of the manner in which the data message was generated, stored or communicated, the manner in which the integrity of the information was maintained and the manner in which the originator of the message was identified. Given the legal nature of electronic agreements, at least three legal aspects of electronic contract formation (the identity of the parties, the integrity of contract, and the time of contract formation) should be authenticated in cross-border e-ADR agreements. Part C of this Section discusses three legal aspects that are crucial

[590] OECD Survey on Electronic Authentication Services (n 434) 6.
[591] In EU and China, electronic time stamps are already in use. It refers to the process of keeping track of the creation and modification time of a document.
[592] OECD Recommendation on Electronic Authentication and OECD Guidance for Electronic Authentication provides for example three assurance levels of authentication: basic (single-factor authentication), medium (two-factor authentication) and high (two-factor authentication with very secure registration procedure).

in electronic contract formation as they can prove both the authenticity and integrity of e-ADR agreements.

a. The identity of parties

276. A party entering into an electronic transaction reliant on an electronic message must be confident of the source of that message.[593] The party needs to verify whom he/she is contracting with especially in an electronic environment where people are unable to meet each other in person. No matter what type of electronic authentication method is used (i.e. electronic signature, electronic seal, or website authentication), the parties to the ADR agreements should be able to be clearly identifiable. For example, if a username is used to conclude an electronic transaction on an e-commerce website, the authentication technology should be able to identify the party via this username when disputes arise. Moreover, such technology must be capable of protecting users from identity theft or fraud.

b. The integrity of the contract

277. Integrity is connected with the accuracy and completeness of the contract. E-ADR agreements are prone to alternations, which are not so easily detectable due to electronic nature. Unlike paper documents, electronic records come with no inherent attributes of integrity.[594] The electronic authentication method should be able to verify that no alternation has been made during the generation, communication and storage process of data messages.

278. The e-ADR agreements should be stored on a reliable medium to be accessible and retrieved by the parties for any subsequent use. When required, that information should be capable of being displayed to the person to whom it is to be presented.[595]

c. Time of contract conclusion

279. In e-ADR agreements, the authentication means should also be able to record when the agreements are concluded or amended. The time of contract conclusion can be important in providing evidence of when the offer was made and when the acceptance became effective, resulting in a binding contract. In the case of amendment, parties are bound by the changed terms if they are informed of the amendments and accept them specifically. It is therefore important to record the time when e-ADR agreements are delivered to each party by electronic

[593] Thomas J Smedinghoff, 'The Legal Challenges of Implementing electronic transactions' (2008)41 Uniform Commercial Cod Law Journal, 22-23.
[594] *Ibid*, 24.
[595] UNCITRAL Model Law on E-commerce, Article 8(1)(b).

communications as the sending time may not always be synchronous with the receipt time.

3.2. Substantive validity requirement to e-ADR agreement

280. E-ADR agreement refers to either a separate ADR agreement[596] or an ADR clause in a contract (for example, an ADR clause that is indicated in the "terms and conditions" of a website). Instead of being signed in paper form, the ADR agreements can be concluded electronically, for example, through an exchange of emails, through an electronic agent or on a business website. On e-commerce merchants' websites, ADR clauses are usually embedded into the website's *General Terms and Conditions*. [597] Depending on the method through which electronic contracts are concluded, there are two major types of web-based ADR agreements: the browse-wrap agreement and the click-wrap agreement. For example, the *Terms of Use* on UltraViolet (www.myuv.com) indicate that "By accessing and using this Site, you accept and agree to be bound by the *Terms of Use*." The arbitration clause that is embedded in the Terms of Use agreement of Ultra Violet is a type of browse-wrap ADR agreement. Other practices can be found on eBay (www.eBay.com), which indicate that "By clicking 'Register,' the users agree to enter into the *User Agreement* with the merchant." The arbitration clause that is included in the eBay User's Agreement is a click-wrap ADR agreement. This may also influence the validity of e-ADR agreements.

281. Given that electronic transactions are usually large in volume and small in value, a majority of electronic contracts are pre-formulated by traders, leaving the non-drafting party with little freedom to negotiate the terms. In these e-ADR agreements, the fundamental element is consent. Parties should be able to choose the type of ADR, the procedural rules and the legal effect of the ADR outcomes voluntarily. Hence, the formal consent[598] acquired in e-ADR agreements shall be examined by substantive rules such as in contract law and consumer law.[599]

282. The substantive validity requirement deals with parties' consent in reaching e-ADR agreements.

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[596] It is rare that a separate ADR agreement is used but it can bring clear notice of the parties to ADR.

[597] Depending on the website, there are different expressions for website agreements. "(General) Terms and Conditions", "Terms of Use", "User's Agreement" and "Terms and Conditions" are used interchangeably.

[598] "Formal consent" refers to consent is given formally, such as in standard form contracts, the non-drafting parties give their consent without being able to negotiate individually with the drafting parties.

[599] Cases with regard to the validity of click-wrap agreement and browse-wrap agreements have been widely discussed in the U.S.A. See Cory S. Winter, 'The Rap on Clickwrap: How Procedural Unconscionability is Threatening the E-Commerce Marketplace' (2008) 18 Widener Law Journal 249, 291; Nathan J. Dvais, Presumed Assent: The Judicial Acceptance of Clickwrap' (2007) 22 Berkley Technology Law Journal 1, 577; Lucille M. Ponte, 'Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and a Proposal for Improving the Quality of These Online Consumer "Products"' (2011) 26 Ohio State Journal on Dispute Resolution 119.

I have two observations regarding the substantive validity of e-ADR agreements. On the one hand, e-ADR agreements should be given the equivalent legal effect as paper contracts to promote the development of e-commerce. It is stipulated in Article 8 of the UN Convention on the Use of Electronic Communications in International Contracts that *"a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication."* On the other hand, there are public policies that may affect the substantive validity of e-ADR agreements, especially in B2C transactions. Therefore, it is important to balance the efficiency of electronic transactions by recognizing e-ADR agreements, and the fairness of the e-ADR agreements by giving non-drafting parties full protection through the right of information and the right of action in court.[600]

283. In offline transactions, customers may obtain useful information about products and traders by the appearance of the shops and products.[601] In electronic transactions, however, it is not the case as customers are not able to see the products or traders in person. Moreover, as the terms and conditions of electronic contacts are becoming longer and more complicated,[602] the information asymmetry[603] between traders and customers has been enlarged in e-commerce. In order to restore the power imbalance between the traders and the customers, national legislators must employ public policy to prevent market distortion and to promote the development of e-commerce.[604] Section 3.2.1. will explore different forms of electronic contracts that are commonly used to obtain consent and deal with the problems with electronic consent. In addition, the discussion will examine the public policy of the EU (Section 3.2.2.), England (Section 3.2.3.) and China (Section 3.2.4.) and the influence that these public policies have on the substantive validity of e-ADR agreements. Section 3.2.5. will conclude the discussion on the substantive validity requirements of e-ADR agreements by comparing the legislation in these jurisdictions and discover the common denominators.

3.2.1. Electronic consent in standard form contracts

[600] The information requirement is stipulated in Article 8(1) of the Consumer Rights Directive and the access to the court is stipulated in Article 10(1) of Directive on Consumer ADR.
[601] United Nations Conference on Trade and Development, Information Economy Report 2015, 69.
[602] For example, Terms & Conditions of Apple iTunes stores include around 19,972 words, Facebook provides Terms & Conditions with 15,000 words, and PayPal with 36,275 words. See European Commission's 'Study on consumers' attitudes towards Terms and Conditions' (2016), 14.
[603] It means traders have more information than their customers, which constitutes unequal situations.
[604] Péter Cserne, *Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach* (2012 Palgrave Macmillan) 119.

284. Depending on the parties' freedom to negotiate and the different bargaining power between the parties, there are two types of contracts: the ordinary contract that is individually negotiated and the standard form contract.[605] In ordinary contracts, the offerees have the freedom to negotiate terms with the other party. E-ADR agreements can be negotiated by the parties through electronic communications such as the exchange of emails. In a standard form contract such as a click-wrap agreement or a browse-wrap agreement, the offerees have limited freedom to change the terms of the contract but only have two options: to agree or to reject the terms. In what follows I will focus on standard form contracts and their use in e-ADR agreements.

285. Standard form contracts are offered in large volume by businesses. Since this form is used repeatedly, it enhances transactional efficiency and convenience. Economic studies have revealed that in a perfectly functioning market with complete information, sellers will include only efficient terms and reasonable risk allocation into the contract because it is beneficial to both parties.[606] It also lowers the transaction cost by allowing transactions of the same type to be processed in the same way.[607] Scholars such as Schwartz and Wilde advocate standard form contracts, holding the view that under the free market competition, rational traders will make fair terms to ensure the validity and effectiveness of the contract.[608] This is because these traders do not want to be confronted with lawsuits and judgments that may invalidate their contracts and slow down their businesses. If traders act in their own interest by using unfair terms, they also risk losing the market as their competitors may provide more favorable terms to the customers.[609]

286. Others believe that there ought to be some control or scrutiny over the fairness of these pre-formulated terms. Scholars opposing standard form contracts hold the view that traders have lucrative purposes of maximizing their profits and therefore they may force customers to enter

[605] Nicholas S Wilson, 'Freedom of Contract and Adhesion Contracts' (1965)14 International and Comparative Law Quarterly 172. In U.K., "standard form contract" is used. In U.S. and France, "contract of adhesion" is used. See Vera Bolgar, 'The Contract of Adhesion: A Comparison of Theory and Practice' (1972)20 American Journal of Comparative Law 53.

[606] Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003)70 The University of Chicago Law Review 1203, 1208.

[607] Robert A Hillman and Jeffrey J Rachlinski, 'Standard-form contracting in the electronic age' (2002)77 New York University Law Review 429, 437-440.

[608] Alan Schwartz & Louis L. Wilde, 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis' (1979) 137 University of Pennsylvania Law Review 630. It indicates that market intervention should occur when imperfect information leads to non-competitive prices and terms.

[609] Richard L Hasen, 'Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules' (1990)38 UCLA Law Review 391, 426; Alan Schwartz and Louis L Wilde, 'Intervening in markets on the basis of imperfect information: A legal and economic analysis' (1979)127 University of Pennsylvania Law Review 630, 660.

into contracts with unfavorable terms.[610] Exploiting the ignorance of the majority of customers might be more lucrative for some traders than competing for smart customers by using fairer terms.[611] Traders may abuse their position to exploit customers as they know their customers normally fail to read terms and may not know about the mandatory laws that can protect them from being obliged to follow those standard terms.[612] When consumers were polled, 47% stated that they did not read the terms and conditions as they were too long or required too much time to read, while 44% stated that they trusted the website.[613] Even if the consumers read the terms and conditions, they may not understand them[614] or may not wish to spend a significant amount of time negotiating terms with traders that are least likely to be enforced.[615] Therefore, customers choose not to read these terms because neglecting terms outweighs the benefits of reading them.

287. The reality is, however, that standard form contracts are frequently used in electronic transactions. Therefore, it is important to consider both the economic efficiency requirement for electronic transactions and the fairness requirement for the protection of weaker parties. This raises the question as to the extent to which an e-ADR agreement is valid and how the validity requirements can be set so as to ensure both the party autonomy and the fairness of the agreement. I will examine these requirements in two types of electronic standard contracts, namely the browse-wrap agreement and the click-wrap agreement.

3.2.1.1. Consent in browse-wrap agreements

288. The browse-wrap agreements originate from the "shrink-wrap agreements" used in software licensing. From its name, "shrink-wrap agreements" refer to the agreements that are formed when customers unwrap the package of software. The terms of the license agreements are not exposed to the customers prior to the transactions. The courts in the U.S. proved to be the

[610] Todd D Rakoff, 'Contracts of adhesion: An essay in reconstruction' (1983)96 Harvard Law Review 1173, 1126; Wilson, (n 605) 176.
[611] Hillman and Rachlinski (n 607) 443.
[612] Michael I. Meyerson, 'The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts', (1996) 47 University of Miami Law Review. 1263, 1269-1275.
[613] Eurobarometer, Special Eurobarometer 342 Consumer Empowerment Report 2010, 142.
[614] It is required in Article 5 of the Unfair Terms in Consumer Contracts Directive that "the terms must always be drafted in plain, intelligible language." The CJEU rendered decisions in Case C-96/14 *Van Hove v CNP Assurances* (ECLI:EU:C:2015:262) that the requirement of transparency in Unfair Terms in Consumer Contracts Directive indicates that an average consumer should be able to evaluate the economic consequences of a contractual term. In reality, this requirement is hardly achieved by traders.
[615] See also Shmuel I Becher and Tal Zarsky, 'Online Consumer Contracts: No One Reads, But Does Anyone Care?' (2015) Jerusalem Review of Legal Studies.

pioneer in deciding the validity of shrink-wrap agreements. The U.S. court in *ProCD, Inc. v. Zeidenberg*[616] concluded that the customer's failure to object to the terms of the shrink-wrap license agreements (for instance, by taking affirmative measures to return the software) can be construed as assent.

289. Similar to this ideology, browse-wrap agreements are developed to allow websites entering into agreements with their users without their explicit consent. The browse-wrap agreement is usually displayed with a hyperlink at the bottom of the business's website as "Terms of Use," "Conditions of Use," or "Terms and Conditions," etc.[617] The users are not required to approve or reject the terms with any positive actions. Instead, by accessing or continuously using the website, users are bound by the browse-wrap agreements. For instance, the Terms of Use on Huawei.com stipulate that "By accessing this Website, you acknowledge that you have read, understood and accepted the following terms. In case you do not understand or agree to any of the terms, you should immediately exit this Website."[618] Other examples of browse-wrap agreements exist in mobile applications that are downloaded from the online application stores such as Apple Store and Google Play. The suppliers of the applications provide services to their customers and enter into contracts with customers via terms of use agreement. The users become to be bound by the terms of use agreement by their acts of download, install and use of the application. The courts in the United States also pioneered in giving validity to browse-wrap agreements on a case-by-case basis.[619] Based on the precedents,[620] at least two conditions need to be met for the U.S. courts to confirm the validity of a browse-wrap agreement: (i) the user has actual or constructive knowledge of the website's terms and conditions; (ii) the user has manifested his unambiguous consent to be bound by the website's terms and conditions. In the following part, I will examine how electronic consent is recognized in browse-wrap agreements in the EU and China.

A. Browse-wrap agreements in the EU

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[616] *ProCD, Inc. v. Zeidenberg* 86 F.3d 1447 (7th. Cir. 1996).

[617] The hyperlink establishes the link between the contents of one webpage to another. See Sableman, 'Link Law Revisited: Internet Linking Law at Five Years' (2001) 16 Berkley Technology Law Journal 273 at 1276, 1277.

[618] For example, Terms of Use of Huawei website indicates by using the website, the user agrees to be bound by the Terms of Use agreement in which an arbitration clause is included < http://me15years.huawei.com/en/terms-of-use/> accessed 19 November 2015.

[619] The courts gave effect to browse-wrap agreements in *Pollstar v Gigamania*, 170 F. Supp. 2d 974 (E.D. Cal. 2000) and *Register.com, Inc. v. Verio*, Inc., 126 F. Supp. 2d 238 (S.D.N.Y., December 12, 2000) whereas the courts were reluctant to enforce browse-wrap agreements in cases *Nguyen v Barnes & Noble Inc.* No 12-56628 (9th Cir. Aug. 18, 2014) and *Zappos.com, Inc., Customer Data Security Breach Litigation*, 893 F. Supp. 2d 158.

[620] *Nguyen v Barnes & Noble Inc.*; Zappos.com, Inc., Customer Data Security Breach Litigation; Long *v. Provide Commerce, Inc.* (Los Angeles County Super. Ct. No. BC513925).

290. There are no CJEU cases that deal directly with browse-wrap ADR agreements, but there are cases in EU jurisdictions that touch upon browse-wrap jurisdiction agreements. These cases are relevant to our study of ADR agreements, because they indicate the validity of browse-wrap agreements in EU jurisdictions.

291. In the context of B2B ADR agreements, a jurisdiction clause in the form of a browse-wrap agreement is given legal effect. In the absence of CJEU cases in browse-wrap agreements, the relevant cases in the EU member states will be studied. This makes sense as the member states follow a similar set of rules in recognizing electronic contracts under the framework of the ECD and eIDAS Regulation. In *Ryanair Limited v Billigfluege de GmbH* and *Ryanair v On the Beach Limited*[621], the Irish Supreme Court confirmed the lower courts' decision by giving the jurisdiction clause in a browse-wrap agreement legal effect because the terms and conditions of the website provided an exclusive jurisdiction clause and the users were aware of it. The jurisdiction clause was included in "Terms of Use" which was available to users by way of a hypertext link at the bottom of each page and as part of the booking process. The Terms of Use govern the use of the website and are binding on all persons using the website. Although *Billigfluege* argued that they are not the parties but just the agent of the parties to the agreements, the court decides that any person could be bound by the jurisdiction clause simply by browsing, using, or viewing the Ryanair's website, without entering into any other contract.[622] Both ADR agreements and jurisdiction agreements are contracts in nature, requiring the mutual consent of the parties. In accordance with the standard Internet practice in the business world, the Terms of Use of a particular website are available by way of a hyperlink with the objective that, by using, browsing, or viewing the website, binds the user to the Terms of Use.[623] Once parties are aware of the terms and continue to use the website, they are presumed to agree to the terms provided by the website. In B2B ADR agreements, it can be inferred that ADR clauses that are included in terms and conditions of the website which are displayed via a hyperlink should also be able to bind their business users.

292. In the context of B2C ADR agreements, Article 5 of the Unfair Terms in Consumer Contract Directive imposes an obligation on traders or suppliers to draft terms in plain and intelligible

[621] *Ryanair Limited v Billigfluege de GmbH; Ryanair v On the Beach Limited* [2015] IESC 11 (*Ryanair v Billigfluege de GmbH*).
[622] *Ibid*. Billigluege's use of the website by way of routing screen-scraping to glean information for a commercial purpose from which it obtained a profit or earned a fee was itself sufficient to constitute consent to those terms."
[623] *Ryanair v Billigfluege de GmbH* (n 621) paragraph 42.

language. The 20th recital in the preamble of the Unfair Terms in Consumer Contract Directive specifies that the consumer must actually be given an opportunity to examine the terms of the contract. In addition, the provisions in the Annex 1 item (i) (list of unfair terms[624]) of the Unfair Terms in Consumer Contracts Directive[625] provide that terms "irrevocably bind(ing) the consumer to terms which he had no real opportunity of being acquainted before the conclusion of the contract" may be unfair.[626] This calls into question whether browse-wrap agreements have been concluded without giving parties opportunities to read the terms.[627] EU case law[628] has concluded that the unfairness of a contractual term shall be assessed, by taking into consideration whether the terms are set out in plain and intelligible language.[629] In fact, the empirical research by Gupta showed that a significant number of European websites[630] have placed the hyperlink to their terms and conditions at the bottom of the websites, without any notices to their users.[631] Therefore, terms that are included in these type of browse-wrap agreements are not effectively communicated to users and users are therefore unaware of these terms.[632] Browse-wrap B2C agreements may not meet the transparency requirement as stipulated in the Unfair Terms in Consumer Contracts Directive and are more likely to be held unfair. Article 6(1) provides that "unfair terms" that are contrary to good faith and cause a significant imbalance in the parties' rights and obligations to the detriment of consumers are

[624] In Case C-478/99 *Commission of the European Communities v Kingdom of Sweden* [2002] ECR I-04147, paragraph 22, the CJEU held that the annex to the Directive is of indicative and illustrative value. For consistency reason, the Court of Justice is referred to as CJEU irrespective of the case judgment that were rendered before the TFEU or not.

[625] Commission Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (Unfair Terms Directive in Consumer Contracts).

[626] Marco Loos and Joasia Luzak, 'Wanted: a bigger stick. On unfair terms in consumer contracts with online service providers' (2016)39 Journal of Consumer Policy 63, 87.

[627] European Commission's Expert Group on Cloud Computing Contracts: Unfair Contract Terms in Cloud Computing Service Contracts Discussion Paper, < http://ec.europa.eu/justice/contract/files/expert_groups/discussion_paper_unfair_contract_terms_en.pdf> accessed 16 October 2017.

[628] Case C-26/13 *Árpád Kásler and Káslerné Rábai and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* ECLI:EU:C:2014:282; Case C-92/*11 RWE VertriebAG v Verbraucherzentrale Nordhein-Westfalen e.V.* (ECLI:EU:C:2013:180); Case C‑472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECLI:EU:C:2012:242 (*Nemzeti v Invitel*).

[629] Reinhard Steennot, 'Public and Private Enforcement in the Field of Unfair Contract Terms' (2015)23 European Review of Private Law 589, 592-593.

[630] Among 50 websites, there are 11 music on demand, 8 web radio, 9 video game, 6 video on demand, 12 video hosting services and 4 multimedia websites.

[631] Indranath Gupta, 'Are websites adequately communicating terms & conditions link in a browse-wrap agreement?' (2012)3 European Journal of Law and Technology, 2.

[632] BEUC Contribution to the European Commission's Expert Group on Cloud Computing Contracts: Unfair Contract Terms in Cloud Computing Service Contracts Discussion Paper, 5, <https://www.beuc.eu/publications/beuc-x-2014-034_are_ec_expert_group_on_cloud_computing_contracts.pdf > accessed 21 February 2019.

non-binding on consumers. [633] A browse-wrap agreement is also considered a "distance contract" which falls within the scope of the EU Consumer Rights Directive.[634] "Distance contract" refers to any contract concluded between the trader and the consumer under an organized distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication (such as mail order, Internet, telephone or fax).[635] It is stipulated in Article 8(1) of the EU Consumer Rights Directive that the trader shall give the consumer necessary prior information or make that information available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. The pre-contractual information requirement intends to maximize the opportunity for consumers to obtain such information before entering into an agreement with the trader.[636] In browse-wrap agreements, the terms and conditions are often displayed via a hyperlink hidden at the bottom of the website. It could be argued that the browse-wrap B2C agreement is not an appropriate means to provide prior information to the consumer as the consumer is able to use the website without knowing the existence of such an agreement.

293. Therefore, one must conclude that the B2B browse-wrap ADR agreements are recognized in the EU. However, the B2C browse-wrap ADR agreements may not be binding on consumers in the EU as they may not meet the transparency and fairness requirements in Unfair Terms in Consumer Contracts Directive.[637]

B. Browse-wrap agreements in China

294. In China, browse-wrap agreements are also widely used in "terms of use" or "terms and conditions."[638] As the users do not have the right to alter terms of browse-wrap agreements, they are controlled by the standard form contract rules. Although there are no cases that deal directly with the validity of browse-wrap agreements in China, there is a case dealing with the validity of a shrink-wrap license agreement, which provides guidance to the validity of a

[633] Unfair Terms Directive in Consumer Contracts, Article 6(1).
[634] EU Council Directive 2011/83/EU of 25 October 2011 on Consumer Rights has repealed Council Directive 97/7/EC on the protection of consumers in respect of distance contracts. (Consumer Rights Directive)
[635] Recital 20 of the Consumer Rights Directive.
[636] Sutatip Yuthayotin, *Access to justice in transnational B2C e-commerce* (Springer 2015) 135.
[637] See (n 628).
[638] See Apple Store Terms of Use agreement <http://www.apple.com/cn/legal/terms/site.html> or Avature Terms of Use agreement <https://www.avature.net/ch/terms-of-use> accessed 9 June 2016.

browse-wrap agreement in China.[639] In *Guoli v Microsoft*, a customer challenged the validity of a shrink-wrap license agreement that was pre-formulated by Microsoft[640] and contains unfair terms that have exempted Microsoft from its liabilities. Beijing First Intermediate People's Court recognized the shrink-wrap agreement as a valid form of contract,[641] but it also held that certain clauses that have the effect of exempting Microsoft's liabilities (i.e. excluding Microsoft from warranties and notification obligations) shall be held void according to Article 40 of the PRC Contract Law.[642]

295. The browse-wrap agreement is a valid form of electronic contract but is subject to substantive judicial control based on consumer protection and standard form contract rules. [643] It is also required in Article 26 of the PRC Consumer Protection Law that standard form terms that have a substantial impact on consumers' interests shall be displayed conspicuously, otherwise these terms and conditions shall be void. This rule also applies to ADR agreements when ADR clauses are formulated as standard form terms. These ADR agreements should be placed in a conspicuous manner to draw consumers' attention.[644] The configuration and location of the browse-wrap agreements (usually displayed as "User's Agreement" at the bottom of the webpage with a hyperlink) are not conspicuous to the users as users can access the website without having to read these terms. It can be concluded that browse-wrap or shrink-wrap agreements are not denied legal effect in China simply because of their electronic form, but substantive rules on standard form contracts and consumer protection are applied to limit the scope of their validity.

C. Consent in browse-wrap agreements in a nutshell

296. From the study of the browse-wrap agreements in the EU and China, it is perceived that browse-wrap agreements are not denied legal effect solely because of their electronic form in

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639 *Guoli v Henan Province Lian Bang Software Technology Development Co., Ltd., Microsoft (China) Co., Ltd.* (2006) Yi Zhong Min Chu Zi No. 14468. This is the only available case in shrink-wrap agreements in China.

640 In the license agreement, it states that "by the use of this software, you have read and accepted relevant terms of the agreement."

641 In line with *ProCD, Inc. v. Zeidenberg*, Beijing First Intermediate People's Court held that the fact that Microsoft provide terms and conditions after the customers have bought the software and allow customers to return software if they disagree with the terms is in accordance with the party autonomy principle.

642 According to Article 40 of the PRC Contract Law, "the drafting party shall not use standard form clauses to exempt him from liabilities, impose heavier obligations on the other party, or preclude the non-drafting party from his major contractual rights, otherwise such clauses shall be void."

643 PRC Contract Law, Article 40; PRC Consumer Protection Law, Article 26.

644 The dispute resolution clause is labelled as a standard form term to be regulated in Article 3 of the Announcement of the State Administration for Industry and Commerce on Issuing the Guidelines for Regulating the Standard Terms of Online Trading Platform Contracts, Gong Shang Shi Zi (2014) No. 144, Article 7. ("SAIC Guidelines on Standard Clauses of Online Trading Platform") (网络交易平台合同格式条款规范指引)

these jurisdictions. However, this does not prevent them from being scrutinized under the substantive review by the national courts. In the EU, the B2B browse-wrap agreements are generally admitted in courts whereas the B2C browse-wrap agreements are scrutinized by the transparency requirements in the Unfair Terms in Consumer Contracts Directive and national contract rules. In China, the browse-wrap agreements are controlled by the application of standard form contract rules and consumer protection rules that forbid terms that are inconspicuous and unfair to consumers. While EU law focuses on the control of unfair terms in consumer contracts, China applies standard form contract rules to regulate browse-wrap agreements.

3.2.1.2. Consent in click-wrap agreements

297. In another type of "click-wrap agreement", parties enter into agreements through a click on the terms for confirmation. Click-wrap agreements require users to register on the website and the agreements become binding when the user has clicked the "I agree" icon to the terms of the website displayed with a hyperlink.[645] Although express consent is given in click-wrap agreements, the legitimacy of the consent may still be disputed. Electronic transactions are known for their efficiency and cost-saving character. Compared to offline transactions, traders tend to insert longer and more complicated terms while customers tend to accept too easily.[646] In order to proceed with the transaction quickly, under the assumption that electronic transactions are fast, customers are used to clicking and rarely pay attention to the terms. Even if they are willing to read the terms, they do not necessarily understand what the terms mean or what the legal implications of those terms are. The British company Skandia conducted an online research in 2011 revealing that only 7% always read online terms and conditions in their entirety when signing up for products and services, while 43% of those do not always read them as they think the terms and conditions are either boring or contain wording that they do not understand.[647] The following discussion will be divided into jurisdictions of the EU and China.

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[645] Norton online software service license agreement indicates that by installing the software, the users agree to the agreement by clicking "I agree" or loading the software, <http://us.norton.com/support/sos/EULA/AOL/N360_SOS_EULA.pdf> accessed November 19, 2015.

[646] According to a Fairer Finance survey, small print for some companies (such as Endsleigh, Sheila's Wheels, Esure and M& S Bank) now runs to more than 30,000 words. < http://www.bbc.com/news/business-27109000> accessed 31 January 2017.

[647] 'Skandia Takes the Terminal out of Terms and Conditions' < http://www.prnewswire.co.uk/news-releases/skandia-takes-the-terminal-out-of-terms-and-conditions-145280565.html> accessed 31 January 2017.

A. Click-wrap agreements in the EU

298. This section will consider two aspects of click-wrap agreements in the EU: click-wrap B2B ADR agreements and the click-wrap B2C ADR agreements. In B2B disputes, no cases can be found that deal directly with click-wrap B2B ADR agreements, but there is one relevant case involving a click-wrap B2B jurisdiction clause.[648] The CJEU confirmed the validity of a B2B jurisdiction clause in a click-wrap agreement in *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*.[649] The main issue was whether the click-wrapping general terms and conditions that contained a jurisdiction clause providing the jurisdiction of a court in Leuven were in accordance with Article 23(2) of the Brussels I Regulation[650] and could be held valid. The defendant (buyer) claimed that the general terms and conditions had not been validly incorporated into the sale agreement as the webpage containing the general terms and conditions of sale did not open automatically upon registration. Instead, a further click to open the conditions of delivery and payment in a new window was required. The court held that the buyer expressly accepted the general terms and conditions by clicking the related box on the website and therefore concluded that there was a real consent. Article 23(2) of the Brussels I Regulation stipulates that parties can agree on jurisdiction agreements via all forms of electronic communications that provide for a durable record of agreement equivalent to "writing". Here, the requirement of "a durable record" is met if the click-wrapping makes printing and saving the text of the general terms and conditions *possible* before the conclusion of the contract, regardless of whether the webpage containing that information does not open automatically on registration on the website and during each purchase. As parties in B2B ADR agreements are in similar bargaining positions as in B2B jurisdiction agreements, it can also be concluded that B2B ADR agreements in the click-wrap form are also accepted in the EU.

299. In B2C disputes, click-wrap ADR agreements are also admitted in the EU provided that they are displayed in plain, intelligible language and give the consumer opportunity to be acquainted with the terms before the conclusion of the contract.[651] As seen with B2C browse-wrap

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[648] In the E.U., both jurisdiction agreement and adjudicative ADR agreement are classified as Annex 1(q) of the Unfair Terms Directive in Commission Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts. Therefore, the validity requirement of click-wrap jurisdiction agreement can be used in click-wrap adjudicative ADR agreement as well.

[649] *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*, C-322/14, ECLI:EU:C:2015:334. (Jaouad v CarsOnTheWeb)

[650] Council Regulation (EU) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012 (Brussels I Regulation).

[651] Unfair Terms Directive in Consumer Contracts, Article 5, Annex I(i). See also discussion in Section 3.2.1.1.A. browse-wrap agreements in the EU.

agreements, there is also a requirement imposed on traders in click-wrap agreements to provide consumers with pre-contractual information in a manner appropriate to the means of distance communication used in plain and intelligible language.[652] Nevertheless, the B2C click-wrap agreements are regulated by national contract rules and the transparency requirement in the Unfair Terms in Consumer Contracts Directive rather than the pre-contractual information requirement of the Consumer Rights Directive as no specific civil remedies are stipulated therein. Depending on the manners in which ADR agreements are presented, the validity assessment of click-wrap ADR agreements may vary. An ADR clause provided in the terms and conditions which are displayed via a hyperlink in small letters during a registration process may not be as conspicuous as an ADR clause that is provided with a pop-up window of terms and conditions or is directly accessible next to the consent button. In the hyperlink scenario, the consumer could continue the registration without opening the hyperlink. In the latter scenarios, the registration would not be completed if the consumers have not read the terms.

B. Click-wrap agreements in China

300. In China, click-wrap agreements are recognized by the people's courts. The earliest case dealing with a click-wrap agreement in China can be traced back to 2002[653] when the people's court has granted a click-wrap B2C service agreement with general legal effect. The following section will look into the substantive validity of click-wrap agreements in both the B2B and B2C contexts.

301. In the B2B context, a click-wrap arbitration clause contained in the service agreement is granted validity by the people's court in *Ningbo Hegao Magnetic Technology Co., Ltd. v. Google Inc., et al.*[654] Ningbo Hegao had clicked the terms and conditions of Google Adwords and was supposed to be legally bound by the service contract. In B2C click-wrap ADR agreements, the substantive law (standard form contract rules and consumer protection rules) can also be applied to assess the substantive validity of the agreements.[655] For example, in *Sun Dingding v Jiangsu Su Ning Yi Gou E-commerce Co., Ltd.*,[656] the people's court confirmed the admissibility of a click-wrap jurisdiction agreement but denied its legal effect because this clause was displayed inconspicuously to customers and excluded the consumer's right to the

[652] Consumer Rights Directive, Article 6(1), 8(1).
[653] *Lai Yun Peng v Beijing Sitong Lifang Information Technology Ltd.* (2002) Supreme People's Court Bulletin 6.
[654] See *Ningbo Hegao Magnetic Technology Co., Ltd. v. Google Inc., et al.* (n 383).
[655] See Section 3.2.1.1 B.
[656] *Sun Dingding v Jiangsu Su Ning Yi Gou E-commerce Co., Ltd.* (2015) Su Zhong Min Zi No. 00253.

court. The people's court assessment in the validity of B2C jurisdiction agreement can also be used to assess the validity of B2C ADR agreement through the application of substantive rules.

C. Consent in click-wrap agreements in a nutshell

302. Based on the analysis of the validity of click-wrap agreements of different jurisdictions, I may conclude that click-wrap agreements are also recognized as a legal form of contract formation both in B2B contracts and in B2C contracts. In the EU, traders have the obligation to draw sufficient notice to their consumers of such agreements and give them the opportunity to read the agreements before the contract is concluded in accordance with the transparency requirement in the Unfair Terms in Consumer Contracts Directive. Moreover, there is an obligation for traders in B2C contracts to provide pre-contractual information in a way appropriate to the means of distance communication used in plain and intelligible language. Therefore, a practice of presenting the terms via a hyperlink to consumers may be sufficient to fulfill this obligation only if the terms are displayed in a plain and intelligible manner appropriate to the means of distance communication. In China, the people's court recognizes click-wrap agreements which are also subject to the substantive law in standard form contract rules and consumer protection rules. Unlike browse-wrap agreements that require tacit consent from the parties, click-wrap agreements require users/customers to approve the contract terms explicitly at the conclusion of the contracts. Moreover, the parties are prevented from using the products or services before signifying their assent to the click-wrap agreements. Therefore, click-wrap agreements are more likely to be enforced than browse-wrap agreements as the users/customers in click-wrap agreements have received constructive notice to the terms and signified their assent to the agreement.[657]

3.2.2. The application of EU public policy to judicial review of ADR agreements

303. After exploring the requirement of electronic consent in e-ADR agreements, I will take a closer look into the public policy rules that might influence the validity of e-ADR agreements in the EU. In order to balance the bargaining powers between traders and consumers, EU legislators have developed several legal instruments on consumer protection that prescribe a number of restrictions on pre-dispute B2C ADR agreements.[658] The validity concern of pre-dispute B2C

[657] Leon Trakman, 'The Boundaries of Contract Law in Cyberspace' (2009) International Business Law Journal, 173.

[658] At the EU level, an attempt has been made to draft the Regulation of Common European Sales Law (CESL) to regulate standard terms in all types of contract including B2B, COM (2011)635 final. Article 7(2) and Article

ADR agreements is also reflected in the draft of ODR procedural rules by the UNCITRAL Working Group III where a two-track approach was proposed.[659] Merchants, at the time of the transaction, would generate two different ODR clauses, depending on the jurisdiction and identity (business or consumer) of the purchaser. It was proposed that in jurisdictions (such as the EU) where pre-dispute arbitration agreements with consumers are restricted, a non-binding ODR decision (such as recommendations) can be proposed by the ODR service provider (Track II), whereas in other jurisdiction (such as the U.S.) where pre-dispute arbitration agreements with consumers are allowed, a binding ODR decision (such as an arbitral award) can be rendered at the end of ODR procedure (Track I).

304. In what follows, I will discuss the interplay between the EU law and national law of the member states in regulating the validity of ADR agreements, specifically with regard to mandatory ADR agreements that force parties to use ADR before they can refer to other dispute resolution methods. Section 3.2.2.1 will discuss the power allocation between the EU and its member states which sets out the legal framework on the validity of ADR agreements. Section 3.2.2.2 will examine the EU legislation which affects the substantive validity of B2C ADR agreements. Section 3.2.2.3 will analyze two branches of EU public policy (principle of effective judicial protection and consumer protection) which are often used by national courts to limit the procedural autonomy of the member states in adjudicating the validity of ADR agreements.

3.2.2.1. EU competence and procedural autonomy of EU member states

A. EU competence

305. The EU may adopt legislation in the field only and insofar as the member states have conferred appropriate competence upon it.[660] The EU competence is divided into: "exclusive competence" which member states may not legislate,[661] "shared competence" divided between the EU and its member states[662] and "supportive competence"[663] which the EU may legislate

70(1) of the draft of CESL: individually negotiated terms may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's notice to them, before or when the contract was concluded. However, the CESL was withdrawn by the EU Commission, leaving it to be regulated by the national contract laws of the member states.

[659] UNCITRAL Working Group III on Online Dispute Resolution, Report of Working Group III on the work of its twenty-seventh session (20-24 May 2013) A/CN.9/769.

[660] TEU, Article 5(2), principle of conferral.

[661] TFEU, Article 2(1), 3.

[662] TFEU, Article 2(2), 4.

[663] TFEU, Article 2(5).

to coordinate, encourage or complement national legislation.[664] In areas that do not fall within the exclusive competence of the EU, the EU shall act "only if the objectives of the proposed action cannot be sufficiently achieved by the member states but can better be achieved at the union level and such actions shall not exceed what is necessary."[665]

306. Consumer protection is a shared legislative competence between the EU and member states and therefore the principle of subsidiarity applies.[666] The EU harmonizes consumer protection law in order to ensure the functioning of the internal market.[667] The EU law must ensure a high level of consumer protection. Therefore, the EU consumer laws, which are composed of both procedural rules (such as Directive on Consumer ADR and ODR Regulation) and substantive rules (such as Unfair Terms in Consumer Contracts Directive), exert influence on the substantive validity of B2C ADR agreements.

B. Procedural autonomy of EU member states

307. Pursuant to Article 81(2)(g) of the TFEU, the EU has competence in adopting measures for the development of alternative methods of dispute resolution when necessary for the proper functioning of the internal market. However, in the absence of uniform procedural rules and remedies, a reliance on the member state national system is necessary. In the absence of the EU law, it is for the domestic legal system of each member states to designate the courts having jurisdiction and to determine the procedural rules on actions for safeguarding the rights of individuals under EU law.[668]

308. The CJEU has nevertheless developed case law that limits procedural autonomy to guarantee a minimum level of judicial protection in all member states. It has for instance established that the rules applied to cases cannot be less favorable than those relating to similar actions of a domestic nature (principle of equivalence). [669] Furthermore, it has been held that the rules applied cannot make it impossible or extremely difficult in practice to exercise relevant rights

[664] Alina Kaczorowska, *European Union Law* (Routledge 2011), Second Edition, 78-79.
[665] TEU, Article 5(3), principle of subsidiarity.
[666] TFEU, Article 4(2).
[667] TFEU, Article 114 (1), (3).
[668] Martin Ebers, 'ECJ (First Chamber) 6 October 2009, Case C-40/08, Asturcom Telecommunicaciones SL v. Cristina Rodriguez Nogueira' (2010)18 European Review of Private Law 823, 825.
[669] Case 33/76, *Zewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, paragraph 19; Case 45/76, *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043, paragraph 13.

protected by EU laws (principle of effectiveness).[670] The principle of equivalence and the principle of effectiveness have been used to limit the procedural autonomy of member states by an increasing body of case laws.[671] In areas that are not harmonized by EU law, the principles of equivalence and effectiveness are used to balance the power between national competence and EU competence in assessing the legal effect of ADR agreements, in specific B2C ADR agreements.

3.2.2.2. EU legal instruments in consumer protection and their influence on B2C ADR agreements

309. The EU strives to harmonize various consumer protection rules in the member states, with the objective to "reduce the obstacle, whatever their origin, to the operation of the internal market"[672]. The notion of "consumer" in these legal instruments referring to "any natural person who is acting in contracts which are outside of his trade, business, or profession" is a rather narrow definition.[673] In the CJEU case law, "consumer" does not extend to legal persons, even if they engage in transactions outside of their trade.[674]

310. In what follows, I will examine how EU legal instruments in consumer protection have influenced B2C ADR agreements. I will firstly focus on the Unfair Terms in Consumer Contracts Directive and examine how this is relevant to determine the validity of an ADR agreement. Furthermore, a study of the EU Directive on Consumer ADR will teach us procedural requirements that must be provided for in an ADR agreement. Finally, I will examine how the EU Consumer Rights Directive may have an impact on B2C ADR agreements.

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[670] Case C-261/95, *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-04025, paragraph 29; Jointe Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport* and *The Queen v Secretary of State for Transprot, ex p Factortame Ltd* [1996] ECR I-01029, paragraphs 70-73.

[671] Dennis Patterson & Anna Södersten, *A Companion to European Union Law and International Law* (Wiley Blackwell 2016) 275. Case C-312/93, Peterbroeck, Van Campenhout & Cie SCS v Belgian State [1995] ECR I-04599, Case 14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 01891, Case C-261-95, *Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS)* [1997] ECR I-04025, *B.S. Levez v T.H. Jennings (Harlow Pools) Ltd.* [1993] ECR I-07835.

[672] CJEU, C-377/98, *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECR I-7079.

[673] Directive 2011/83/EU on Consumer Rights [2011] OJ L 304/64, Article 2; Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L95/32, Article 2 and Directive 2013/11/EU of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes, [2013] L 165/63, Article 4(1).

[674] CJEU, joined cases C-541/99 and C-542/99, *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl* [2001] ECR I-9049, Case C-110/14, *Horațiu Ovidiu Costea v SC Volksbank România SA* [2015] ECLI:EU:C:2015:538.

A. Unfair Terms in Consumer Contracts Directive

311. The Unfair Terms in Consumer Contracts Directive applies to the relationship between sellers or suppliers and consumers in cross-border and non-negotiated consumer contracts. It aims to facilitate the establishment of the internal market and to protect the consumers' rights in sales or service contracts. Article 5 requires that the terms must always be drafted in plain, intelligible language when the terms are offered to consumers in writing. Where there is doubt about the meaning of a contract term, the interpretation more favorable to the consumer shall prevail. Article 6(1) of the Unfair Terms in Consumer Contracts Directive requires member states to ensure that unfair terms used in contracts between sellers or suppliers and consumers will not bind consumers.[675] The transparency requirement requires the national court to consider the requirement of transparency in assessing the unfairness of a contract term.[676] Moreover, a contract term's non-compliance with the transparency requirement may be considered unfair by the national court and therefore becomes non-binding on the consumer.[677]

312. Article 3(1) of the Unfair Terms in Consumer Contracts Directive provides a general prohibition of unfair terms. It states that a contractual term that has not been individually negotiated in advance is unfair if: (i) it is contrary to the requirement of good faith; (ii) and causes an imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[678] It is specifically mentioned that a term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer is not able to influence the substance of the term, particularly in a pre-formulated standard contract.[679] Note that for reasons of efficiency and convenience, a huge number of e-ADR agreements (such as browse-wrap agreements and click-wrap agreements) are pre-formulated by traders as standard contracts. In this case, even if consumers give their expressive consent to the ADR agreements, their validity is subject to the judicial review of national courts under the Unfair Terms in Consumer Contracts Directive.

313. Annex 1 provides an indicative and non-exhaustive list and includes 17 types of contractual

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675 Directive on Unfair Terms in Consumer Contracts, Article 6.

676 Case C-26/13 *Árpád Kásler, Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, ECLI:EU:C:2014:282, paragraphs 73-74.

677 Case C-191/15, *Verein für Konsumenteninformation v Amazon EU Sàrl*, ECLI:EU:C:2016:612; Joined Cases C-154/15, C-307/15 and C-308/15, *Francisco Gutiérrez Naranjo v Cajasur Banco SAU* (C-154/15), *Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA BBVA* (C-307/15), *Banco Popular Español, SA v Emilio Irles López Teresa Torres Andreu* (C-308/15), ECLI:EU:C:2016:980.

678 Directive on Unfair Terms in Consumer Contracts, Article 3(1) para 1.

679 Directive on Unfair Terms in Consumer Contracts, Article 3(2).

terms that may be regarded as unfair terms. During the implementation of the Unfair Terms in Consumer Contracts Directive, some member states took a black list approach which forbids all the unfair terms listed in Annex 1(e.g. Austria, Belgium, Bulgaria, Czech Republic, Estonia, Greece, Latvia), some took a grey list approach that presumes the terms to be unfair unless the parties can rebut this presumption after the dispute arises (e.g. Poland, UK, France, Poland, Slovakia), while others use a combination of the black list and grey list approach (e.g. Germany, the Netherlands) meaning that part of the terms belong to the black list and part of the terms belong to the grey list.[680] Among the terms in the non-exhaustive and indicative list of unfair terms in Annex 1, item (q) refers to terms "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions."[681] Although the member states have the authority to determine the list of unfair terms on their own, this provision indicates that certain types of B2C ADR agreements may be treated as unfair terms under Article 3(1) of the Directive, which are non-binding on consumers.[682]

314. The fairness standard in Unfair Terms in Consumer Contracts Directive has been examined by national courts of the member states as well as by the CJEU to ensure a consistent interpretation and implementation of the Directive. It is rare that the CJEU determines directly the unfairness of a substantive clause in a contract and its compliance with Article 3 as it is the task of the national court to make this assessment.[683] Nevertheless, in *Océano v. Rocio Murciano Quintero*,[684] the CJEU[685] exceptionally concluded that a B2C exclusive jurisdiction clause that confers exclusive jurisdiction on the territorial jurisdiction of which the seller or supplier has his principal place of business must be regarded as unfair within the meaning of Article 3 of the Directive.[686]

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[680] Prof. Dr. Hans Schulte-Nölke et al, 'EC Consumer Law Compendium: Comparative Analysis', February 2008, 395-403, <http://ec.europa.eu/consumers/archive/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf> accessed 20 May 2016. (EC Consumer Law Compendium)

[681] Directive on Unfair Terms in Consumer Contracts, Annex 1(q).

[682] Consumer Law Compendium: Comparative Analysis, (n 680) 344, 395. The open-ended wording of the Unfair Terms in Consumer Contracts Directive does not clarify how the member states shall establish the form of the non-binding nature, there are absolute nullity model (Germany, Ireland, Portugal, Spain, etc.), relative nullity model (Czech Republic, Latvia and the Netherlands) and unclear model (Austria, Greek, Hungary, etc.). See EC Consumer Law Compendium: Comparative Analysis, (n 680) 403-408.

[683] Jules Stuyck, 'The European Court of Justice as a motor of private law' in Christian Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press 2010) 113.

[684] Case C-240/98, *Océano Grupo Editorial SA v. Rocío Murciano Quintero*[1998] ECR I 4941 (Océano v. Rocio Murciano Quintero).

[685] The CJEU was named as ECJ before the Treaty of Lisbon 1 December 2009.

[686] *Océano v. Rocio Murciano Quintero*, paragraph 24.

315. The CJEU explained that this assessment was reached in relation to a term that was sole to the benefits of the seller and contained no benefit for the consumer. In the case of a dispute with small claims, it would be difficult for consumers to bring an action in a foreign jurisdiction but less onerous for the seller or supplier to file such an action in the jurisdiction of his own. The exclusive jurisdiction clause thereby undermined the effective legal protection of the rights that the Directive affords to the consumer and thus such kind of clause falls under the category referred to in subparagraph (q) of Annex No. 1 of the Directive. The CJEU has therefore allowed national courts to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term.

316. National courts can apply the same rationale[687] in *Océano v. Rocio Murciano Quintero* to assess the unfairness of B2C arbitration agreements by taking into consideration whether such agreements "cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of consumers."[688] It has been established in *Mostaza* and *Asturcom* that national courts must determine, of their own motion, the fairness of a pre-dispute B2C arbitration agreement, where national courts have all the legal and factual elements available, even in the absence of the consumer's request, during the enforcement stage, or even though the consumer had only pleaded the invalidity during the annulment stage and not during the arbitral proceedings.[689]

B. Directive on Consumer ADR

317. Over the past decade, the EU legislature has taken a number of measures to promote efficient out-of-court consumer redresses.[690] EC Recommendation 98/257/EC, for example, set out principles for adjudicative ADR whereas EC Recommendation 2001/310/EC set out principles

[687] The exclusive jurisdiction clause is more favorable to traders than to consumers as it grants the sellers more favorable conditions in bringing a legal action in the jurisdiction of his/her jurisdiction, which creates significant imbalance between sellers and buyers, to the detriments of consumers.

[688] Gabrielle Kaufmann-Kohler, 'Online Dispute Resolution and its Significance for International Commercial Arbitration' (2005) Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner, 445. Christine Riefa, 'Uncovering the Dangers Lurking Below the Surface of European Consumer Arbitration' (2008)4 Consumer Journal 24.

[689] Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*. [2006] ECR I-10421; Case C 40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-09579.

[690] Green Paper of 16 November 1993 on the access of consumers to justice and the settlement of consumer disputes in the single market; Recommendation 98/257/EC O.J. L 115 on the Principles Applicable to the Bodies Responsible for Out-of-court Settlement of Consumer Disputes, April 17, 1998; Recommendation 2001/310/EC O.J. L 109 on the Principles for out-of-court bodies involved in the Consensual Resolution of Consumer Disputes, 4 April 2001; Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, COM (2002) 196.

for consensual ADR. The Directive on Consumer ADR[691] is an EU legal instrument that integrated the proposed principles of ADR in two previous recommendations to promote consumer's access to justice. The objective of the Directive on Consumer ADR is intended to achieve a high level of consumer protection without restricting consumers' access to the courts, to the proper functioning of the internal market.[692]

318. Due to the divergence in the implementation of the Unfair Terms Directive in Consumer Contracts, there are discrepancies in the judicial control regarding the fairness analysis of pre-dispute ADR agreements[693] and legal consequences of unfair terms.[694] However, the EU Directive on Consumer ADR has harmonized member states' laws on the legal effect of pre-dispute B2C ADR agreements by the principle of liberty.[695] The principle of liberty, stipulated firstly in Article VI of the Recommendation 98/257/EC and then in Article 10 of the Directive on Consumer ADR, requires that an agreement between a business and a consumer to submit a complaint to an ADR entity shall not bind the consumer if it was concluded before the dispute was materialized and if it has the effect to deprive the consumer of his/her right to bring an action before the courts for the settlement of the dispute.[696] Alongside the substantive requirements in unfair terms stipulated by Article 3, Article 6 and Annex 1(q) of the Unfair Terms in Consumer Contracts Directive, the principle of liberty is a step further than the Unfair Terms in Consumer Contracts Directive with regard to regulating B2C ADR agreement. It is up to the national court to determine *ex officio* the unfairness and legal effect of a B2C ADR agreement (except that such terms directly fall into the black list of unfair terms stipulated by national laws of the member states) in Unfair Terms in Consumer Contracts Directive, whereas the principle of liberty in the Directive on Consumer ADR gives a definite answer to the non-binding effect on consumers of a pre-dispute B2C ADR agreement that has deprived the consumer of his/her right to court proceedings.

319. A number of remarks need to be made to the effect of this principle of liberty on the binding

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[691] Commission Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, OJ L 165/63 ("Directive on Consumer ADR").
[692] Directive on Consumer ADR, Recital 60.
[693] Riefa (n 688) 26.
[694] See EC Consumer Law Compendium: Comparative Analysis, (n 680) 403. Article 6 of the Unfair Terms in Consumer Contracts Directive only requires member states to lay down that unfair terms in B2C contracts shall not be binding on the consumer. The legal consequence of unfair terms may be dependent on the national implementation of each member states.
[695] Directive on Consumer ADR, Article 10 (2). The liberty principle applies to all the ADR entities that seek to be certified by national authorities under Article 20.
[696] Directive on Consumer ADR, Article 10 (1).

effect of a B2C ADR agreement. First, it only precludes the binding effect of ADR agreements on consumers and therefore the agreement can still be binding on traders. Second, the principle of liberty does not explicitly exclude all types of pre-dispute ADR agreement as such but refers to certain types of pre-dispute B2C ADR agreements that have the effect of depriving consumers' access to justice.[697]

320. The question arises as to what type of pre-dispute ADR agreements has the effect of "depriving consumers of their access to justice" and shall therefore not be binding on consumers? A commonly shared opinion is that pre-dispute B2C arbitration agreements, that bind parties to arbitration with enforceable decisions and preclude consumers' right to bring legal actions, shall have no binding effect on consumers.[698] Pre-dispute B2C ADR agreements that set forth pre-conditions in order for consumers to bring an action in court need to be specifically examined by courts under the principle of liberty. These B2C ADR agreements may be in compliance with the principle of liberty if the ADR outcomes are non-binding on consumers and if the agreements do not prevent consumers from accessing court due to a substantial delay or a significant cost. [699]

C. EU Consumer Rights Directive

321. The EU Consumer Rights Directive applies a full harmonization approach[700] (for example, with regard to the information requirement in distance and off-premises contracts) to increase legal certainty, eliminate the barriers to the internal market, and ensure a high level of consumer

[697] Access to justice is a constitutional right enshrined by Article 5 of the European Convention on Human Rights and in Article 47 of the Charter of Fundamental Rights of the European Union. It grants the citizen with a legal right to bring an action in court.

[698] European Parliament Hearing, Internal Market and Consumer Protection Committee-on the proposals for ADR Directive and ODR Regulation, paragraph VII: "in binding processes, in particular arbitration, the Directive should clarify under which circumstances a pre-dispute agreement is valid"; Pablo Cortés & Arno R. Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress' (2014) 21 Maastricht Journal of European and Comparative Law 1, 26; Julia Hornle, 'Legal Controls on the Use of Arbitration Clause in B2C E-Commerce Contracts' (2008)2 Masaryk University Journal of Law and Technology 23, 26; Mohammed A. Aslam, 'B-2-C Pre-Dispute Arbitration Clauses, E-Commerce Trust Construction and Jenga: Keeping Every Cog and Wheel' (2013)7 Masaryk University Journal of Law and Technology 1, 5.

[699] Pablo Cortés, 'The Consumer Arbitration Conundrum: A Matter of Stautory Interpretation or Time for Reform?' in *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 76.

[700] Maximum harmonization/full harmonization is an implication that no further action can be taken by the member states to implement the laws. Christian Twigg-Flesner, 'A cross-border-only regulation for consumer transactions in the EU' in *A Cross-Border-Only Regulation for Consumer Transactions in the EU* (Springer 2012) 17; Norbert Reich and others, *European Consumer Law* (Intersentia 2014) 400-401.

protection by establishing uniform rules.[701] The information requirement is perceived as an effective method to enhance public awareness of ADR in resolving B2C disputes. The Directive tries to re-establish the balance between the parties by providing the consumer with information about the goods or services.[702] Traders are imposed with additional information obligations to give consumers more leverage in electronic contracting.[703]

322. It is required in Article 8(1) that:

> *"The trader should give the information provided for in Article 6(1) or make that information available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. In so far as that information is provided on a durable medium, it shall be legible."*

323. The traders are required to provide the consumer with necessary information about the products or services in a clear and comprehensible manner.[704] The pre-contractual information requirement (including information on ADR) reduces the information asymmetry between traders and consumers in electronic transactions. In the context of a pre-formulated standard contract, information can provide consumers with a better understanding of the meaning and the judicial consequence of the contract terms.[705] Consumers can use the ADR that is provided by traders (especially when traders are unilaterally bound by a specified ADR) to resolve disputes. However, there are no civil remedies for failing to perform these pre-contractual information duties, particularly with regard to the validity of the contract.[706]

324. Although the pre-contractual information of the CRD requires traders to give consumers the opportunity to be aware of the terms before the conclusion of the contract, it does not provide any legal basis for national courts to determine the validity of e-ADR agreements as there are

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[701] EU Council Directive 2011/83/EU of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Consumer Rights Directive), Recital 7 & 9.

[702] Immaculada Barral, 'Consumers and New Technologies: Information Requirements in E-commerce and New Contracting Practices on the Internet' (2009)27 Penn State International Law Review 609, 613. Ilse Samoy and Marco B.M. Loos, *Information and Notification Duties* (Intersentia 2015) V.

[703] Diane Rowland, Uta Kohl and Andrew Charlesworth, *Information technology law* (Routledge 2017) 243.

[704] One of the items (t) in Article 6(1) of the Consumer Rights Directive has included information of (where applicable) the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it. See also Directive 97/7 on the protection of consumers in respect of distance contracts, Recital 11.

[705] Stefan Grundmann, Wolfgang Kerber and Stephen Weatherill, *Party autonomy and the role of information in the internal market* (Walter de Gruyter 2001) 314.

[706] Rodrigo Momberg, 'Standard Terms and Transparency in Online Contracts' in Franceschi 197.

no civil remedies. Instead, the validity of e-ADR agreements is regulated by the contract rules of the member states.

3.2.2.3. EU public policy affecting the substantive validity of ADR agreements

325. The following section will focus on the role of EU public policy in affecting the validity of ADR agreements. It will examine the interplay between the primacy of EU laws and the procedural autonomy of EU member states with respect to ADR agreements.

326. There is no uniform concept of "public policy" in EU treaties or regulations. Instead, each member state has a unique responsibility to define their own "public policy."[707] However, in order to ensure the establishment of an internal market in the EU, the CJEU has developed case law to curtail the scope of public policy of member states.[708] The concept of "public policy" (*ordre public*), as interpreted by the CJEU, covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society, which may include, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare.[709]

327. The following part will be divided into two sections that explore the influence of EU public policy rules on the procedural autonomy of member states in the context of ADR agreements. The first section discusses how the principle of effective judicial protection, as a fundamental right of individuals, imposes restrictions on the mandatory ADR scheme established by EU member states. The second section examines the role that EU consumer laws play in B2C arbitration agreements, as protection for weaker parties.

A. The principle of effective judicial protection

328. Several EU legal instruments[710] have stipulated that member states should establish an out-of-court dispute resolution mechanism in order to enhance protection for consumers. Some EU member states have implemented such requirements by establishing mandatory consensual ADR schemes by national legislation. Cases have been brought to the CJEU to decide whether

[707] Case 41/74, *Yvonne van Duyn v. Home Office* [1974] ECR 01337.
[708] Case 30/77, *Reigna v. Pierre Bouchereau* [1977] ECR 1999.
[709] Commission Directive 2006/123/EC on Services in the Internal Market [2006] OJL 376/36, Recital paragraph 41.
[710] The out-of-court settlement requirement has been stipulated by several legal instruments such as Article 24 of Consumer Credit Directive 2008/48/EC, Article 101 & 102 of the Payment Services Directive 2013/36/EU and Article 18(2)(C) of Energy Directive 2012/27/EU.

such mandatory ADR schemes established by national legislation are in breach of EU law, with respect to the principle of effective judicial protection.

329. The principle of effective judicial protection originates from the European Convention on Human Rights (ECHR): [711] Article 6 deals with the right to a fair trial and Article 13 with the right to an effective remedy. The right to a fair trial requires that "anyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." [712] *Kudla v Poland* [713] differentiates Article 13 from Article 6 by establishing the principle that domestic law should guarantee a separate legal procedure giving an effective remedy with regard to a complaint. The principle of effective judicial protection has been developed by the ECHR with a broad scope of rights including but not limited to, access to justice[714], the right to a fair trial and the principle of due process,[715] the right of defense[716] and the right to be represented.[717] The CJEU has enshrined such rights in its judgments as a general principle of EU law.[718]

330. Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter "the Charter")[719] was inherited from the ECHR. While the first paragraph of the Charter is based on Article 13 of the ECHR, the second paragraph of the Charter echoes Article 6 of the ECHR. [720] Although the rights granted in the Charter correspond to the ECHR, more extensive protection is provided in the Charter. The right to an effective remedy in the Charter has a more extensive scope than that of the ECHR since it applies to all rights and freedoms guaranteed by EU law, whereas the right to an effective remedy in the ECHR is limited to violation of the rights included in the ECHR.[721] It is stipulated in the second paragraph of Article 19(1) of the TEU that member states are required to provide sufficient remedies to ensure effective legal

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[711] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms [1950], amended by protocol No. 14 on 1 June 2010.
[712] *Ibid*.
[713] *Kudla v Poland* no. 30210/96 (ECtHR, 26 October 2000).
[714] *Golder v United Kingdom* App no 4451/70 (ECtHR, 21 February 1975), *Chevrol v France* App no 49636/99 (ECtHR, 13 February 2003), *Dubinskaya v Russia* App no 4856/03 (ECtHR, 13 July 2006).
[715] *Ruiz-Mateos v Spain* App no 12952/87 (ECtHR, 23 June 1993).
[716] *Bricmont v Belgium* App no 10857/84 (ECtHR, 7 July 1989) ; *Ruiz-Mateos v Spain* (1993)
[717] *Ezeh and Connors v United Kingdom* App no 39665/98 and 40086/98 (ECtHR, 9 October 2003), *Monnelll and Morris v United Kingdom* App No 9562/81 and 9818/82 (ECtHR 2 March 1987), *Karatas and Sari v France* App No 38396/97 (ECtHR, 16 May 2002)
[718] Case 222/84 *Johnston* [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 *Heylens* [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 *Borelli* [1992] ECR I-6313.
[719] Charter of Fundamental Rights of the European Union [2012] OJ C326/02.
[720] Explanations relating to the Charter of Fundamental Rights, OJ 2007 C303/17.
[721] European Union Agency for Fundamental Rights, 'Handbook on European Law relating to access to justice' (2016) 92.

protections that are covered by EU law.[722] The European Court of Justice developed a role for national courts to secure enforcement of EU law at the national level.[723] After the Treaty of Lisbon, the Charter became the source of primary EU law, serving as a parameter for examining the validity of secondary EU legislation and national measures.[724]

331. National legislation that may prejudice the effective judicial protection principle can be justified by certain legal grounds which were established by the CJEU in the *Hauer* case:[725]

> *"It is settled case law that fundamental rights do not constitute unfettered prerogatives provided that restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed."*[726]

That being said, the effective judicial protection principle can be reconciled with national legislation under the principle of necessity and proportionality.[727]

332. The CJEU has confirmed in its judgments that general principles of EU law shall also apply to member states when they are implementing EU law.[728] In *Alassini*,[729] the CJEU considered that, although the mandatory nature of the settlement procedure stipulated by Italian national law might prejudice the principle of effective judicial protection, such requirement can be justified if it pursues an objective of general interest pursued by the measure in question (Universal Service Directive) and does not involve a disproportionate and intolerable interference that infringes the substance of the rights guaranteed.[730] The mandatory settlement procedure provided for under the national legislation was proportionate to the aim of the Universal Service Directive (recital 47 and Article 34), which provides a transparent, simple

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[722] TFEU, Article 19(1).
[723] Case 6/64 *Flaminio Costa v ENEL* [1964] ECLI:EU:C:1964:66, the ECJ held that the Treaty had created "its own legal system which …became an integral part of the legal systems of the member states and which their courts are bound to apply.
[724] Treaty on European Union, Article 6(1).
[725] *Hauer v Land Rheinland-Pfalz*, Case C-44/79 [1979] ECR 03727.
[726] Case C-28/05 Dokter and Others [2006] ECR I-5431
[727] Charter of Fundamental Rights of European Union, Article 52, paragraph 1.
[728] European Union Agency for Fundamental Rights, EU Charter of Fundamental Rights, Article 51 explanation < http://fra.europa.eu/en/charterpedia/article/47-right-effective-remedy-and-fair-trial> accessed 25 May 2016. See Case C-2/92 Bostock [1994] ECR I-955, paragraph 16 and Case C-292/97 [2000] ECR I-2737, paragraph 37.
[729] Case C-317/08 *Rosalba Alassini v Telecom Italia SpA* [2010] ECR I 2231 (*Alassini v Italia*).
[730] Directorate General for Internal Policies, 'Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights' (2012) PE462.446, 55.

and inexpensive out-of-court settlement for consumer disputes.[731] No less restrictive alternative existed as other alternatives were not as efficient as a mandatory settlement requirement in achieving this objective.[732] It was not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure were disproportionate to those objectives either. After exanimating the national legislation, the CJEU ruled that the Universal Services Directive must be read as not precluding national legislation prescribing mandatory out-of-court dispute resolution before a court as the principle of effective judicial protection has not been breached provided that the following conditions are met:

(i) the decision is non-binding on the parties;

(ii) the procedure does not cause a substantial delay for the purposes of bringing legal proceedings;

(iii) it suspends the period for the time-barring of claims;

(iv) it does not give rise to costs or gives rise to very low costs for the parties;

(v) electronic means should not be the only means by which the procedure can be accessed.

333. Article 1 of the EU Directive on Consumer ADR provides that the Directive is without prejudice to the national legislation making participation in such procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system. In *Menini & Rampanelli v Banco Popolare,*[733] the CJEU confirmed that national legislation which prescribes recourse for consumers to a mediation procedure as a pre-condition to legal proceedings relating to those disputes is in compliance with Article 1 of the EU Directive on Consumer ADR if the parties are in charge of the process of mediation and may organize it as they wish and terminate it at any time.[734] The Directive on Consumer ADR precludes national legislation that requires consumers to be assisted by a lawyer and permits the withdrawal from a mediation procedure only if they demonstrate the existence of a valid reason in support of that decision.[735]

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[731] The out-of-court settlement requirement has been stipulated by several legal instruments such as Article 24 of Consumer Credit Directive 2008/48/EC, Article 101 & 102 of the Payment Services Directive 2013/36/EU and Article 18(2)(C) of Energy Directive 2012/27/EU.

[732] See *Alassini v Italia* (n 729) paragraph 65.

[733] Case C-75/16 *Livio Menini & Maria Antonia Rampanelli v Banco Popolare Società Cooperativa* ECLI:EU:C:2017:457 (*Menini & Rampanelli v Banco Popolare)*

[734] *Menini & Rampanelli v Banco Popolare*, paragraph 50.

[735] EU Directive on Consumer ADR, Article 8(b), 9(2)(a).

334. It proves the legitimacy of a mandatory mediation scheme if the decisions are non-binding and the mandatory ADR scheme does not create obstacles for parties to bring judicial proceedings. Although *Alassini v Italia* and *Menini & Rampanelli v Banco Popolare* do not deal directly with the validity of consensual agreements but rather with national legislation on mandatory consensual procedures, it shows a receptive trend of mandatory consensual ADR and provides some sort of guidance to assess the validity of e-ADR agreements. It also reflects how national courts should evaluate the validity of ADR agreements by balancing between procedural autonomy of the member states and fundamental judicial protection right rendered by the EU Treaty. Mandatory e-ADR agreements that require parties to use ADR before going to courts may not breach the principle of effective judicial protection if the parties have full control of the ADR process, experience no extra cost and time delay for bringing legal actions, and the ADR decisions are not binding on consumers.

B. EU consumer protection law and procedural autonomy

335. Consumer protection is prioritized as top protection that the EU legislature offers, evidenced by the measures the EU has taken to ensure the establishment and functioning of the internal market.[736] In this regard, the CJEU plays an important role in harmonizing the consumer protection laws in EU member states as the member states have discretions to implement the Unfair Terms in Consumer Contracts Directive.[737] The CJEU has developed a series of case laws to determine whether national procedural rules limit the effect of consumer protection laws. This has also influenced the procedural rules of the member states such as the regulation on a consumer arbitration agreement.

336. Consumer protection has been used by the CJEU as a legal ground, qualified as public policy,[738] to grant national courts competence to rule on the substantive validity of mandatory ADR agreements (arbitration agreements). As this process involves a limitation to the procedural autonomy of the member states, it shall be justified by the application of the principles of effectiveness and equivalence.[739] It is for the member states to designate the competent court and to set forth the procedural rules for proceedings to ensure the protection of the individual

[736] Article 114(3), Article 169 of TFEU, and Article 38 of Charter of Fundamental Rights of European Union.
[737] Reich and others, (n 700) 40.
[738] The concept of "public policy" has been used interchangeably with "overriding mandatory rules" although the scope of "public policy" is narrower than "overriding mandatory rules". See Alexander J. Bělohlávek, 'Public Policy and Public Interest in International Law and EU law' (2012) Czech Yearbook of International Law, 117-148.
[739] See Section 3.2.2.1 B.

rights acquired through the direct effect of EU law, provided that such rules are no less favorable than those governing similar domestic actions and that such rules are not framed to render the exercise of rights conferred by EU law difficult. [740]

337. The CJEU has started to qualify certain areas of EU laws (competition law, consumer law) into the domain of public policy so as to allow national courts to assess the validity of arbitration agreements on the basis of these grounds.[741] This was what was decided, for instance, in the case of *Eco Swiss China Time Ltd v Benetton International NV*. Although during the arbitration proceedings, neither the parties nor the arbitrators had raised the point that the licensing agreement might be contrary to Article 85 (now Article 101) of the TFEU, the national court was granted a right to annul an arbitral award due to a failed compliance with the EU competition law. Article 101 of the TFEU constitutes a fundamental provision that is essential to the functioning of the internal market and provides prohibitions on agreements, decisions and concerted practices that may affect trade between member states and that affect the prevention, restriction or distortion of competition in the internal market. The CJEU has applied the principle of equivalence to reach its conclusion:

> *"Where the national rules of procedure require a national court to grant an application for annulment of an arbitral award based on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 101 of the TFEU."* [742]

338. Although it was traditionally held that consumer protection was not part of EU public policy, consumer protection has been gradually qualified as public policy via case law of the CJEU.[743] The CJEU in *Mostaza*[744] referred to Article 6(1) of the Unfair Terms in Consumer Contracts Directive as a mandatory provision that re-establishes the equality between consumers and traders by replacing the imbalanced rights and obligations that were established by traders. The national legislation provides courts with the authority to annul an arbitral award that contravenes the public policy. The CJEU does not determine the validity of the B2C arbitration

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[740] Case C-78/98, *Preston and Others* [2000] ECR I-3201, paragraph 31, and Joined Cases C-392/04 *i-21 Germany GmbH* and C-422/04 *Arcor AG & Co. KG v Bundesrepublik Deutschland.* [2006], ECR I-8559, paragraph 57.

[741] Joined Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-04705; Case C-136/97, *Eco Swiss China Time Ltd v Benetton International NV.* [1999] ECR I-03055.

[742] *Eco Swiss China Time Ltd v Benetton International NV*, paragraph 37.

[743] Case 177/83, *Kohl* [1984] ECR, Rec. 3651.

[744] Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL.* [2006] ECR I-10421, para 36.

clause itself but provides guidance for national courts to determine whether a contract term is fair or not.

"A national court must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings but in the action for annulment."[745]

339. A further step was taken by the CJEU in *Asturcom*[746] where Article 6 of the Unfair Terms in Consumer Contracts Directive was treated of equal standing to national rules of public policy that could constituted as a ground to refuse the enforcement of an arbitral award by the national court even if the consumer has not brought an action for the annulment of the award. Different from the situations in *Mostaza*,[747] the parties had not challenged the arbitral award during arbitration proceedings, but the issues were brought up at the enforcement stage. The arbitral award was therefore considered a final decision with *res judicata* effect. The Court held that the principle of *res judicata* is a matter of the national legal order in accordance with the principle of procedural autonomy.[748] In light of the nature and significance of the public interest, the Court held that Article 6 must be regarded as a provision with equal standing to national rules that rank, within the domestic legal system, as rules of public policy although this ruling was subject to criticism.[749] The CJEU, therefore, applied the principle of equivalence as the national court under domestic procedural rules may review an arbitral award in order to assess whether the arbitration clause breaches domestic rules of public policy. It is for the national court, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature. By interpreting Article 6 of the Unfair Terms in Consumer Contracts Directive qualifying as the public policy of the EU law, the CJEU opens the door for national courts to scrutinize arbitral awards by invoking EU consumer protection law *ex officio* even though the consumer has not

[745] *Ibid*, paragraph 39.
[746] Case C 40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-09579.
[747] Mostaza (n 744).
[748] *Asturcom* (n 746), paragraph 38.
[749] Maud Piers, 'Consumer arbitration in the EU: A forced marriage with incompatible expectations' (2010)2 Journal of International Dispute Settlement 1, 16-20. It is argued by professor Piers that the CJEU could have used the principle of effective judicial protection instead to justify the setting aside of the arbitral award rather than widening the scope of public policy exception.

pleaded that claim.

340. After *Asturcom* case, it can be estimated that, with the implementation of Directive on Consumer ADR, the principle of liberty embodied therein can also be qualified as EU public policy to limit the party autonomy in B2C contracts for the protection of consumer interests. B2C ADR agreements that are formulated before the materialization of disputes and that have the effect of depriving the consumer of his right to bring an action before the courts for settlement of the dispute may be challenged by the EU public policy and held non-binding on consumers by national courts.

3.2.2.4. EU's approach to assess the substantive validity of e-ADR agreements

341. In Section 3.2.2.2, I have examined the relevant EU legal instruments that may influence ADR agreements (especially with regard to B2C ADR agreements). The Unfair Terms in Consumer Contracts Directive and the Directive on Consumer ADR have provided consumer protections which allow consumers to have access to justice both from a substantive and procedural perspective. While the Directive on Consumer ADR confers protection for consumers' procedural right to bring the dispute in court before the disputes arise by the principle of liberty, the Unfair Terms in Consumer Contracts Directive still provides added value to assess the validity of B2C ADR agreements at least in two respects. First, it gives a further layer of consumer protection in requiring the terms in consumer contracts to be displayed in a plain and intelligible manner. In case that the B2C ADR agreements are not prohibited by the Directive on Consumer ADR, they are subject to the unfairness analysis under the Unfair Terms in Consumer Contracts Directive. Second, the consumer protection that is offered via the principles of equivalence and effectiveness by the CJEU in the context of unfair terms can also be applied in the context of the Directive on Consumer ADR. The EU Consumer Rights Directive requires traders to provide consumers with information rights about the out-of-court complaint and redress mechanism prior to be bound by the agreement and ensures that consumers are sufficiently informed of their rights in distance contracts.

342. In Section 3.2.2.3, I analyzed the interactions between EU public policy (EU fundamental rights and EU laws) and substantive validity of ADR agreements. It is observed that member states have the discretion to set forth detailed procedural rules governing actions for safeguarding consumer rights derived from EU law. National courts have the discretion to assess the legitimacy of such consumer ADR scheme by examining its compliance with EU fundamental right (the principle of effective judicial protection). The potential breach of the

fundamental principle of effective judicial protection enshrined in EU law, however, can be justified by the principles of necessity and proportionality. I have also explored the interactions between EU consumer protection law and national procedural autonomy in assessing the substantive validity of pre-dispute B2C arbitration agreements. It turns out that national courts must determine the validity of pre-dispute B2C arbitration agreements by invoking the EU consumer protection law *ex officio*. Although it could be argued whether the CJEU should broaden the scope of public policy (to include consumer protection) in intervening the procedural autonomy of the member states, the case law of the CJEU plays an important role in harmonizing the application of EU laws and providing guidance for national courts to assess the substantive validity of ADR agreements.

3.2.3. Case study on e-ADR agreements in England

343. ADR agreements are by nature contracts and therefore they are ruled by the party autonomy principle, which is the cornerstone of contract law. The party autonomy principle reflects the exchange of goods and services between parties at a fair price and ensures that the interests of both parties are met.[750] Traditional contract law is based on a strong assumption of rationality, which means people will act rationally in concluding a contract.[751] This does not prevent the legislature and public authorities from performing their protective function to ensure fairness. This section will study the influence of English law on the substantive validity of e-ADR agreements, particularly with regard to mandatory ADR agreements in B2C contracts. I will examine how English law has influenced the substantive validity of e-ADR agreements and how the national courts should balance party autonomy and public policy when assessing the validity of e-ADR agreements.

344. In English Common Law, the concept of "public policy" does not have a clear definition but is formed by different laws and cases.[752] Burrough J. in *Richardson v. Mellish* held that the public policy "is a very unruly horse, and once you get astride it you never know where it will carry you."[753] A similar opinion was shared by Lord Scarman in *Pao On v Lawu Yiu Long* that

[750] Michael Coester, 'Party Autonomy and Consumer Protection' (2014) Journal of European Consumer and Market Law 3, 170-177.
[751] Thomas Wilhelmsson, 'Various Approaches to Unfair Terms and Their Background Philosophies' (2008)14 Juridica International Law Review 51, 55.
[752] The public policy is defined as "a principle of judicial legislation or interpretation founded on the current needs of the community." Percy H. Winfield, 'Public Policy in the English Common Law' (1928) 42 Harvard Law Review 1, 92.
[753] *Richardson v. Mellish* [1824] 2 Bing 229.

"such a rule of public policy would be unhelpful because it would render the law uncertain."[754] Nevertheless, public policy plays an important role to limit the freedom of contracts in circumstances where the fundamental public interests are at stake. Lord Atkin in *Fender v St John Mildmay* affirmed that there is a paramount public policy that should be observed by contracts.[755] Lord Denning replied to Burrough J. regarding the character of the public policy stating that "the unruly horse can be kept in control by a good man in the saddle."[756] Lord Mansfield indicated that public policy ought to be confined to new cases and had implied that it was an important basis of judicial legislation.[757] As such, the public policy becomes a doctrine of law that is capable of invalidating private agreements.[758]

345. This is reflected in B2C contracts where consumers and traders are considered as having equal bargaining power. Leonhard has used a spectrum of consent to show the difference between "informed consent" where a party gives consent knowingly with full information and comprehension and other types of consent where a party only manifests his/her apparent consent without any knowledge or meaningful understanding of the terms ("formal consent").[759] Traders can manipulate parties' consent by using electronic contracts in standard form to obtain formal consent of consumers through electronic signatures or through certain actions such as click-wrapping or browse-wrapping without giving consumers enough time to review and understand contract terms.

346. The English law has developed a combination of Common Law rules and statutory rules to strike the balance between contract freedom and public policy protection for vulnerable parties. In *Interfoto v. Stiletto*, Lord Bramwell pointed out that English law traditionally developed a piecemeal approach in response to problems of unfairness[760] by applying equitable doctrines to strike down unconscionable bargains. The harmonized EU legal regime in consumer protection has indirectly influenced the substantive validity of B2C ADR agreements through mandatory rules that are directly applicable. It aims to "replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance

[754] *Pao On v Lawu Yiu Long* [1979] UKPC 17.
[755] *Fender v St John Mildmay* [1937] AC 1, House of Lords.
[756] *Enderby Town Football Club v. Football Association Ltd* [1971] Ch. 591.
[757] *Jones v Randall* (1774) 1 Cowp. 17.
[758] Brandon Kain and Douglas T. Yoshida, 'The Doctrine of Public Policy in Canadian Contract Law' (2007) Annual Review of Civil Litigation, 3.
[759] Chunlin Leonhard, 'The unbearable lightness of consent in Contract Law' (2012)63 Case Western Reserve Law Review 57, 69.
[760] Ewan McKendrick, *Contract law: text, cases, and materials* (Oxford University Press 2012) 324.

which re-establishes equality between the parties."[761] The statutory regulation on unfair terms in consumer contracts by the Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999 (which have been later integrated into the Consumer Rights Act) have been employed to serve this function. [762] The first part of this section will discuss the Common Law rules (incorporation of terms and unconscionability doctrine) in limiting the freedom of contract principle. The second part will discuss the statutory rules on unfair terms that affect the substantive validity of e-ADR agreements.

3.2.3.1. Common Law rules in general contracts

347. Before developing statutory rules on unfair terms in contracts, unfair terms in England were regulated by Common Law principles.[763] Party autonomy (also known as "contract freedom") is defined as a fundamental right that allows an individual to enter into agreements that gain or dispose of possessions, services or otherwise alter legal relationships.[764] Different countries use various mechanisms to control party autonomy so that the fairness of the transactions is ensured. Civil law countries, for instance, recognize and enforce general principles such as the principle of good faith in making and carrying out contracts. English law does not commit itself to such an overriding principle but has adopted a piecemeal approach with a number of solutions (i.e. incorporation rules and rules of unconscionability and inequality of bargaining powers) to resolve problems of unfair terms.[765] In what follows, I will study the constituents of the piecemeal approach adopted by English courts and explore how they are used to limit party autonomy in e-ADR agreements.

A. Incorporation rules

348. In English Common Law, terms can be incorporated in a contract by signature or by notice. These methods of incorporation are developed to ensure that consent is given by the non-drafting parties in either an explicit or implied way. The case law on these incorporation rules

[761] *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona I Manresa*, Case C-415/11 [2013] ECLI:EU:C:2013:164.
[762] The rules in consumer protection of unfair terms in both Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999 have been absorbed in the Consumer Rights Act 2015.
[763] Common Law is "a legal tradition marked by a number of different and only contingently related features." Douglas E Edlin, *Common law theory* (Cambridge University Press 2007) 72.
[764] David P Weber, 'Restricting the freedom of contract: A fundamental prohibition' (2012)16 Yale Human Rights and Development Law Journal 51, 56-57.
[765] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348, per Bringham L.J.(*Interfoto v Stiletto*)

will be applied to analyze the validity of e-ADR agreements in various electronic forms.

a. Incorporation by signature

349. If a contract is signed then it is established that the signatory will be bound by its terms in the absence of fraud, misrepresentation or *non est factum*[766] (Latin for "not his deed"), regardless of whether that party has read them or has any knowledge of them.[767] In *L'Estrange v. F. Graucob Ltd.*, it was held that *the signatory* was bound by an exemption clause that she had not read, which was printed on confirmation order in small print, and left her with no remedy in relation to serious defects in the goods supplied.[768] The court ruled that "a reasonable person would believe that she was assenting to the terms by her signature." [769]

350. The incorporation by signature rule may be challenged when the signatory was unaware of the nature of the document and did not grant real consent to its content. For example, a driver should not be bound by the time sheet even though he has signed it because he could not expect the time sheet which contains contractual terms to vary the terms of the employment contract.[770] In such cases, it is argued that the incorporation by the signature rule will not apply if the drafting party was aware that the signing party had not read the signed document.[771] However, in order to ensure the certainty of commercial contracts and protect the freedom of contract, the English Common Law does not go that far in *L'Estrange v. F. Graucob Ltd.*, and the signatory is still bound by the signature requirement.

351. With respect to e-ADR agreements, e-ADR clauses are incorporated into contracts by the electronic signature of the parties. The electronic signature can be formed by emails[772] or by click-wrap agreements in the current case. As indicated in Section 3.1.2.3, the English courts use a functional approach in assessing formal requirements of e-ADR agreements. It will be

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[766] "*Non est factum*" is a defense in the contract law that allows a signatory to escape the performance of a contract that is different from what he/she intended to execute or sign.

[767] *Parker* v. *South Eastern Ry. Co.* (1877) C.P.D. 416, 421; *Roe* v. *Naylor* [1917] 1 K.B. 712, 715; *The Luna* [1919] P.D. 22; *Blay* v. *Pollard and Morris* [1930] 1 K.B. 628; *Curtis* v. *Chemical Cleaning and Dyeing Co.*[1951] 1 K.B. 805, *per* Denning L.J. at 808; *Bahamas Oil Refining Co.* v. *Kristiansands Tankrederie A/S* [1978] 1 Ll. Rep. 211; *Singer (UK) Ltd.* v. *Tees & Harlepool Port Authority* [1988] 2 Ll. Rep. 164, 166; *Harvey* v.*Ventilatorenfabrik Oelde Gmbh* (1988) 8 Tr. L. 138; *Charlotte Thirty Ltd. & Bison Ltd.* v. *Croker Ltd.* (1990) 24 Con. L.R. 46; *Saphir (Merchants) Ltd.* v. *Zissimos* [1960] 1 Ll. Rep. 490, 499; *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.* [1978] 1 Q.B. 69.

[768] *L'Estrange v. F. Graucob Ltd.[*1934] 2 KB 394.

[769] JR Spencer, 'Signature, Consent, and the Rule in L'estrange v. Graucob' (1973)32 The Cambridge Law Journal 104, 106.

[770] *Grogan v Robin Meredith Plant Hire and Triact Civil Engineering Ltd.*[1996] C.L.C. 1127 CA.(*Grogan v Robin*).

[771] Andrews, *Arbitration and Contract Law: Common Law Perspectives* (n365) 216.

[772] See *Golden v Salgaocar* (n 533).

for the court to decide in the particular case whether an electronic signature has been correctly used and what legal effect should be given to it. For example, *Bassano v Toft and others*[773] confirmed that the consumer credit agreement can be executed by (simple) electronic signature via click-wrapping. The loan contract of Mrs. Bassano, who is the debtor, was concluded via a click-wrap agreement. Mrs. Bassano registered an account on the website with a username and password. When the loan terms had been agreed, the loan agreement with those agreed terms was presented on the computer screen. Mrs. Bassano then indicated acceptance of the loan agreement by clicking on an acceptance button marked "I Accept" which was in a defined field on the screen. The loan agreement was then generated in PDF form, which was available to Mrs. Bassano at any time by logging into her account and using the chosen password. Mrs. Bassano electronically signed the loan agreement by clicking on the "I Accept" button, thereby generating a document sent to the creditor bearing her typed name that authenticated the document. The contract between Mrs. Bassano and the bank was entered into via electronic signature as Mrs. Bassano assented to the terms via the click-wrap agreement.

b. Incorporation by notice

352. In addition to incorporation by electronic signatures, e-ADR agreements can also be entered into through incorporation by notice. This is usually the case in browse-wrap agreements where parties agree to be bound by terms and conditions by conducts. The e-ADR agreements should be reasonably drawn to the notice of the other party before or at the time of contract conclusion and in contractual documents. In *Ryanair v On the Beach*,[774] it was held by the Irish court that the commercial use of the website of the defendants constitutes an unambiguous manifestation of assent to its terms and conditions. Hanna Justice concluded that:

"*The jurisdiction clause which was contained in terms and conditions of the website was binding on the defendants in circumstances where those terms were at all times available for inspection by the defendants and the plaintiff have taken appropriate steps to ensure that the terms were brought to the user's notice through their inclusion on the website via a clearly visible hyperlink.*"[775]

In this case, the defendant has entered into an agreement with Ryanair through a browse-wrap

[773] *Bassano v Toft and others* [2014] EWHC 377 (QB).
[774] *Ryanair v On the Beach* [2013] IEHC 14.
[775] *Ibid*, paragraph 27.

agreement in which terms and conditions of the website were incorporated by notice.

353. The trader's standard terms can be incorporated *by notice* provided that three conditions are fulfilled.[776] First, notice must be given at or before the time of contract conclusion. The second requirement is that terms must have been contained or referred to in a document that was intended to have contractual effect. The third condition is that reasonable steps must have been taken to bring the terms to the notice of the other party. Compared with tickets and receipts in paper form, electronic contracts usually contain more provisions and more complicated legal terms.[777] It becomes increasingly difficult for users to locate these terms as they may be hidden at the bottom of the webpage with an inconspicuous hyperlink. Moreover, from a cost-effective perspective, chances are low that Internet users will read all the terms of electronic contracts.[778] The electronic environment has changed the manner in which terms are presented to the parties and therefore required courts to apply incorporation rules taking into account these manners.

354. Firstly, the notice to the incorporated terms should be made *before* or *at the time* of contract conclusion.[779] In *Thornton v Shoe Lane Parking,*[780] Lord Denning held that the clause was presented too late to be incorporated into the contract. The contract was entered into between the customer and the parking company when the customer puts his money into the vending machine of the parking place. The terms on the parking ticket were presented to the customer after the conclusion of the contract and therefore cannot be binding on the customer. This is in accordance with the information requirement of the Consumer Rights Directive which stipulates that terms should be given to consumers before the conclusion of a contract. Therefore, terms to be incorporated by electronic means should also provide a technical device that makes the terms available to users before the conclusion of a contract, for example, via a scroll-down menu.

355. Secondly, the parties should be aware that the terms and conditions to be incorporated are objectively intended to have contractual effect.[781] In *Grogan v Robin Meredith Plant Hire,* the signed term sheet was not a contractual document but merely a document that records the

[776] Ewan McKendrick, *Contract law: text, cases, and materials* (Oxford University Press (UK) 2014) 322-323.
[777] See (n 602).
[778] European Commission's 'Study on consumers' attitudes towards Terms and Conditions' (2016), 16.
[779] In *Olley v Marlborough Court Ltd* [1949] 1 KB 532. CA and *Thornton v Shoe Lane Parking,* the notice of the exclusion clause came after the conclusion of contract and therefore have no binding effects.
[780] *Thornton v Shoe Lane Parking* [1971] 2 QB 163.
[781] In *Chapelton v Barry UDC* [1940] 1 KB 532. CA, the English Court of Appeal held that the defendant council's written exclusion clause-contained on the back of his receipt for the chairs-was not objectively intended to affect contractual rights.

employee's working time. Therefore, the terms that are stipulated in the term sheet cannot be incorporated into the main contract. Electronic terms on a website may sometimes serve as a contractual document and may sometimes act merely as a source of information. The drafting party should make it clear that the terms to be incorporated have binding force and constitute a part of the main contract.

356. Thirdly, the drafting party should draw sufficient and reasonable notice to the other party of the ADR clauses in a conspicuous manner. In *Parker v South Eastern Rly Co.*,[782] a passenger had deposited a bag with contents exceeding the value of £10 in the railway station. However, the back of the receipt stated that the railway company would not be liable for loss exceeding £10. In determining whether or not reasonable steps have been taken in order to draw the terms to the notice of the other party, the courts consider factors such as the location of the notice and its prominence. The terms were presented on the back of the ticket in the absence of any reference to terms on the front of the document. The jury in the instant case found that the plaintiff did not read the special condition on the back of the ticket, nor was he, under the circumstances, under any obligation to read it.

357. There is also a correlation between the prominence requirement of terms and the onerous nature of terms. The famous "red hand rule" is used to assess whether terms are reasonably incorporated by notices. The rule has been established by Denning LJ in *Spurling v Bradshaw* is that: "The more unreasonable a clause is, the greater the notice which must be given of it. Some clauses would need to be printed in red ink with a red hand pointing to it before the notice could be held to be sufficient."[783] Megaw LJ also assessed the degree of notice by evaluating the unusual nature of the clauses in *Thornton v Shoe Lane Parking*: [784]

"*when a condition is particularly onerous or unusual, the party seeking to enforce it must show that such an unusual condition of that particular nature, was fairly brought to the notice of the other party."*

358. Bingham LJ in *Interfoto v Stiletto* held that the "reasonable steps test applies not just to exclusion clauses but to all 'onerous or unusual clauses' of the other party's standard terms."[785] Three relevant factors should be considered in determining the onerous and unusual nature of

[782] *Parker v South Eastern Rly Co* (1877) 2 CPD 416.
[783] *Spurling v Bradshaw* [1956] 1 WLR 461.
[784] *Thornton v Shoe Lane Parking* [1971] 2 QB 163.
[785] Andrews, *Contract law* (n 374) 421.

the terms: first, the nature of the transaction; second, the character of the parties and third, the degree of notices required. Such a stringent approach to the incorporation of terms should be confined to terms that are both unusual and manifestly unfair.[786] In *Kaye v Nu Skin UK Ltd*, the judge concluded that the *Interfoto* principle is applicable to contracts containing arbitration clauses. However, all the relevant circumstances must be taken into account in deciding whether or not the particular arbitration agreement at issue is unusual or onerous and, if it is, whether it has been brought fairly and reasonably to the notice of the other party.[787] The court should take into consideration the nature of the contract and character of the parties.

359. This requirement should be added, in particular, with regard to adjudicative ADR clauses that deprive a party's right of civil actions in court. These adjudicative ADR clauses are more unusual and onerous than other terms especially when the parties are with unequal bargaining powers. The ADR clauses are often included in general terms and conditions. There are two possible ways when an arbitration clause in general terms and conditions can be incorporated into the main contract: (i) the incorporation by general reference to terms and conditions and (ii) the incorporation by specific reference to ADR clauses.[788] In *Aughton Limited v MF Kent Service Limited*,[789] the Court of Appeal adopted a strict approach by treating arbitration agreements differently from other types of standard terms and concluded that an arbitration clause must be expressly referred to in the document and that a mere reference to general terms and conditions of a contract was insufficient. After the implementation of the Arbitration Act, a general reference to terms and conditions containing an arbitration clause is also accepted "when the terms are readily available and the question arises in the context of dealings between established players in a well-known market."[790] According to the "red hand rule," reasonably sufficient notice should be made to adjudicative ADR clauses with unusual or onerous features. In the case of ADR clauses that are provided in B2C contracts in which consumers have no power to negotiate the terms, these B2C ADR clauses should be incorporated into the main contract by specific reference. In the case of ADR clauses that are provided in B2B contracts, a general reference to terms and conditions should be sufficient.

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[786] Gerard McMeel, 'The Construction of Contracts' (2011) Oxford University Press, 442.
[787] *Kaye v Nu Skin UK Ltd [*2010] 2 All ER (Comm) 832, Paragraph 28.
[788] The incorporation by reference rule in arbitration agreement is specified by Section 6(2) of the Arbitration Act 1996 without specifying the requirement.
[789] *Aughton Limited v MF Kent Service Limited* [1993] WL 963255.
[790] *Sea Trade Maritime Corp v. Hellenic Mutual War Risks Association (Bermuda) Ltd* [2006] EWHC 2530 (Comm); *Habas sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL* [2010] EWHC 29(Comm).

B. Unconscionability and inequality of bargaining power

360. Besides incorporation rules, the Common Law has also developed equitable doctrines (such as duress and undue influence) to protect parties with unequal bargaining powers.[791] The principle of unconscionability has not been firmly established in England although it is a generally accepted principle in the U.S.[792] It is used to examine whether or not there is gross inequality, oppression, or unfair surprise in a contract bargain.

361. English law does not commit itself to such a generalized principle in order to protect the fundamental principle of contractual freedom as it is difficult to define the "unfairness" standard and would render the law uncertain.[793] Lord Denning tried to establish a general principle of unconscionability in *Lloyds Bank Ltd v Bundy* where a guarantee contract was set aside because the beneficiary failed to comply with a fiduciary duty it owed to the guarantor, who was one of the beneficiary's clients.[794] He held that:

> *"English law gives relief to one who, without independent advise, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."*

In *Avon Finance v Bridger*, Lord Denning similarly decided the contract was void because the terms were unfair and the parties were in unequal bargaining positions, coupled with undue pressure.[795] Lord Denning believed that a general principle that embodies undue influence warrants relief where there is inequality in bargaining power. Lord Justices Brandon and Brightman took a traditional approach by invoking the notion of undue influence and avoiding the notion of inequality in bargaining power.

362. The attempt to establish an unconscionability principle was finally struck down by the House

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[791] Séverine Saintier, 'Defects of Consent in English Law: Protecting the Bargain?' in Larry A DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press 2016) 121.

[792] It is stipulated in the U.S. Uniform Commercial Code paragraph 2-302 that: "If the court finds the contract or any clause of the contract unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

[793] Spencer Nathan Thal, 'The inequality of bargaining power doctrine: the problem of defining contractual unfairness' (1988)8 Oxford Journal of Legal Studies 17, 24.

[794] *Lloyds Bank Ltd v Bundy* [1975] QB 32.

[795] *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281.

of Lords in *National Westminster Bank plc v Morgan*. In this case, Lord Scarman held that the element of an unequal bargain can only serve as a relevant feature in some cases of undue influence but it can never become an appropriate basis for the principle of an equitable doctrine.[796] Professor Collins holds that the freedom of contract collides with a far-reaching control over the fairness of contracts and the courts can only scrutinize minutely the procedures leading up to the contract to ensure that freedom of the parties was not restricted by pressure, fraud, abuse of positions and other factors that interfered with consent.[797] Therefore, the doctrines of unconscionability and inequality of bargaining power can be applied indirectly to limit contractual freedom, by a combination with other doctrines (such as undue influence or duress).[798] As Lord Scarman mentioned in *National Westminster Bank plc* v *Morgan*, even if there is a need to establish a general principle of relief against inequality of bargaining power, it is the Parliament's task to enact the legislation to limit the freedom of contract, not the courts. The role of unconscionability and inequality of bargaining power was later absorbed by statutes regulating unfair terms, such as the Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulation 1999 which will be shortly discussed below.

3.2.3.2. Statutes regulating unfair terms in B2C contracts

363. In addition to Common Law rules in regulating contracts, the statutes in consumer law also provide limitations to the substantive validity of B2C e-ADR agreements. These statutes in consumer law are Unfair Contract Terms Act in 1977, Unfair Terms in Consumer Contracts Regulations in 1999 and Consumer Rights Act in 2005. In what follows I will fist explain the specific role that each of these legal instruments play in today's English contract law. Then I will examine the impact of these instruments on the validity of B2C ADR agreements in England.

A. Statutory rules on unfair terms in England

364. The English Arbitration Act has established a default rule that presumably treats B2C arbitration agreements with pecuniary remedies of claim not exceeding £5,000 as unfair and holds them unenforceable under Part 2 of the new Consumer Rights Act 2015.[799] For the

[796] *National Westminster Bank plc v Morgan* [1985] UKHL 2.
[797] Hugh Collins, *The law of contract* (Cambridge University Press 2003) 270-271.
[798] Thal (n 793) 19.
[799] Consumer Rights Act 2015, Chapter 15, consolidated the Unfair Terms in Consumer Contracts Regulation 1999 and replaced it with Part 2 on Unfair Terms.

amount above £5,000, the validity of the arbitration agreement shall be determined by the arbitration tribunal or the court in accordance with the fairness test stipulated in Part 2 of the Consumer Rights Act 2015.[800] The unfairness of the arbitration terms, however, does not prevent consumers from relying on such terms.[801] The English legislators have set the amount of the claim (£5,000) as a safety valve to protect consumers' interests in B2C arbitration agreements regardless of whether the arbitration agreements have been concluded before or after disputes arise. The electronic B2C arbitration agreements with small pecuniary remedies are therefore held unenforceable against consumers.[802]

365. Besides this default rule of the Arbitration Act, English law has statutory rules on the control of unfair terms in contracts. The Law Commission has issued two reports on the regulation of exemption clauses, one in 1969 and the second in 1975.[803] These two reports discussed the existing control over exemption clauses in Common Law and provided recommendations on the regulation of exemption clauses to a broader scope, resulting in the Unfair Contract Terms Act 1977.

366. The Unfair Contract Terms Act 1977 ("UCTA")[804] was enacted to regulate unfair terms in both B2B and B2C contracts. However, the UCTA is only applicable to exemption or limitation clauses that exclude liabilities of traders for breach of a contractual obligation and does not deal with the fairness assessment of the contract itself.[805] The UCTA specifically mentioned that the arbitration agreement is not to be treated as an exemption clause[806] and therefore falls outside the scope of the UCTA. Other ADR agreements are similarly not exemption clauses and, therefore, are not regulated by UCTA. In order to implement the Unfair Terms in Consumer Contracts Directive of the European Union, the Unfair Terms in Consumer

[800] See discussions in sub-section 3.2.3.2.C. .
[801] Consumer Rights Act 2015, Section 62(3).
[802] Other member states, such as Germany, impose similar restrictions on the B2C arbitration agreements. Section 1031(5) of German Code of Civil Procedure requires that B2C arbitration agreements shall be contained in a record or document personally signed by the parties and the contents of the signed document may not contain agreements other than those making reference to the arbitration proceedings except being recorded by a notary.
[803] Exemption Clauses in Contracts First Report, Law Commission No. 24; Exemption Clauses Second Report, Law commission No. 69.
[804] Unfair Contract Terms Act 1977, Chapter 50 (UCTA).
[805] UCTA, Section 13(1): The Act prevents terms with exclusion or restriction of any liabilities; making the liability or its enforcement subject to restrictive or onerous conditions, excluding or restricting any right or remedy in respect of liability or subjecting a person to any prejudice in consequence of his pursing any such right or remedy; excluding or restricting rules of evidence or procedure, and excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.
[806] UCTA, Section 13(2)

Contracts Regulations 1999 (the UTCCRs) was enacted by the Parliament.

367. While the UCTA covers both B2B and B2C contracts, the UTCCRs covers B2C contracts only. Unlike the UCTA that regulates only exemption clauses, the UTCCRs also regulates terms imposing obligations and liabilities on consumers, including B2C ADR clauses. With respect to unfair terms in B2B contracts that are outside the scope of exemption clauses and B2C contracts, neither the UCTA nor the UTCCRs are applicable. The courts are reluctant to intervene in the parties' agreement especially between traders with equal bargaining powers, holding the view that traders should be capable of making contracts of their own volition. [807]

B. From UTCCRs to CRA

368. Due to the overlap between the UCTA and the UTCCRs in regulating unfair terms in consumer contracts, the Law Commissions have proposed that the two regimes should be incorporated into a new regime for consumer contracts.[808]

369. The Consumer Rights Act (CRA) was promulgated in 2015 to consolidate current consumer rights legislation and to implement EU legislation.[809] In Part 2, the CRA merges unfair terms rules in consumer contracts from both the Unfair Contract Terms Act 1997 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999 (the UTCCRs), providing consumers with protection against unfair contract terms that are drafted by the traders.

370. One of the major changes present in the CRA was the applicable scope of unfair term rules in B2C contracts. Different from the UTCCRs and the Unfair Terms in Consumer Contracts Directive, the unfair terms rules in the CRA are applicable not only to non-negotiated terms but also to negotiated terms. Negotiated terms may also be held unfair and thus are non-binding on consumers if they cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer.[810] Moreover, in addition to consumer contracts, the unfair terms rules also apply to consumer notices. "Consumer notices" include an announcement, whether or not in writing, and any other communication or purported communication to the extent that the notice relates to rights or obligations between a business and a consumer or purports to exclude or restrict a trader's liability to a consumer. [811] In the context of the electronic

[807] Jill Poole, *Contract law concentrate: law revision and study guide* (Oxford University Press 2013) 134. See *Granville Oil & Chemicals Ltd v Davis Turner & Co. Ltd* [2003] EWCA Civ. 570.
[808] The Law Commission No. 292 Unfair Terms in Contracts, SE/2005/13.
[809] The Consumer Rights Act 2015 Explanatory Notes.
[810] Consumer Rights Act 2015, Section 62(4); Competition & Markets Authority, Unfair Contract Terms Guidance: Guidance on the unfair terms provisions in the Consumer Rights Act 2015, 19.
[811] Consumer Rights Act 2015, Section 61 (8).

environment, it takes into account terms and conditions on websites that are not contractual in nature.

371. The CRA also integrates decisions of the CJEU regarding the interpretation of the Unfair Terms in Consumer Contracts Directive. For example, national courts have the obligation to determine the fairness of a contract term in a consumer contract regardless of whether parties have raised this issue or not.[812] Another new requirement of transparency has been added to unfair term rules.[813] It requires traders to ensure that a term of a consumer contract or a consumer notice in writing is legible and expressed in plain and intelligible language.[814] In deciding whether a term or notice is expressed in plain and intelligible language, it must be considered from the perspective of an "average consumer".[815] An "average consumer" means a consumer who is reasonably well-informed, observant and circumspect, and who is assumed to read the relevant documents and to seek to understand what is being read.[816]

372. The CRA has unified the UCTA and the UTCCRs in regulating unfair terms of consumer contracts. It extends the scope of consumer protection to negotiated terms and notices that were previously not covered by the UTCCRs. The following section focuses on the unfairness assessment that is stipulated in the CRA.

C. Unfair terms in the CRA

373. The fairness test in Regulation 62 of the CRA is adopted from the UTCCRs and the Unfair Terms in Consumer Contracts Directive. The unfair term of a contract has no binding force on consumers. A term or a notice is unfair "if *contrary to the requirement of good faith*, it causes *a significant imbalance* in the parties' rights and obligations under the contract *to the detriment of the consumer*."[817] The fairness test should be applied by (a) taking into account the nature of the subject matter of the contract, and (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.[818]

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[812] Consumer Rights Act 2015, Section 71. See *Mostaza* (n 744) and *Asturco*, (n 746).
[813] It is in line with the written form requirement of unfair terms in Regulation 7(1) of the UCTCCRs.
[814] Consumer Rights Act 2015, Section 68. See *Nemzeti v Invitel* (n 628).
[815] *The Office of Fair Trading v Ashbourne Management Services Ltd, and others* [2001] EWHC 1237 (Ch), paragraph 158.
[816] Consumer Rights Act 2015, Section 64(5); *ibid*, paragraph 128.
[817] Consumer Rights Act 2015, Section 62(4), (6).
[818] Consumer Rights Act 2015, section 62 (5),(7). See Case C-472/11 *Banif Plus Bank v. Csaba Csipai and Viktória Csipai* [2011] ECLI:EU:C:2013:88.

374. It has been further explained by Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank* that "the requirement of significant imbalance is met if a term is so weighed in favor of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favor."[819] He then dealt with "good faith" stating that "the requirement of good faith is one of fair and open dealing." "Openness" requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. It requires that "appropriate prominence should be given to terms which might operate disadvantageously to the customer." "Fair dealing" requires that a supplier should not, deliberately or unconsciously, take advantage of "the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position, or any other factor listed in or analogous to those listed in Schedule 2 to the UTCCRs (now the CRA)."

375. Unlike the rule in Section 91 of the Arbitration Act 1996 which entirely forbids arbitration clauses with claims of no more than £5,000, terms listed in Schedule 2 are not automatically invalid but rather need to be examined by a fairness test under the UTCCRs on a case-by-case analysis. Adjudicative ADR agreements (such as arbitration agreements), which prevent consumers from resorting to court proceedings or any other legal remedies, may be held unfair and are therefore non-binding on consumers. However, an arbitration clause that makes clear that consumers (or both parties) have a free choice as to whether or not go to arbitration is in accordance with the CRA provided that it is described in clear language and is not misleading.[820]

376. Part 1 of Schedule 2 of the CRA has provided a grey list of unfair terms that is similar to the list of unfair terms in Annex I of Unfair Terms in Consumer Contracts Directive and in the Schedule 2 of the UTCCRs. These terms are not necessarily unfair but serve as an indication of unfairness.[821] Among these non-exhaustive and indicative unfair terms list, there are two types of terms that are relevant for evaluating the validity of e-ADR agreements.[822] In what follows, I will first discuss case-law in England regarding the first type of unfair terms which are displayed inconspicuously to consumers, and then move on to the second type of unfair terms which have the effect of depriving parties of their rights to legal action in courts.

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[819] *Director General of Fair Trading v First National Bank* [2001] UKHL 52, paragraph 17.

[820] Office of Unfair Trade, Unfair Contract Terms Guidance: Guidance for the Unfair Terms in Consumer Contracts Regulations 1999, September 2008, 67.

[821] The grey list is distinguished from the black list of unfair terms which are automatically unenforceable against consumers, such as the wording that would exclude or restrict liability for death or personal injury resulting from negligence.

[822] Consumer Rights Act 2015, Part 1 of Schedule 2, item 10 and 20.

a. Terms displayed in an inconspicuous manner

377. E-ADR clauses are quite often embedded in the terms and conditions of a website. The terms and conditions are normally provided to consumers in the user's registration agreement via a hyperlink. The question is whether such terms and conditions that are referred to by a hyperlink in a registration agreement are binding on consumers, in particular, when the terms and conditions are onerous to consumers.

378. In e-ADR agreements, whether the consumer has a real opportunity of becoming acquainted with the terms and conditions before the conclusion of the contract is crucial in assessing the substantive validity of B2C contracts. Terms that are displayed without reasonable notice are likely to be non-binding on consumers. As a point of reference, one should compare terms in electronic contracts with the cases where terms are printed on the back of a ticket. In those cases, the terms are effective only if steps are taken to bring the contracting parties' attention to these terms. [823] If such steps are taken, the signature would be effective regardless of whether the parties actually read or understand those terms. In electronic contracts, the terms are less conspicuous because they are easily hidden in lengthy contents of a contract whereas in ticket cases the terms are usually provided on a single page.[824] Click-wrap agreements and browse-wrap agreements have been developed by traders to bind consumers with incorporation by signature or by notice.

379. In *Spreadex Limited v Colin Cochrane*[825], a consumer was required to click on the "view" button to read four documents including a customer agreement on the trader's website, and then click on the "agree" button to signify his agreement to the terms. The main issue was whether the consumer was bound by the liability exemption clause included in the customer agreement. The court held that "for a term to be binding, *notice about its existence* as well as the *relative ease of access and understanding* are necessary preconditions." This discussion was based on two major considerations. Firstly, consumers would often bypass the invitation to read and proceed directly to click on "Agree" without reading the terms. The court considered that the use of hyperlinks to four separate documents (among which the customer agreement includes a liability exemption clause) was an entirely *inadequate* way to inform the

[823] *Parker v South Eastern Railway* [1877] 2 CPD 416; *L'Estrange v Graucob* [1934] 2 KB 394 *Olley v Marlborough Court* [1949] 1 KB 532; *Thornton v. Shoe Lane Parking* [1971] 1 All ER 686.
[824] Nancy S Kim, 'Situational Duress and the Aberrance of Electronic Contracts' (2014)89 Chicago-Kent Law Review 265, 270-272.
[825] *Spreadex Limited v Colin Cochrane* [2012] EWHC 1290.

consumer of its potential liability for unauthorized transactions.[826] Secondly, the Customer Agreement was 49 pages long and contained numerously printed and complex paragraphs. Accordingly, the court determined that is the way that terms were presented made it impossible for consumers to have read the second sentence of Clause 10(3) and to understand its implications. Here, the Customer Agreement was challenged by the substantive rules of consumer contracts because of the inconspicuous manner in which the terms were presented to consumers.

b. Terms which hinder consumers' right of action

380. The substantive consumer law (the CRA) in England has provided similar control of unfair terms in consumer contracts as the UTCCRs. Therefore, English courts' decisions with regard to the UTCCRs can be used as a reference to decide the case with respect to the CRA. A mandatory arbitration agreement pre-formulated by a business will be deemed unfair and non-binding on consumers if it creates a significant imbalance in the parties' rights and obligations, to the detriment of the consumer. The English court denied the validity of arbitration clauses in consumer contracts in *Mylcrist Builders Ltd v Buck* where the High Court refused to enforce an arbitral award against a consumer that was concluded by an arbitration clause in the standard form provided by the builder in a construction contract.[827] In that case, the High Court held that, while the notice of the consumer was drawn to the arbitration clause included in the terms and conditions via her signature of the box[828], the impact of the arbitration clause was not apparent to Mrs. Buck, who was not aware of its effect. Taking into account the nature of the contract, the circumstances at the conclusion of the contract and terms of the contract, the High Court found that the arbitration clause was unfair and not in compliance with the UTCCRs. Nevertheless, under certain circumstances, for example, when there is a significant imbalance that could negatively impact the rights and obligations of consumers, it is possible for English courts to allow pre-dispute arbitration clauses or adjudication clauses in consumer contracts.[829]

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[826] *Ibid*, paragraph 21.

[827] *Mylcrist Builders Ltd v Buck* [2008] EWHC 2172. In *Picardi v Mr. and Mrs. Cuniberti* [2002] EWHC 2923 (QB), the court also ruled out an adjudication clause in a standard form construction contract and declined to enforce the adjudication decision because it will cause irrecoverable expenditure for consumers in defending it, which may hinder the consumer's right to take legal action.

[828] There was a box at the end of the letter for completion which stated that: "We have understood and agreed with the estimate and its terms and conditions and confirm our order with Mylcrist Builders Ltd to commence work on the property as detailed above."

[829] *Allen Wilson Shopfitters v Mr. Anthony Buckingham* [2005] EWHC 1165. The consumer has entered into a construction contract with an adjudication provision with a construction company. The court held the adjudication

381. The UTCCRs only permits ADR mechanisms that deprive consumers of their rights of action after disputes arise as the post-dispute ADR agreements are then regarded as having been individually negotiated.[830] The common views are shared that consumers will not pay notice to the ADR agreements until the disputes arise.[831] However, with the CRA coming into effect, the unfairness analysis is applied also to the individually negotiated terms. Therefore, the post-dispute B2C ADR agreements also fall within the scope of judicial review on unfair terms.

3.2.3.3. English approach in assessing the substantive validity of e-ADR agreements

382. In England, the piecemeal approach has been used to evaluate the validity of e-ADR clauses both in B2B contracts and B2C contracts. The piecemeal approach refers to various rules that have been developed by Common Law to tackle unfair terms in contracts.[832] The piecemeal approach, as its name suggests, covers a limited scope of application (such as the incorporation rule and undue influence rule) and does not cover all the circumstances of unfair terms. In order to increase the certainty in assessing unfair terms, England adopted statutory rules to tackle unfair terms through the UCTA and UTCCRs (which were later incorporated into the CRA).[833]

383. Both the piecemeal approach and statutory rules are used to assess the legal effect of e-ADR agreements. The piecemeal approach has filled the gap between statutory regulation on unfair terms in B2C contracts and the lack of regulation in the validity of e-ADR clauses in B2B contracts. In this way, terms that do not give consumers sufficient and reasonable notices before the conclusion of a contract may not be binding on consumers especially when such terms are onerous to consumers. Generally, the validity of e-ADR agreements (both in B2B and B2C context) is regulated by Common Law rules that offer parties greater freedoms and avoid contract intervention, while e-ADR B2C agreements are assessed more restrictively under statutory control. In English law, party autonomy in B2C ADR agreements is limited by both procedural and substantive requirements. Pursuant to Section 91 of the Arbitration Act 1996, B2C arbitration agreements with a pecuniary remedy of the claims not exceeding £5,000 are

agreement was not unfair as the contract terms were proposed by the agent of the consumer and could never contravene the requirement of good faith.

[830] Cortés, 'The Consumer Arbitration Conundrum: A Matter of Stautory Interpretation or Time for Reform?' (n 699) 70.

[831] The American Arbitration Association's Consumer Due Process Protocol Statement of Principles of the National Consumer Disputes Advisory Committee: "Consumers are often unaware of their procedural rights and obligations until the realities of out-of-court arbitration are revealed to them after disputes have arisen."

[832] Hugh Beale and others, *Cases, materials and text on contract law* (Hart 2010) 760.

[833] The Alternative Dispute Resolution for Consumer Disputes Regulations 2015 (No. 542, No. 1392 Amendment).

banned, regardless of whether the agreements are made before or after the dispute arise. On the other hand, Regulation 62 of the CRA prevents unfair terms in B2C agreements from binding on consumers. Unfairness is determined by two conditions. First, the unfair terms are contrary to the requirement of good faith. Second, the unfair terms cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of consumers. B2C e-ADR agreements should be presented to the parties with specific reference in plain and legible language and should not prevent consumers' access to the court.

3.2.4. Case study of e-ADR agreements in China

384. The principle of public policy has been used for two purposes in China: first, to ensure that parties with weaker bargaining positions are protected in accordance with the public interest; and second, to discourage undesirable conduct, and prevent an unsavory agreement.[834] It is stipulated in Article 52(4) and (5) of the PRC Contract Law that a contract shall be null and void if it violates mandatory law and administrative regulations or is contrary to the public interest.[835] The public interest in the PRC Contract Law is a fundamental principle for realizing the welfare of the state and society which are often construed broadly to include consumer protection.[836] Public policy provisions that apply to e-ADR agreements, amongst other matters, aim to ensure fairness in standard form contracts and guarantee the protective regime of weaker parties (consumers) in the context of e-commerce.

385. In what follows I will examine how current legislation and jurisprudence balance between party autonomy of e-ADR agreements and the public policy through the application of the fundamental principle of fairness in contract law and special consumer protection rules. To that end, I will firstly explore the substantive contract rules in regulating standard terms (Section 3.2.4.1) and special rules on consumer protection (Section 3.2.4.2). This should allow us to determine whether current legislation is sufficient to assess the validity of e-ADR agreements. I will also examine whether the People's Courts have applied these rules uniformly. Then, I will conduct a case study of the currently available ADR agreements on selected websites in China and determine if they are in conformity with the stipulated rules (Section 3.2.4.3). Finally, I will make suggestions and recommendations on the substantive rules for assessing the validity

[834] Mo Zhang, *Chinese Contract Law: Theory and Practice* (Martinus Nijhoff Publishers 2006) 60.
[835] In China, the concept of "public interest" is used interchangeably with "public policy", which connotes both public order and social virtues. See Zhang, *ibid*, 180.
[836] Junwei Fu, *Modern European and Chinese contract law: A Comparative Study of Party Autonomy* (Kluwer Law International 2011) 47.

of e-ADR agreements in China (Section 3.2.4.3).

3.2.4.1. The application of "standard form clause rule"[837]

386. Article 128 of the PRC Contract Law established the freedom of contract by allowing parties to choose dispute resolution methods upon mutual consent. Parties are able to use negotiation and mediation to resolve contractual disputes before referring to arbitration or litigation. From a cost-effective perspective, e-ADR clauses are often included in standard form contracts. As a proof of such benefit, the use of standard form contracts is a common practice in e-commerce transactions. However, consumers have little or no power to modify the unfair terms that are imposed by traders in standard form contracts. An example of such a term is an adjudicative ADR clause that deprives a consumer of his right to take legal action. As discussed in Section 3.2.1. , there ought to be some legislative control over the standard form clause especially when a market failure[838] occurs. The standard form contract rule is used to ensure that the non-drafting parties are well protected against the drafting parties in cases where terms are unfavorable and unfair.[839] In PRC Contract Law, the term "standard form clause" is used instead of "standard form contract." A contract that includes standard form clauses is not necessarily a standard form contract as a whole.[840] Therefore, the concept of "standard form clauses" has a broader scope than "standard form contracts," as it includes standard form clauses in other non-standard form contracts. As e-ADR agreements are very often formulated as standard form clauses or in standard form contracts, the theory of standard form clauses in PRC Contract Law is therefore applicable to assess the validity of e-ADR agreements.

A. Scope of standard form clauses

387. Standard form clauses are pre-formulated by one party without being individually negotiated with the other party. [841] Two conditions need to be met in order to qualify as a standard form clause under the PRC Contract Law. First, the standard form clauses are drafted by one contracting party for the purpose of using these clauses when contracting with multiple users.

[837] "Standard form contract rule" is stipulated by Article 39 & 40 of the PRC Contract Law.
[838] Market failure describes the situation where free markets fail to allocate resources efficiently when market actors act irrationally.
[839] The rules on standard contract and exemption clauses are inspired by the General Transaction Conditions Law 1976 of Germany and the Unfair Contract Terms Act 1977 of the UK. Han Shiyuan, *Gerneral Theory of Contract Law* (Fa Lü Chu Ban She 2004) 207. (韩世远：《合同法总论》).
[840] Liming Wang, 'The Analysis on the Standard Form Clauses in PRC Contract Law' (1999)6 Zheng Fa Lun Cong 3, 3-4. (王利明：《对<合同法>格式条款规定的评析》)
[841] PRC Contract Law, Article 39, paragraph 2.

Moreover, standard form clauses cannot be modified by the non-drafting party. Even if the contract terms are pre-formulated by one party, they may not be standard form clauses if they can be individually negotiated by the parties. This is illustrated in the case of *Hangzhou Si Wei Da v. ICBC bank*. In that case, a dispute over a loan contract was entered into between Si Wei Da (an individual) and ICBC bank, was submitted to Hangzhou Financial Arbitration Committee.[842] The loan contract was pre-formulated by ICBC with a choice of dispute resolution clause between arbitration and litigation. Both parties agreed to choose arbitration as a method for dispute resolution. Therefore, the court held that this dispute resolution clause was not a standard form clause.

B. Obligations of the drafting parties in standard form clauses

388. There are several requirements that the drafting party must bear in mind, including the fairness principle and reasonable notice requirement. In what follows, I will explain these different requirements respectively.

389. First, standard form clauses should be drafted in accordance with the fairness principle. Pursuant to Article 5 of the PRC Contract Law, parties should allocate the rights and obligations of the contract reasonably in accordance with the principle of fairness.[843] The fairness principle is not directly defined in the PRC Contract Law, but as advocated by Chinese scholars, fairness is rooted in the reasonable allocation of rights and obligations.[844] The benefits a party acquired shall proportionally match the obligations it bears.[845] The principle of fairness prevents parties with greater power from relying on their advantageous positions and imposing unfair terms on the other contracting party. Parties have the right to request a court or an arbitral tribunal to modify or revoke the standard form clauses if the clauses were drafted against the fairness principle.[846]

390. Second, the drafting parties are required to use reasonable means to draw the non-drafting party's attention to the provisions that exempt or restrict its liability and to explain those

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[842] *Hangzhou Si Wei Da Fei Zhi Zao Bu Co., Ltd. v Industrial and Commercial Bank of China Holding Co., Ltd. Hangzhou Jiangnan Branch* (2015) Zhe Hang Zhong Que Zi No. 4 (浙杭仲确字第 4 号) （*Hangzhou Si Wei Da v ICBC*）

[843] Yang Lixin, *General Principles on Contract Law* (Fa Lü Chu Ban She 1999), 115. （杨立新：《合同法总则》）

[844] See Han (n 839) 39；Zhang (n 834) 74.

[845] Jiang Ping, *et al, A Detailed Explanation of the Contract of Law* (China University of Political Science and Law Press 1999) 6-7. (江平：《中华人民共和国合同法解释精解》)

[846] PRC Contract Law, Article 54.

provisions if requested by the non-drafting parties.[847] Scholars generally hold that the notification obligation shall not be restricted only to provisions that exempt or restrict the drafting parties' liabilities but also apply to other standard form clauses that are unfair.[848]

391. The law is not clear as to what qualifies as fulfilling the obligation of reasonable notice. Accordingly, Professor Wang Liming has proposed five factors to assess whether sufficient notice has been drawn to the non-drafting parties in accordance with standard form contract rules, namely the contractual nature of the document, prominence, clarity, time and extent of notice. [849]

(i) Contractual nature;

392. The standard form clauses must be presented in a clear way to show that the terms are intended to be part of the contract. Standard form clauses may be presented in different places. For example, they can be displayed on the back of a ticket, on the notice board of a shop, or in a hyperlink to a website. The drafting party should inform customers of the contractual nature of standard form clauses and their legal consequences.

(ii) Prominence;

393. The drafting party should conspicuously draw the non-drafting party's attention to the standard form clauses depending on the type of transactions. Although the legislature has not defined what constitutes "reasonable notice" in the PRC Contract Law and its judicial interpretations, case law has demonstrated that the "reasonable notice" requires the drafting party, under common circumstances, to use a clear and obvious manner to keep the non-drafting party informed of the information that is closely related to their personal interests. [850] The manner in which terms should be made conspicuous is stated in Article 6 of the Judicial Interpretation of the PRC Contract Law (II),[851] providing that:

"The drafting party who provides standard form clauses shall adopt the words, symbols, character styles, or other special marks that are conspicuous to draw the other party's notice to clauses that exempt or limit liabilities of the other party. The drafting party shall bear the

[847] PRC Contract Law, Article 39, paragraph 1.
[848] Jianyuan Cui, *New Contract Law Principles and Case Analysis* (Jilin University Press 1995) 101; Wang (n 840)7.
[849] Wang (n 840) 6.
[850] *Liu Jian Xin v An Hui Province Han Dou Xiong E-commerce Company* (2015) Shen Long Fa Bu Min Chu Zi No. 917 (深龙法布民初字第 917 号)
[851] Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the PRC Contract (II), Fa Shi [2009] No.5, Article 6 (Judicial Interpretation on PRC Contract Law (II)).

burden of proof to show that it has fulfilled the notification obligation as stipulated."

394. Whether an ADR clause is conspicuous to the non-drafting parties depends on the manner in which it is presented, which may greatly vary in electronic forms. For example, it is more difficult to justify the conspicuous nature of a browse-wrap agreement than a click-wrap agreement as parties are not offered a chance to review the agreement before the conclusion of the contract. Moreover, even in the same type of click-wrap agreements, courts may render rather different conclusions on the conspicuous nature of the agreements depending on whether the non-drafting parties have direct access and informed assent to the terms.[852] For example, an ADR clause which is displayed next to the signature is considered more direct than an ADR clause embedded via a hyperlink.

(iii) Clarity of the content;

395. The content of standard form clauses should be clarified and explained in plain language so that the non-drafting parties understand the meaning of those clauses. The scope of clarification and explanation includes, for example, the content of the standard form clause and the potential risks of this clause.[853] In case there are deviations with regard to the interpretation of the standard form clauses, the clauses should be interpreted in a manner unfavorable to the drafting parties.[854]

(iv) Time of notice;

396. Although it is not stipulated clearly at what point in time sufficient notice has been given to the non-drafting party, the notice of standard form clauses should be made no later than or at the time the contract is concluded. The other parties should know or have a chance to take knowledge of the existence of these clauses before they make a decision to enter into the contract with the drafting party.

(v) Extent of notice.

397. The drafting party should provide the non-drafting party with sufficient opportunity to

[852] See *Beijing Century Zhuoyue Information Technology Co., Ltd. v Sun Le'an* (2014) San Zhong Min Zhong Zi No. 09382, Beijing the Third Intermediate People's Court (民中字第 09382 号) and *Qin Wei v Shanghai Niuhai Electronic Commerce Co., Ltd*. (2014) Pu Min Yi Min Chu Zi Di No. 9378, Shanghai Pudong New District People's Court (浦民一民初字第 9378 号): Both websites provide terms of service agreement in click-wrap form but only the one with an automatic popped-up term of agreement is admissible because it can prove the user has read the terms.

[853] Yang (n 843) 116.

[854] PRC Contract Law, Article 41. This is in accordance with the rule in English law of *contra proferentem* (interpretation of exemption clause), although Article 41 applies to all terms.

understand the content of the standard form clauses. For example, the non-drafting parties should be given sufficient time to read the content of the standard form clause. Therefore, imposing a deadline by which the non-drafting party must conclude a contract may be inappropriate.

C. Legal effects of standard form clauses

398. The following discussion will consist of three parts: the conditions applicable to the revocation of standard form clauses, the conditions applicable to the invalidity of standard form clauses, and the application of separability principle in the PRC contract law. The principle of separability sets forth an additional level for the legal analysis of a dispute resolution clause in standard form.

399. First, if the drafting party fails to reasonably draw the non-drafting party's attention to the standard term and when such standard term has exempted or limited the drafting party's liabilities, these standard terms can be revoked by the other party. The PRC Contract Law does not define directly the legal consequence of a drafting party's failure to draw sufficient notice of the other parties to the standard-term clauses in Article 39. Instead, the Judicial Interpretation on PRC Contract Law (II) has clarified the conditions under which the standard form clauses can be revoked. If the drafting party fails to draw reasonable notice of the standard term to the non-drafting party and to explain the terms if the non-drafting party requires,[855] resulting in the non-drafting party's failure to notice standard-term clauses that exempt or limit his/her liabilities, the non-drafting party has the right to ask the court to revoke the standard form clause.[856]

400. Second, the standard form clauses shall be held void[857] by the people's court if the drafting party fails to draw reasonable notice of the standard term to the non-drafting party and when such standard term has been used to exempt his own liabilities,[858] aggravate the non-drafting party's liabilities or exclude the non-drafting party's major rights under Article 40 of the PRC Contract Law.[859] The scope of "major rights" (of the non-drafting party) includes the

[855] PRC Contract Law, Article 39 paragraph 1.
[856] Judicial Interpretation on PRC Contract Law (II), (n 851), Article 9.
[857] Judicial Interpretation on PRC Contract Law (II), (n 851), Article 10; PRC Contract Law, Article 40.
[858] The liabilities that are exempted here shall be interpreted as the mandatory liabilities that are inherent in law which cannot be derogated.
[859] Zhang Xiaoliang, 'The application of standard contract theory in individual cases' (浅谈格式合同理论在个案中的准确把握) (2005) 2 Arbitration and Law 38 (仲裁与法律), 45.

contractual obligations that are inherent in the contract and which cannot be deviated from, such as the right of withdrawal and, right of indemnification. [860]

Accordingly, a question arises whether ADR clauses (that have the effect of excluding parties' right of action) fall into the category of standard terms that "exclude major rights of the non-drafting parties." In Chinese jurisprudence, people's courts have ruled inconsistently on whether an exclusive jurisdiction clause has the effect of excluding the major rights of the non-drafting party. In *Huang v. Jiangsu Bank*, the people's court held that an exclusive jurisdiction clause in a standard form contract valid as it does not have the effect of aggregating the non-drafting party's liabilities or excluding a major right of the non-drafting party under Article 40 of the PRC Contract Law.[861] It is held by some scholar that the dispute resolution clause is a procedural right whereas "major rights" in Article 40 refers to substantive contractual rights.[862] Therefore, Article 40 is not directly applicable to a dispute resolution clause in standard form.

Nevertheless, there is also contradictory jurisprudence where the people's court has invalidated an exclusive jurisdiction clause in a standard form contract pre-formulated by the merchants based on the holding that such a clause has the effect of excluding the non-drafting party's major right (the right to choose a dispute resolution method) particularly in B2C contracts.[863] The applicability of Article 40 to mandatory ADR clauses should be determined in weighing the bargaining power of the parties. Given that mandatory ADR clauses have a character similar to exclusive jurisdiction clauses in the sense that they prevent parties from having recourse to a specific court, the standard form contract rules applied to exclusive jurisdiction clauses shall also be extended to assess the validity of these ADR clauses by analogy. In other words, a

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[860] Shi Yang and Rui Zhu, 'Reasonable Notification Obligation of the Drafting Party and Validity Assessment of Standard-form Clauses' (2010)18 Ren Min Si Fa 29, 32-33.(《格式条款提供方的合理提示义务与格式条款效力的认定》)

[861] *Huang Xianguang v Jiangsu Bank Holding Limited Company Changshu Zhao Shang Cheng Branch* (Huang v Jiangsu Bank) (2015) Su Shang Xia Zhong Zi No. 00211 (苏商辖终字第 00211 号). Other cases that have similar scenario and decisions are, for instances, *Yangzhou Fei Da Color Wrap Co.,Ltd. v Yangzhou Municipality Guang Lin District Jin Da Nong Cun Small Loan Co.,Ltd* .(2015) Yang Shang Xia Zhong No. 00089 （扬商辖终字第 00089 号）; *An Hui Ma An Shan Nong Cun Commercial Bank Holding Co., Ltd*. *Fei Xi Branch v Pang Yanqing* (2015) He Guan Zhong Zi No. 00562（合管终字第 00562 号）; *Pan Yi Qin v Guangxi Shiyi International Trade Co., Ltd, & Alibaba* (2015) Rong Shui Min Er Chu Zi No. 34-2 （融水民二初字第 34-2 号）.

[862] 'Case analysis: legal validity of arbitration clause in standard form contract', Beijing Huanzhong & Partners. 《格式合同中的仲裁条款，效力如何认定？（2016 年浙江案例）》

[863] *Zhejiang Taobao Internet Co., Ltd v. Chen Yu* (2015) Chang Zhong Li Min Zhong Zi No. 01488 (长中立民终字第 01488 号); *Linlin v Beijing Ctrip* (2012) Er Zhong Min Zhong Zi No. 17117 (二中民字第 17117 号); *Niuhai E-commerce Company v Zhang Li Lun* (2017) Yue 01 Min Xia Zhong No. 1534 （粤 01 民辖终 1534 号）; *China Post Group v Quan Wen Feng* (2017) Yue 01 Min Xia Zhong 1340 （粤 01 民辖终 1340 号）

mandatory ADR clause should also be held invalid by reference to Article 40 if it excludes the non-drafting party's major right (i.e. the right to choose a dispute resolution method) and no reasonable notice has been drawn to the non-drafting party.

401. Third, the separability principle indicates that even if a contract is invalid, revoked or terminated, the validity of the dispute resolution clause in that contract shall not be affected.[864] If a dispute resolution clause is included in a standard form contract, the invalidity of the whole standard form contract does not necessarily affect the validity of the dispute resolution clause. There are two steps that need to be taken in order to determine the validity of such a dispute resolution clause. First of all, one must determine whether the dispute resolution clause is a standard form clause?[865] For example, if the non-drafting party is offered a chance to choose a dispute resolution method, it is then not a standard form dispute resolution clause. The fact that the dispute resolution clause is provided in a standard form contract does not necessarily mean the dispute resolution clause in a standard form clause on its own. Secondly, if the dispute resolution clause is in standard form, the next determination shall be whether the non-drafting party has given real consent to such a dispute resolution clause. Such consent will be based in part on whether the drafting party has drawn the non-drafting party's reasonable attention to such a standard form dispute resolution clause.

3.2.4.2. The application of consumer protection law

402. There is no definition of "consumer" in the PRC Consumer Protection Law. Article 2 seems to offer an implicit meaning of the term, stating that: "the rights and interests of consumers are protected when they purchase and use goods or receive services for daily consumption." As consumer protection is only provided to purchases for private use, the consumer protection law does not regulate the purchase of goods and services for professional uses.[866] The concept of "consumer" in China does not specifically indicate whether the consumer can be a legal entity. The majority of Chinese legal scholars are of the opinion that legal entities cannot be consumers under the PRC Consumer Protection Law[867] as the consumer protection measures in the PRC

[864] PRC Contract Law, Article 57. The principle of separability is also enshrined in Article 19(1) of the Arbitration Law of the PRC.

[865] Not every clause in standard form contracts is standard form clause.

[866] *Wang Xiuying v Zhang Liupeng* (2009) An Min San Zhong Zi No. 131 （安民三终字第 131 号）, People's Intermediate Court of Henan Province An Yang Municipality. The people's court decided that the legal service provided to an individual does not fall under the scope of Article 2 of the PRC Consumer Protection Law.

[867] Liming Wang, 'Concept of consumer and application scope of the consumer protection law' (消费者的概念及消费者权益保护法的调整范围)(2002) Political Science and Law 2, 5-7; Yuying Wang, 'Discussion on the

Consumer Protection Law are intended for individuals only.[868]

403. The PRC Consumer Protection Law has applied the standard form clauses rules in the context of consumer contracts. The validity requirements of standard form clauses in consumer contracts are stricter than standard form clauses rules in general contract law in two respects: the broader conspicuousness requirement and the wider invalidity conditions. In what follows, I will discuss first the added obligation of traders to enhance the conspicuousness of the standard-term clause in consumer contracts and second the broader invalidity conditions of standard form clauses in B2C contracts, which have a broader scope of invalidity than B2B contracts.

A. Notification requirements for the traders who provide standard form clauses

404. The traders should conspicuously draw consumers' attention to standard form clauses that contain all the information having a substantial impact on consumers, including quantity, quality, price, expenses, period and method of performance, safety precautions and risk warning, after-sale services, civil liabilities, as well *any other content* that may affect consumers' interests.[869] With regard to general standard form contract rules in the PRC Contract Law, the notification requirement to standard form clauses is only restricted to those that limit or exempt the non-drafting parties' liabilities.[870] The notification requirement in consumer contracts is extended to a broader scope including other information that has the potential to influence consumer's interests according to the nature of the contract and transactions.[871]

405. In order to implement such information requirement, it is stipulated in the Judicial Interpretation of the Supreme People's Court of China[872] and confirmed in case law that the court should uphold the party's request to invalidate a standard-form jurisdiction clause which

applicable scope of Consumer Protection Law' (论《消费者权益保护法》的适用范围(2013) Fa Lü Shi Yong 2, 76-77；Yanfang Zhang, *Study of Consumer Protection Law* (消费者保护法研究) (Fa Lü Chu Ban She 2002).

[868] For example, Article 27 prevents traders from insulting consumers by examining the bodies of consumers and Article 40 requires traders to compensate for personal injuries of consumers that are caused by their use of products.

[869] PRC Consumer Protection Law, Article 26, paragraph 1.

[870] PRC Contract Law, Article 39, paragraph 1.

[871] Interpretative notes to the PRC Consumer Protection Law (2013 Amendment) on Article 26, paragraph 2(1), available < http://vip.chinalawinfo.com/newlaw2002/SLC/SLC_SiyItem.asp?Db=SyItem&Gid=838873035> accessed 28 February 2017. (中华人民共和国消费者权益保护法(2013 修正)释义第二十六条)

[872] Judicial Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC, Article 31.

is not prominent to consumers.[873] As the notification requirement is imposed on traders in the case of jurisdiction clauses, similar requirements are expected in ADR clauses, especially those that exclude consumer's right to bring legal actions. This is demonstrated by Article 15 of the draft of the Implementation Measures of the PRC Consumer Protection Law where businesses are required to use conspicuous manner to draw consumer's attention to substantial information that may affect consumer's interests and bans traders' use of standard form clause to exclude or restrict consumers' rights to complain, to report, or to choose litigation or arbitration.[874] Therefore, ADR clauses, which may influence how consumers protect their legal rights, should be included in the notification requirement.

406. The State Administration for Industry and Commerce has issued "Guidelines for regulating the standard terms of the online trading platform (SAIC Guidelines on Standard Clauses of Online Trading Platform) ." [875] The online trading platform operator should present standard form clauses or the hyperlink to such clauses in a conspicuous place on its main webpage and use technology to ensure that users can have easy access to read and download the contract.[876] The SAIC Guidelines further clarify that the "conspicuous manner" requires the drafting party to use methods to draw sufficient attention of the non-drafting party, including the words, symbols, character styles or other special marks. [877] It prevents the drafting party from using hyperlinks that are not easily accessible to consumers, from using technological techniques to hide the information that is substantive to consumer's interests, or from providing further-on terms that are not directly available.[878]

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[873] The people's court held in *Liu Jianxin v Anhui Province Han Dou Xiong E-commerce Co., Ltd.* (2015) Shen Long Fa Bu Min Chu Zi No. 971 (深龙法布民初字第 917 号), *Gao Hui v Shenzhou Tercent Computer System Co., Ltd.* (2016) Wan 15 Min Xia Zhong 43 (皖 15 民辖终 43 号) that business has not presented the jurisdiction clause in a conspicuous manner.

[874] Draft of the Implementation Measures of the PRC Consumer Protection Law, 16 November 2016. < http://www.chinalaw.gov.cn/article/cazjgg/201611/20161100482105.shtml>, Article 15.

[875] The online trading platform (also called "online marketplaces") refers to a third-party trading platform that enables sellers and buyers to have direct transactions of goods/services on virtual transaction sites in accordance with the transaction rules.

[876] Announcement of the State Administration for Industry and Commerce on Issuing the Guidelines for Regulating the Standard Terms of Online Trading Platform Contracts, Gong Shang Shi Zi (2014) No. 144, Article 7. ("SAIC Guidelines on Standard Clauses of Online Trading Platform") (网络交易平台合同格式条款规范指引) It is also stipulated in Article 33 of the E-Commerce Law of the PRC that the platform business shall put the information with regard to the service agreement and transaction rules and the website link of the abovementioned information at a conspicuous place of the website to ensure that businesses and consumers have easy access to read and download those terms.

[877] SAIC Guidelines on Standard Clauses of Online Trading Platform, *ibid*, Article 9, paragraph 2.

[878] For example, the terms are hidden in general terms and conditions which are not directly accessible in the registration agreement.

B. Invalidity of standard form clauses in consumer contracts

There are two scenarios relevant to the legal effect of standard form clauses in consumer contracts: non-binding effect of standard form clauses that are inconspicuous to consumers and invalidity effect of standard form clauses that are unfair to consumers. The first scenario is stipulated by the first paragraph of Article 26 of the PRC Consumer Protection Law. Those standard-term clauses that are not presented in a conspicuous manner to consumers are not incorporated into the contract and are not binding on consumers.[879] The second scenario is stipulated by paragraph 2 and 3 of Article 26 of the Consumer Protection Law. Traders should not use standard form clauses, notices, announcements or shop bulletins to impose unfair or unreasonable conditions on consumers that exclude or limit consumers' rights, reduce or exempt liabilities of the traders, aggravate consumers' liabilities, or create other issues that are unfair or unreasonable to consumers.[880] The traders shall not enter into transactions with consumers by imposing standard terms on them with technological means.[881] If standard form clauses are provided under the conditions mentioned above, they should be deprived of legal effects.[882]

407. What are the major rights of consumers that traders cannot derogate from in standard form clauses? The SAIC (State Administration of Industry and Commerce) Guidelines on Standard Clauses of Online Trading Platform provide a list of "major contractual rights" that the drafting party cannot waive by standard form clauses, including the right to choose the dispute resolution method. [883] In other words, the Guidelines have established the right to choose a dispute resolution method as one of the major rights of the platform users and the online trading platform cannot deviate from such right by contract. The SAIC Guidelines on Standard Clauses of Online Trading Platform are applicable not only to third-party online trading platforms but also to traders who provide products and services on their websites directly. [884]

408. Standard form clauses should be controlled more strictly in B2C contracts than in B2B

[879] Interpretative notes to the PRC Consumer Protection Law (2013 Amendment) on Article 26, (n 871).
[880] PRC Consumer Protection Law, Article 26, paragraph 2.
[881] The technological means refers to imposing standard terms on consumers by using technological method, such as imposing terms and conditions on consumers by using electronic means without bringing consumers' awareness to such terms. See Zhang Zishun, 'Understanding and application of the use of standard form clause via technological means to force transactions' (2015) Xiang Tan University Graduate Thesis, 6-8 (利用格式条款借助及时手段强制交易的理解与适用).
[882] PRC Consumer Protection Law, Article 26, paragraph 3.
[883] SAIC Guidelines on Standard Clauses of Online Trading Platform, (n 876), Article 12(4).
[884] SAIC Guidelines on Standard Clauses of Online Trading Platform, (n 876), Article 19.

contracts to protect consumer interests. Any standard form clauses that include contents to narrow traders' liabilities, limit consumers' rights or include any other contents that are unfair or unreasonable to consumers shall be held invalid.[885] This non-exclusive list of conditions grants people's courts to have a wider scope for invalidating unfair standard form clauses in B2C contracts.[886] Whereas in Article 40 of the PRC Contract Law, the conditions to invalidate standard form clause are limited to those that exempt the drafting party from liability, impose heavier liability on the other party, or preclude the non-drafting party's major rights. Therefore, PRC Consumer Protection Law provides wider protection for consumers in controlling standard form clauses than the stipulations in the PRC Contract Law.

3.2.4.3. Case study on the substantive validity of e-ADR agreements in China

409. In what follows, I will examine the substantive validity of e-ADR agreements that exist on commercial websites and are currently used by traders. I will explore whether e-ADR agreements in current practice are subject to substantive rules of contract law and consumer protection law. In addition, I will evaluate the important factors that affect the assessment of the substantive validity of ADR agreements in an electronic environment. To that end, I will make a distinction between the type (adjudicative and consensual ADR agreements) based on the content of e-ADR agreements and the role of third-party neutrals.

A. Electronic adjudicative ADR agreements

410. "Adjudicative ADR agreements" here refer to ADR clauses that authorize a third-party neutral to make binding decisions for the parties. In the absence of sufficient Chinese jurisprudence and legislation on adjudicative ADR clauses of consumer contracts, reference is made to the exclusive jurisdiction clauses, which have a similar character to adjudicative ADR clauses that limit parties' access to courts. In practice, there is also case law in which the people's courts applied Article 31 of the Judicial Interpretation on the Civil Procedure Law to uphold a party's request to invalidate an electronic arbitration clause that was displayed in an inconspicuous manner to consumers. [887]

[885] SAIC Guidelines on Standard Clauses of Online Trading Platform, *ibid*, Article 9, paragraph 2.
[886] The scope of "unfair or unreasonable terms" include for example contract formation, contract amendment, contract performance, interpretation of contract and dispute resolution clauses. See Interpretative notes to the PRC Consumer Protection Law (2013 Amendment) on Article 26, paragraph 2(2).
[887] *Chen Yongpei v Ningbo Jiangdong Hongcheng Information Technology Co.,Ltd.* (2016) Zhe 02 Min Xia Zhong No. 113(浙 02 民辖终 113 号).

a. Case law on the judicial control of exclusive jurisdiction clauses

411. Article 31 of the *Judicial Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC* (Judicial Interpretation on Civil Procedure Law) in 2015 clarified the validity of standard exclusive jurisdiction clauses in consumer contracts.

> *"Where a trader uses a standard exclusive jurisdiction clause*[888] *to enter into an agreement with a consumer but fails to draw sufficient notice to the consumer of such clause, the competent people's court shall uphold the claim brought by the consumer to invalidate such a jurisdiction clause."* [889]

412. Due to the transition before and after the implementation of the Judicial Interpretation on the Civil Procedure Law in 2015, cases that were rendered before 2015 mostly recognized the validity of exclusive jurisdiction clauses in consumer contracts. For example, in *Shen Jianbo v Zhejiang Taobao Internet Co., Ltd.*, the people's court upheld the exclusive jurisdiction clause based on Article 40 of the PRC Contract Law as the court found such an exclusive jurisdiction clause did not exclude major rights of the non-drafting party.[890] Cases rendered after the implementation of the Judicial Interpretation on the Civil Procedure Law tend to invalidate exclusive jurisdiction clauses if the drafting party has not drawn sufficient notice of the consumers to such clauses.

413. There are two main issues in the application of Article 31 of the Judicial Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC. First, there are no uniform standards in determining the "conspicuous" nature of jurisdiction clauses. Second, it is not clear whether Article 31 can be used to assess arbitration clauses.

414. First of all, the "reasonable notification obligation" that is stipulated in Article 31 of the Judicial Interpretation on the Civil Procedure Law "requires the drafting parties to use a clear and conspicuous manner to enable the non-drafting parties to be aware of the information that is closely related to their interests."[891] The electronic jurisdiction clauses are usually embedded in terms and conditions of the online trading platform that are provided to consumers with a

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[888] Jurisdiction clause (*guan xia xie yi*, 管辖协议) in Chinese context is subject to two ways of interpretation: one specifically refers to exclusive jurisdiction clause, the other refers to all kind of dispute resolution clause.
[889] Judicial Interpretation on the Civil Procedure Law, Article 31.
[890] *Shen Jianbo v Zhejiang Taobao Internet Co., Ltd.* (2014) Zhe Yong Xia Zhong Zi No. 246 (浙甬辖终字第 246 号).
[891] People's Court Newspaper, 'The jurisdiction clause of Tmall website is invalid', 19 March 2015 < http://rmfyb.chinacourt.org/paper/html/2015-03/19/content_95620.htm?div=-1> accessed 20 June 2016. *Chen Zhi Xin v Zhejiang Tmall Internet Co., Ltd*. (2015) Yan Shang Zhong Zi No. 00105 (盐商辖终字第 00105 号).

hyperlink in the user's registration agreement. The users must click on "I have agreed with the terms and conditions and want to register with the website" in order to complete the registration process.

In some cases, the people's court has invalidated electronic jurisdiction clauses embedded in terms and conditions, holding that the exclusive jurisdiction clause embedded in terms and conditions had not met the conspicuous standard and deprived consumers of their right to bring an action in other courts.[892] In *Chen Zhi Xin v. Zhejiang Tmall Internet Co., Ltd*., the people's court held that the exclusive jurisdiction clause was void even if it was displayed in bold font style because it was difficult for consumers to distinguish jurisdiction clauses from other clauses which were also displayed in bold font style. Therefore, the people's court determined that the trader had not drawn sufficient notice to consumers. The cost of bringing claims in a court which was located outside the consumer's domicile was disproportionate to the value of goods or services. Therefore, such an exclusive jurisdiction clause limited the consumer's right to choose the appropriate court and was held invalid by the people's court. In other cases, the people's court has upheld the validity of exclusive jurisdiction clauses, finding that the trader had drawn sufficient notice of the jurisdiction clauses to consumers and such clauses had not limited consumers' rights.[893] In *Li Rui v. Zhao Xu & Taobao,* the people's court held that a jurisdiction clause that was displayed in bold font style and underscored was sufficiently conspicuous to the non-drafting parties.

Conflicting judgments in determining the conspicuousness and validity of jurisdiction clauses exist even in the assessment of the same jurisdiction clauses of the same websites (such as Taboo, SuNing and Ctrip).[894] Although the terms were displayed in the same manner in these

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[892] *Liu Jianxin v Anhui Province Han Dou Xiong E-commerce Co., Ltd.* (2015) Shen Long Fa Bu Min Chu Zi No. 971 (深龙法布民初字第 917 号)；Gao Hui v Shenzhou Tercent Computer System Co., Ltd. (2016) Wan 15 Min Xia Zhong 43 (皖 15 民辖终 43 号).

[893] *Li Weigao v Zhejiang Tianmao Internet Co., Ltd*. (2015) Yu Min Chu Zi No. 00308 (雨民初字第 00308 号); *Wu Hongbo v Shanghai Ctrip Business Co., Ltd.* (2016) Xiang 0105 Min Chu No. 46 （湘 0105 民初 45 号）, *Wang Qianyun v Shanghai Ctrip International Travel Agency Co., Ltd.* (2016) Hu 0110 Min Chu No. 4985 (沪 0110 民初 4985 号), *Li Rui v Zhao Xu, Taobao* (2017) E 0281 Min Chu 1671 (鄂 0281 民初 1671 号).

[894] See for example, exclusive jurisdiction clauses are supported in *Wu Hongbo v Shanghai Ctrip Business Co., Ltd.* (2016) Xiang 0105 Min Chu No. 46 （湘 0105 民初 45 号）, *Cao Xia v Nan Jing Su Ning Yi Gou e-commerce Co., Ltd.* (2015) Yan Shang Xia Zhong Zi No. 00044（盐商辖终字第 00044 号） and *Shen Jianbo v Zhejiang Taobao Internet Co., Ltd.* (2014) Zhe Yong Xia Zhong Zi No. 246 (浙甬辖终字第 246 号), whereas exclusive jurisdiction clauses are denied in *Wang Huan, Mei Limei v Shanghai Ctrip Business Co., Ld.* (2015) San Zhong Min Zhong Zi No. 08708 (三中民终字第 08708 号), *Sun Dingding v Jiangsu Su Ning Yi Gou E-commerce Co., Ltd.* (2015) Su Zhong Min Zi No. 00253 and Pan Ziqiang v Zhejiang Taobao Internet Co., Ltd. (2014) He Guan Zhong Zi No. 00428 (合管终字第 00428 号).

cases, disparate legal effects were given to the exclusive jurisdiction clauses in consumer contracts by different people's courts. Even though Article 31 of the Judicial Interpretation on the Civil Procedure Law has clarified rule regarding the validity of exclusive jurisdiction clause, the standards for determining the "conspicuousness" of jurisdiction clauses are still absent. Jiangsu Province High People's Court recently defined the "conspicuous" standard in its *Summary of Minutes on the Trial of Cases Concerning Consumer Disputes*.[895] The online trading platform's use of standard form clauses in black font-style or in bold font style was not conspicuous enough to provide prominent notice to consumers. Instead, a separate pop-up window was required to remind consumers of the special jurisdiction clause or exemption clause. This proved to be a concrete guideline for online trading platforms to draft terms and conditions to be in compliance with laws despite that this guidance has a limited scope of application within Jiangsu Province.

415. Another issue brings about the scope of application of Article 31 of the Judicial Interpretation. The validity of standard ADR clauses that have a similar legal effect as jurisdiction clauses depriving consumers' right to bring a dispute in the court of their domicile is not stated in the Judicial Interpretation on the Civil Procedure Law. It is interesting that some people's courts[896] have applied Article 31 to invalidate an arbitration clause in a consumer contract, holding the view that "the electronic arbitration clause between the trader and the consumer has not brought sufficient notice to consumers and therefore the request of the party to invalidate such a clause should be upheld under Article 31." The jurisdiction clause in Article 31 has been interpreted broadly to also include an arbitration clause as a protection for consumers.[897] Other courts held that Article 31 only applies to choice-of-court clauses that fall under Article 34 of the Civil Procedure Law of the PRC and therefore does not include arbitration clauses.[898] Even though Article 31 of the Judicial Interpretation on the Civil Procedure Law could not be applied directly to the arbitration clause in B2C contracts, adjudicative ADR clauses, which have also deprived consumers of their right to bring a dispute in the court of their domicile, should be

[895] Jiangsu Province High People's Court, 'Summary of Minutes on the Trial of Cases Concerning Consumer Disputes', [2016] No. 10, item No.12: the validity of standard clauses in online shopping. (江苏省高院关于审理消费者权益保护纠纷案件若干问题的讨论纪要)

[896] *Chen Yongpei v. Ningbo Jiangdong Hongcheng Information Technology Co.,Ltd.* (2016) Zhe 02 Min Xia Zhong No. 113(浙 02 民辖终 113 号).

[897] See (n 888) two ways of interpretation of "jurisdiction clause": one refers to the choice-of-law clause, the other refers to the dispute resolution clause in general.

[898] *Jia Si v. Leshan Xinhe Zhiye Co., Ltd.* (2015) Le Min Te Zi No.3(乐民特字第 3 号); *Xu Yufang v. Leshan Xinhe Zhiye Co., Ltd*. (2015) Le Min Te Zi No.4(乐民特字第 4 号); *Zhang Wenting v. Leshan Xinhe Zhiye Co., Ltd*. (2015) Le Min Te Zi No.5(乐民特字第 5 号).

held void under Article 26 of the PRC Consumer Protection Law.[899]

b. Case study of adjudicative ADR clauses in commercial websites in China

416. The case study of adjudicative ADR clauses has been divided into two parts. The first part will examine the frequency of ADR clauses usage in China. The second part will analyze the legal nature of selective ADR clauses. The aim of this case study is to determine what the current practice in ADR clauses is and examine whether these ADR clauses are in compliance with current legislation and jurisprudence.

417. First of all, I have selected the top 20 Internet companies from the "List of 100 top Internet enterprises of China" in 2016[900] and studied their websites. These Internet companies are studied because their websites are more frequently used and visited by consumers than others. This allowed me to look at 40 websites in total as some of the companies have more than one website. Based on an examination of the terms and conditions on these websites, I concluded that only two out of forty websites use the arbitration clause to resolve disputes, the rest of the websites use jurisdiction clause instead. The general practice of traders is to use jurisdiction clauses instead of ADR clauses in the terms and conditions of their websites. There are likely two main reasons accounting for this phenomenon: first, people are more familiar with and trust in litigation; second, the litigation fee is comparatively inexpensive.

418. In the1980s and 1990s, following the legal reform and the growing usage of the litigation, the rate of ADR usage in China dropped.[901] In spite of the legislative incentives to revitalize ADR in China, litigation retains more credibility than other types of ADR in China.[902] Moreover, the relative inexpensive litigation fee also contributes to the popularity of litigation in China. According to the Measures on Payment of Litigation Fees of 2007, the litigation cost has been reduced significantly to allow parties to have access to litigation.[903] It is therefore not

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[899] Both jurisdiction clauses and adjudicative clauses are based on party autonomy to grant a tribunal located in a situs to use a set of procedural rules to adjudicate disputes. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, *Haynsworth v. The Corporation*, 121 F.3d, 956, 963.

[900] The Ministry of Industry and Information Technology of the PRC, Top 100 Chinese Internet Enterprises of 2016, available at: < http://www.isc.org.cn/zxzx/xhdt/listinfo-33800.html> accessed 24 February, 2017.

[901] Fan Yu, 'The Improvement and Development of the Alternative Dispute Resolution Mechanism in Contemporary China' (当代中国非诉讼纠纷解决机制的完善与发展), (2003) Xue Hai 77.

[902] Chinese people are influenced by "partial rule of law" which only focus on litigation while neglecting out-of-court mechanisms. Du Wen, 'The significance of ADR to re-establish the out-of-court dispute resolution framework in China' (论 ADR 对重塑我国非诉讼纠纷解决体系的意义), (2003) 21 Journal of China University of Political Science and Law 3,155.

[903] Xiao Jianguo & Tang Xin, 'Cost and Fee Allocation in Civil Procedure: China National Report' (2012) 4 Tsinghua China Law Review 43, 65.

surprising to see that jurisdiction clauses are used more often in China.

419. In the second part, the following case study examined several electronic adjudicative ADR clauses from various e-commerce websites in China. The case study is limited to ADR clauses that are provided on websites, especially in the user's agreement and/or the service agreement.[904] In the following chart, two types of ADR clauses are included: arbitration clauses in B2C and B2B contracts (3 in total) and adjudicative ADR clauses (internal dispute resolution) in B2B contracts (2 in total). As the ADR clauses in B2C contracts were chosen from Chinese domestic websites, I have translated the original text from the Chinese language into English in the subsequent chart. The other two adjudicative ADR clauses in B2B contracts were drafted originally in English as they were intended for international businesses. The case study includes a comparison of various ADR clauses copied directly from the agreement of the website keeping their original form (such as font size and style). This demonstrates the nature of the ADR clauses and the manner in which they are displayed on the website. In the "Assessment of the validity of ADR clauses" column, I assess the validity of such ADR clauses based on the manner in which each clause is presented to the non-drafting parties and its compliance with current legislation and jurisprudence.

[904] ADR clauses are often included in "user's agreement" or "service agreement". These ADR clauses have been found by searching "service agreement" and "user agreement" together with "arbitration" or "adjudication".

Website agreement	**Nature of the website**	**B2C**	**Content in the original format**	**Presentation of ADR clause**	**Assessment on the validity of ADR clause**
1. MeiTuan User's Agreement http://www.meituan.com/about/terms.html	Group buying website[905]	B2C	13. Dispute Resolution (English translation) Any disputes that arise between the user and MeiTuan shall be resolved through negotiation. If no agreement can be reached, the disputes shall be submitted to Beijing Arbitration Commission. The arbitral award shall be final and binding. 十三、争议解决 (Chinese text) 用户与美团网因本协议的履行发生争议的应通过友好协商解决，协商解决不成的，任一方有权将争议提交北京仲裁委员会依据该会仲裁规则进行仲裁。	The arbitration clause is displayed in black font style.	Conspicuous to users via a click-wrap agreement; Exclude consumers' right to court proceedings; Valid under Article 26(1) of the PRC Consumer Protection Law.

[905] Group buying, also known as collective buying, offers products and services at significantly reduced prices on the condition that a minimum number of buyers would make the purchase.

2. KuWo User's agreement http://i.kuwo.cn/US/docs/SignDoc.htm	Music sharing website	B2C	**12. Jurisdiction and applicable laws** (English translation) … **12.2 Any disputes arising from this agreement shall be resolved amicably by the parties. In case no agreement can be reached, the dispute shall be submitted to Qingdao Arbitration Commission in accordance with the arbitration rules and with the place of arbitration in Beijing. The arbitral award shall be final and binding.** … 十二、法律管辖与适用 (Chinese text) … 12.2 因本协议引起的或与本协议有关的任何争议，双方应友好协商解决，协商不成的，均应提交青岛仲裁委员会按照其仲裁规则在北京进行仲裁。仲裁裁决是终局的，对双方均有约束力。 …	The arbitration clause is displayed in bold font style, but other clauses are also displayed in bold font style.	Inconspicuous to users via a click-wrap agreement; Exclude consumers' right to court proceedings; Invalid under Article 26(3) of the PRC Consumer Protection Law.
3. Shiji Jiayuan User's agreement http://www.jiayuan.com/bottom/declare.html	Social network website	B2C	18. Applicable law and jurisdiction (English translation) Any dispute arises from this agreement between the user and Shiji Jiayuan shall be submitted to Beijing Arbitration Commission with a binding decision.	The arbitration clause is displayed in bold font style.	Conspicuous to users via a click-wrap agreement; Exclude consumers' right to court proceedings; Valid

			18、法律的适用和管辖 (Chinese text) 本注册条款的生效、履行、解释及争议的解决均适用中华人民共和国的现行法律，所发生的争议应提交北京仲裁委员会，其仲裁裁决是终局的。		under Article 39 of the PRC Contract Law.
Website agreement	**Nature of the website**	**B2B**	**Content**	**Presentation of ADR clause**	**Assessment on the validity of ADR clause**
1. Alibaba.com Transaction Service Agreement http://rule.alibaba.com/rule/detail/2054.htm?spm=a271m.8038972.0.0.kwaH2U	Online trading platform for B2B transactions	B2B	Seller-Buyer Disputes[906] 10.3 DISPUTE BETWEEN BUYER AND SELLER. IN CASE A DISPUTE ARISES BETWEEN BUYER AND SELLER FROM OR IN CONNECTION WITH AN ONLINE TRANSACTION, IF THE DISPUTE IS NOT RESOLVED THROUGH AMICABLE NEGOTIATION WITHIN THE PRESCRIBED TIME PERIOD ACCORDING TO THE RELEVANT TRANSACTIONAL TERMS, YOU AGREE TO SUBMIT THE DISPUTE TO ALIBABA.COM FOR DETERMINATION. IF YOU ARE DISSATISFIED WITH ALIBABA.COM'S DETERMINATION, YOU MUST APPLY TO THE HONG KONG ARBITRATION CENTRE ("HKIAC") FOR ARBITRATION AND NOTIFY ALIBABA.COM OF SUCH APPLICATION WITHIN 20 CALENDAR DAYS AFTER ALIBABA.COM'S DETERMINATION. IF EACH OF BUYER AND SELLER IN THE DISPUTE DOES NOT APPLY FOR ARBITRATION WITHIN THE ABOVE 20 CALENDAR DAYS, EACH OF THE BUYER AND THE SELLER SHALL BE DEEMED TO HAVE AGREED THAT ALIBABA.COM'S DETERMINATION SHALL BE FINAL AND BINDING ON YOU. WITH A FINAL DETERMINATION, IN THE CASE THE ONLINE TRANSACTION ADOPTS THE ALIPAY SERVICES, ALIBABA.COM MAY INSTRUCT ALIPAY TO DISPOSE OF THE FUNDS HELD BY ALIPAY ACCORDING TO SUCH	The hybrid adjudicative ADR clause (internal dispute resolution plus arbitration) is displayed in capital letters.	Conspicuous to users via a click-wrap agreement; Exclude user's right to court proceedings; Valid under Article 39 of the PRC Contract Law.

[906] Seller-Buyer Disputes refer to disputes arise from electronic transactions between users of the online platform (sellers and buyers).

			DETERMINATION, AND IN THE CASE THE ONLINE TRANSACTION ADOPTS ALIBABA.COM SUPPLEMENTAL SERVICES, ALIBABA.COM MAY DISPOSE OF THE FUNDS HELD BY ALIBABA.COM ACCORDING TO SUCH DETERMINATION. FURTHER, EACH OF BUYER AND SELLER SHALL BE DEEMED TO HAVE WAIVED ANY CLAIM AGAINST ALIBABA.COM, ALIPAY AND OUR AFFILIATES AND AGENTS. <u>User-Alibaba Disputes</u>[907] 10.4 Other Disputes. In case a Dispute arises between you and Alibaba.com in any other circumstances, if the Dispute is not resolved between you and Alibaba.com, you and Alibaba.com agree that the Dispute shall be finally resolved by arbitration with the HKIAC. 10.5 HKIAC ARBITRATION. IF ANY DISPUTE IS SUBMITTED TO THE HKIAC FOR ARBITRATION, THE ARBITRATION SHALL BE CONDUCTED IN ACCORDANCE WITH THE RULES OF THE HKIAC IN FORCE AT THE TIME OF APPLYING FOR ARBITRATION AS AMENDED BY THIS CLAUSE. THE ARBITRATION PANEL SHALL CONSIST OF ONE SINGLE ARBITRATOR. UNLESS THE PARTIES AGREE OTHERWISE, THE ARBITRATION SHALL BE CONDUCTED IN ENGLISH AND IN HONG KONG. THE ARBITRATION SHALL BE CONDUCTED BY TELEPHONE, ONLINE AND/OR SOLELY BASED ON WRITTEN SUBMISSIONS AS SPECIFIED BY THE PARTY INITIATING THE ARBITRATION, PROVIDED THAT THE ARBITRATION SHALL NOT INVOLVE ANY PERSONAL APPEARANCE BY THE PARTIES OR WITNESSES UNLESS OTHERWISE AGREED BY THE PARTIES. THE ARBITRATION AWARD RENDERED BY THE HKIAC SHALL BE FINAL AND BINDING ON ALL THE RELEVANT PARTIES. THE ARBITRATION EXPENSES SHALL BE BORNE BY	The arbitration clause is displayed in capital letters.	Conspicuous to users via a click-wrap agreement; Exclude user's right to court proceedings; Valid under Article 39 of the PRC Contract Law.

[907] User-Alibaba Disputes refer to disputes arise between the online platform (Alibaba) and the user (either buyer or seller).

			THE LOSING PARTY UNLESS OTHERWISE DETERMINED IN THE AWARD.		
2. DHgate Registration Agreement http://help.dhgate.com/help/buyer_about_usen.php?catpid=g8	Online trading platform for B2B transactions	B2B	Seller-Buyer Disputes 3.6 In order to help the sellers and the Registered Users solve and settle any transactional disputes effectively and efficiently, DHgate has established the "Handling Procedures for Transactional Dispute". Such procedures can be viewed at: http://help.dhgate.com/help/buyerhelpen.php?catid=3303. Here, the sellers and Registered Users shall agree that when the Registered Users file the transactional disputes with DHgate, the sellers and the Registered Users should comply with the "Handling Procedures for Transactional Dispute", and permit DHgate to make a final binding decision regarding the dispute. User-DHgate Disputes 8.5 Any action or proceeding arising out of or related to this Agreement or your use of this Site must be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of the application for arbitration. The arbitral award shall be final and binding upon both parties.	The internal dispute resolution clause is displayed in plain text. The arbitration clause is displayed in plain text	Inconspicuous to users via a click-wrap agreement; Not exclude user's right to court proceedings; Valid under Article 39 of the PRC Contract Law. Inconspicuous to users via a click-wrap agreement; Exclude user's right to court proceedings; Valid under Article 39 of the PRC Contract Law.

c. Evaluation of available adjudicative ADR clauses in commercial websites in China

Adjudicative ADR clauses in B2C contracts

420. The assessment of B2C arbitration agreements is subject to the substantive consumer protection law. One (KuWo) out of three B2C websites that use arbitration as a dispute resolution method does not employ a conspicuous manner to draw consumers' notice to the arbitration clause. According to the current jurisprudence, a standard-form arbitration clause that is not displayed in a conspicuous manner and has the effect of excluding consumers' right of action can be annulled by consumers. [908] Therefore, the arbitration clause in KuWo User's Agreement can be held invalid in violation of Article 26, paragraph 2 of the PRC Consumer Protection Law for being unfair and unreasonable to consumers. The arbitration clauses of MeiTuan and Shiji Jiayuan websites are presented in a conspicuous manner to draw consumers' notice. Therefore, although they have excluded consumer s' rights to court proceedings, they are more likely to be held valid in accordance with Article 26 paragraph 1 of the PRC Consumer Protection Law.[909]

Adjudicative ADR clauses in B2B contracts

421. As adjudicative ADR clauses have a binding effect on the parties, they are subject to the scrutiny of substantive rules in contract law. With regard to B2B arbitration clauses in standard form contracts, it is generally held in China that parties possess equal bargaining power. Therefore, the arbitration clauses do not have the effect of exempting the drafters from their liabilities, aggravating the non-drafting party's liabilities, or excluding the non-drafting party's major rights and should, therefore, be held valid.[910] However, I am of the opinion that business users of the online trading platform are situated like consumers when they bring disputes against the platform. With the development of the platform economy, the distinction between consumers and businesses becomes obscure as a result of the given parties' engagement in

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[908] *Chen Yongpei v Ningbo Jiangdong Hongcheng Information Technology Co., Ltd.* (2016) Zhe 02 Min Xia Zhong No. 113 (浙 02 民辖终 113 号)； *Wang Yongjun v People's Insurance Company (Group) of China Ltd.* (2016) Yue 04 Min Zhong No. 243 (粤 04 民终 243 号).

[909] Similar jurisprudence has been found in respect of jurisdiction clause: *Li Rui v Zhao Xu, Taobao* (2017) E 0281 Min Chu 1671 (鄂 0281 民初 1671 号); *Cao Xia v Nan Jing Su Ning Yi Gou e-commerce Co., Ltd.* (2015) Yan Shang Xia Zhong Zi No. 00044（盐商辖终字第 00044 号）.

[910] In practice, arbitration clauses in B2B standard contracts are granted legal effect. (Xiamen Intermediate People's Court (2015) Xia Min Ren Zi No. 200 (厦民认字第 200 号) and Beijing No.2 Intermediate People's Court (2015) Er Zhong Min Te Zi No. 05856(二中民特字第 05856 号) .

activities on the platform.[911] The users have no negotiation power but to enter into an agreement with the online trading platform by agreeing to the terms and conditions. Hence, business users should be offered protections similar to those offered to consumers when they are in dispute with the online trading platforms. This means with regard to adjudicative e-ADR clauses in B2B contract, the drafting party (online trading platform) should also follow the conspicuousness requirement in drawing sufficient notice of the business users to those standard form terms.[912]

422. Both Alibaba and DHgate are online trading platforms (marketplaces) that provide sellers and buyers trading venues to conclude B2B transactions. The dispute resolution mechanism used by Alibaba.com and DHgate is composed of two types of dispute resolution clauses depending on the parties of the disputes. A distinction is made with regard to disputes between the third-party online platforms (such as Alibaba and DHgate) and users on the one hand, and disputes between sellers and buyers on the other hand.

(i) Disputes between third-party online platforms and users in B2B contract

423. The arbitration clause in the Alibaba Transaction Service Agreement between the users and Alibaba is displayed in capital letters. One can assume that by using capital letters in the Transaction Service Agreement, it clearly draws the attention of the non-drafting parties to the arbitration clause. As such, the arbitration clause should be held valid under Article 40 of the PRC Contract Law as the notification obligation has already been fulfilled by the online platform.

In contrast, the arbitration clause in the DHgate Registration Agreement between the users and DHgate, however, in which parties are required to submit the dispute to CIETAC for arbitration, is displayed in plain text. A question is then asked whether Article 40 is applicable in the current case to determine the validity of B2B arbitration clause in plain text. According to current jurisprudence, the invalidity condition in Article 40 would not apply to the arbitration clause in B2B contracts as such arbitration clause does not have the effect either to exempt the

[911] The narrow scope of "platform economy" refers to online marketplaces that allow for concluding or facilitating the process of concluding contracts. See Internal Market and Consumer Protection, 'Online Platforms: How to Adapt Regulatory Framework to the Digital Age?' 5, <http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_BRI(2017)607323> accessed 9 October 2017.

[912] This can be proved in *Wang Xiao Ke v Alibaba* (2016) Zhe 0108 Min Chu 2373 where the people's court treats the arbitration clause in Alibaba Transaction Service Agreement is unfair to the online seller because of the unequal bargaining powers between the parties.

drafting party's liabilities, to aggravate the non-drafting party's liabilities or to exclude the non-drafting party's major rights.[913] Therefore, such an arbitration clause shall be held valid.

(ii)Disputes between sellers and buyers in B2B contracts

424. In the Alibaba Transaction Service Agreement, the dispute resolution clause is also displayed in capital letters. In order to resolve disputes more efficiently on the platform, the Agreement designed a tiered dispute resolution clause which requires parties (buyers and sellers on the website) to exhaust the internal complaint mechanism of Alibaba (in the event that disputes cannot be settled between the parties within the prescribed time) before being able to resort to arbitration. If the parties do not subsequently submit their disputes to arbitration, the decision made by Alibaba will be automatically binding.[914] Although it is controversial whether Alibaba can impose on the parties to submit their dispute to arbitration with the Hong Kong International Arbitration Center (HKIAC) via a click-wrap agreement when they are unsatisfied with the decision of internal dispute resolution, such a clause has been displayed in bold letters to the notice of both parties, and therefore shall be held valid under Article 10 of the Judicial Interpretation II on PRC Contract Law.

The dispute resolution clause of DHgate's Registration Agreement, which obliges parties to use the internal dispute resolution, is displayed in plain text. The internal dispute resolution mechanism of DHgate is also designed to efficiently handle disputes between the users of the marketplace. Although it requires parties to use the internal dispute resolution to resolve the dispute, it does not prevent parties from using other external dispute resolution methods. Therefore, the dispute resolution clause in DHgate's Registration Agreement shall also be held valid.

B. Electronic consensual ADR agreement

425. Consensual ADR agreements leave the control of the proceedings and the possible outcomes to the parties instead of a third-party neutral.[915] The third-party neutral only assists parties in

[913] PRC Contract Law, Article 39; *Chen Ming Hua v Jia Xing Yuan Hao Zhi Ye Co.,Ltd*. (2015) Zhe Jia Zhong Que Zi No.3 (浙嘉仲确字第 3 号); *Gui Jianhong v. Guo Tai Jun An Stock Holding Co., Ltd*. (2015) Hu Yi Zhong Min Ren (Zhong Xie) Zi No. 25 (沪一中民认(仲协)字第 25 号): both cases have confirmed that arbitration clause does not exempt or restrict the non-drafting party's liability and therefore the drafting party is not obliged to draw reasonable notice of the non-drafting party to such clauses.

[914] Alibaba's decision is enforceable through its affiliated payment service provider called Alipay.

[915] S. Blake, J. Browne and S. Sime, *A Practical Approach to Alternative Dispute Resolution* (OUP Oxford 2010) 25.

reaching an agreement, rather than rendering decisions. It is generally agreed that a combination of binding and non-binding dispute resolution processes can better serve the parties as there will be the last resort offering binding solutions if parties cannot reach an agreement.[916] The consensual ADR clauses are often used in combination with a jurisdiction clause or an arbitration clause, creating a multi-tiered (or escalation) dispute resolution clause in order to offer a final solution in the event that parties failed to reach an agreement through the consensual ADR.

426. In China, owing to the development of diversified dispute resolution mechanisms[917] and the innovation of the Internet financial sectors,[918] consensual ADR clauses (especially industrial mediation) have been widely adopted to resolve disputes arising from electronic financial products/services contracts (such as the agreement in buying securities futures or stock exchanges). The Internet provides convenience for investors to purchase financial products via websites. In order to facilitate these transactions, the Chinese Securities Regulatory Commission (CSRC) has issued a Securities Transaction Agency Model Agreement that includes a model dispute resolution clause.[919] The model clause is a "multi-tiered ADR clause" that consists of both a consensual ADR clause and an adjudicative dispute resolution clause. This dispute resolution model clause of CSRC has been widely adopted in the terms and conditions of financial institutions. For example, a multi-tiered ADR clause in an investment agreement between Zhuhai Yingmi Fund Management Co., Ltd. and investors stipulates that[920]:

"*Any disputes arising from or relevant to this agreement shall be amicably negotiated between the parties; if no agreement can be reached, the parties agree to submit the*

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[916] Anna Nylund, 'Access to Justice: Is ADR a Help or Hindrance?' in *The Future of Civil Litigation* (Springer International Publishing 2014) 341; Louis F Del Duca, Colin Rule and Kathryn Rimpfel, 'eBays De Facto Low Value High Volume Resolution Process- Lessons and Best Practices for ODR Systems Designers' (2014)6 Arbitration Law Review, 219.

[917] Opinions of the Supreme People's Court on Further Deepening the Reform of Diversified Dispute Resolution Mechanism of the People's Courts (关于人民法院进一步深化多元化纠纷解决机制改革的意见), Fa Fa [2016] No. 14, strengthening connection with commercial mediation and industrial mediation in investment, finance, securities and futures, insurance, real estate, e-commerce, intellectual property rights and international trade.

[918] Newly created Internet financial products always lack explicit regulation and requires highly trained professionals to distinguish, whereas judges are usually unskilled in this field.

[919] Chinese Securities Regulatory Commission Securities, Transaction Agency Model Agreement, 13 January 2014 <http://www.sac.net.cn/flgz/zlgz/201401/t20140116_80225.html> accessed 21 June 2016, （证券交易委托代理协议指引）Article 25: "Any disputes that arise from the execution of this agreement may be negotiated amicably between parties or mediated by Chinese Securities Association Mediation Center. If no negotiation or mediation can be reached, the parties agree to submit the dispute to arbitration / litigation in where the securities company is domiciled (arbitration or litigation can be chosen by the parties)."

[920] See Zhuhai Yingmi Fund Management Co., Ltd. "Yingmi Bao" Fast Withdrawal User's Service Agreement, < https://www.yingmi.cn/customerDetails22.html > assessed 17 June 2016.(珠海盈米宝财富管理有限公司"盈米宝快速取现用户服务协议")

dispute to the Securities Dispute Mediation Center of Chinese Securities Association. If the dispute cannot be mediated, the parties can choose either to submit the dispute to Guangzhou Financial Arbitration Commission for arbitration or to bring a claim in the people's court where the defendant is located. In the absence of such a choice by the investor, the dispute will be handled by the people's court where the defendant is located."

427. The multi-tiered dispute resolution clause provided above in "Yingmi Bao" Fast Withdrawal Service Agreement is composed of consensual ADR clauses (negotiation and mediation) followed by an adjudicative dispute resolution clause (arbitration or litigation chosen by the parties). The consensual ADR clauses here first provide parties with options for negotiation and mediation; if both negotiation and mediation are unable to resolve the dispute, the parties have a final redress for arbitration or litigation. Such a multi-tiered dispute resolution clause is used to increase the efficiency of dispute resolution. The Securities Dispute Mediation Center is a mediation institution established by the Chinese Securities Association that aims to assist parties in reaching a mediated settlement agreement at no extra cost and within a short time.[921] Parties are still able to refer their disputes to arbitration or litigation when no agreement can be reached via mediation. The multi-tiered ADR clause neither deprives parties of their right to bring an action in court nor incur financial burden on the parties.[922] Therefore, such a multi-tiered dispute resolution, which can enhance consumer's redress, shall be held valid. Nevertheless, in my view, the drafter of the agreement should still use a conspicuous manner (such as formatting the clause in bold or in a different color) to make consumers aware of the dispute resolution options that are available to them.

C. Factors that determine the substantive validity of e-ADR agreements in Chinese jurisprudence

428. Current legislation in contract law and consumer protection law provides certain rules for evaluating the substantive validity of e-ADR clause and tries to balance the interests of parties with unequal bargaining powers. Despite that jurisprudence in standard-form jurisdiction clauses offers some rules for assessing the substantive validity of e-ADR agreements, there is a lack of clarity regarding the "conspicuousness" standard with regard to the manner in which a clause is presented and as to the applicability of Article 40 of the PRC Contract Law with

[921] Announcement of the Securities Association on Issuing Three Rules including the Administrative Measures for the Mediation of Securities Disputes, Mediation Dispute Mediation Rules and Administrative Measures for Mediators, Securities Association of China (Industry Regulations, 8 January 2016). The maximum time for a simplified mediation process is 10 working days and for an ordinary mediation process is 20 working days.

[922] Mediation Rules of Chinese Securities Association, Article 19: the mediation is free of charge for both parties.

regard to the major right of the parties, and Article 26 paragraph 2 of the PRC Consumer Protection Law with regard to terms that are unfair and unreasonable to consumers. In the absence of clear rules, various interpretations by people's courts may result in legal uncertainty of e-ADR agreements.[923] The following factors can be used as a guidance to improve the predictability in assessing the substantive validity of e-ADR agreements in China.

a. Bargaining power of the parties

429. In e-ADR agreements, the power imbalance between traders and consumers has been further enlarged because of the manner in which contracts are concluded (click-wrap or browse-wrap) between parties and the way in which information is provided to the parties (via a hyperlink or a pop-up window). In electronic contracts, the non-drafting parties encountered more challenges in identifying the contract terms that may have an impact on their rights and understanding how these contract terms affect their interests, whereas in offline transactions such information asymmetry is less obvious owing to a shorter length of terms and the face-to-face interactions between sellers and buyers.[924] The SAIC Guidelines have granted local AICs[925] with the authority to supervise and correct unfair practices of traders who use standard terms to infringe on consumers' interests.[926] One suggestion is for SAIC to provide a blacklist of standard terms that are forbidden or a whitelist of standard terms that are allowed. For example, an ADR clause that does not prevent parties from using other types of dispute resolution or that unilaterally bind the drafting party (traders) is allowed.

430. In addition, business users of online trading platforms such as Alibaba and GHgate are no different than ordinary consumers when they enter into disputes with online trading platforms.[927] There is also an unequal bargaining power between online platforms and the business users as the business users have no power to alter the terms provided by online trading

[923] For example, whether the e-ADR agreement has breached Article 40 of the PRC Contract Law and Article 26 of the PRC Consumer Protection Law.
[924] See discussions in Section 3.2.1 Electronic consent in standard form contracts.
[925] The Administration for Industry & Commerce is the competent authority in charge of market supervision and related enforcement through administrative means. It is consisted of SAIC at the national level and local AIC at/below provincial level.
[926] SAIC Guidelines on Standard Clauses of Online Trading Platform (n 876) Article 4.
[927] For example, in the proposed EU Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (COM (2018)238 final), business users of the online trading platform are offered a similar protection as consumer users including setting up an internal dispute resolution system.

platforms, which are on a take-it-or-leave-it basis.[928] In *Wang Xiao Ke v Alibaba*[929], a seller on AliExpress (a C2C marketplace) brought a claim against the marketplace (AliExpress) to request a refund of the payment for the merchandise he delivered to the buyer over AliExpress. One of the legal issues of the case was the validity of the arbitration clause in Alibaba Transaction Service Agreement. The people's court applied a fairness test from the PRC Contract Law and held that the arbitration clause, which requires parties to submit the dispute to the HKIAC, violates the fairness principle as the arbitration clause is in favor of Alibaba, who is more advantageously positioned than the seller with regard to the control of information and resources. Such an arbitration clause also restricted the seller's choice of dispute resolution as it would be more difficult and inconvenient for the seller to handle the dispute through the HKIAC. This shows a tendency to treat sellers of the platform as the weaker party vis-a-vis platform operators who have greater bargaining powers. In such environments, the sellers, like the buyers, should also be protected against unfair dispute resolution clauses in terms and conditions of online trading platforms. For example, the SAIC Guidelines provide users (both traders and consumers) with the same protection when the online platform operator uses standard terms to exclude or restrict the users' rights including the rights to bring legal actions, engage in arbitration or use other legal remedies when disputes arise.[930]

431. The current consumer protection law in China provides more protection for standard form clauses in B2C contracts than in B2B contracts. Pre-formulated e-ADR clauses that have not been negotiated between parties, like those included in terms and conditions in online trading platform, are regulated by the standard form contract rules in Article 39 and 40 of the PRC Contract Law. It is proposed that the legislature could provide similar protection for all users of the online trading platform by regulating the standard form clauses of the platform in general.

b. Conspicuousness of e-ADR clauses

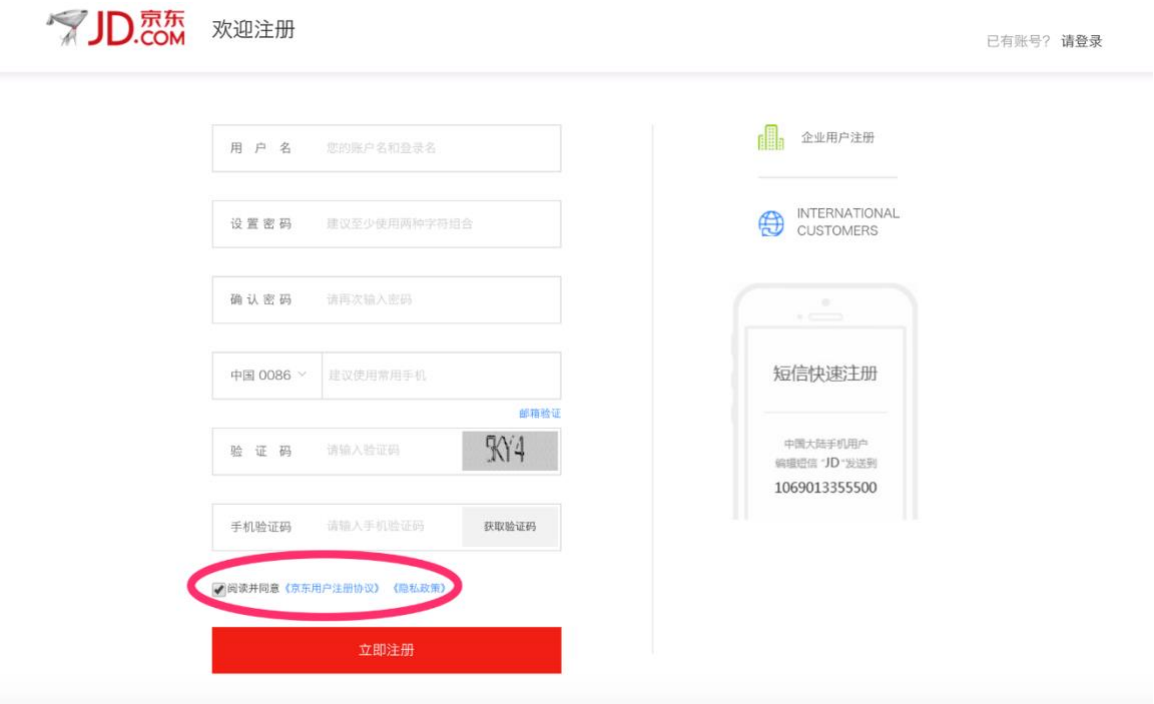
432. It becomes more difficult for the non-drafting parties to identify e-ADR clauses in electronic standard form contracts than in paper contracts as they can be embedded in terms and

[928] The Commission Staff Working Document on 'A Digital Single Market Strategy for Europe-Analysis and Evidence' also shares the view that there might also be an asymmetry in bargaining power between big platforms and SMEs, SWD (2015) 100 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015SC0100 > 55, accessed 9 October 2017.
[929] *Wang Xiao Ke v Alibaba* (2016) Zhe 0108 Min Chu 2373 (浙 0108 民初 2373 号).
[930] SAIC Guidelines on Standard Clauses of Online Trading Platform, (n 876), Article 12(4).

conditions with a substantial amount of information. [931] The conspicuous requirement ensures that the non-drafting parties are able to know the existence of e-ADR clauses. Examples of "inconspicuous manner", provided by *the Interpretative Notes to the PRC Consumer Protection Law (2013 Amendment),* include the traders' use of hyperlinks that are inconveniently accessible to consumers or the traders use technological techniques to hide information that is substantive to consumer's interest. [932] While terms displayed in bold font style or in different sized font are conspicuous in paper form, they are not necessarily conspicuous in terms and conditions since consumers are easily distracted when browsing webpages with information overflow.[933] The conspicuousness of the term is also related to the consent of the parties. Customers should be offered an opportunity to know the content of the terms before they agree with them. The fact that the ADR clause is displayed in bold font style or capital characters in the User's Service Agreement does not necessarily meet the conspicuousness requirement by merely providing a hyperlink during the registration process. It is also important that the ADR clause in terms and conditions is incorporated into the main contract by a specific reference.

433. I will use the jurisdiction clauses that are used by businesses on their website as an example to illustrate the conspicuous manner in which sufficiently draw consumer's attention. In the following screenshot from the registration webpage of JingDong.com, the jurisdiction clause is embedded in the User's Registration Agreement provided with a hyperlink on the registration webpage (which stipulates that "I agree with JingDong Registration Agreement"). The consumers are unable to read the User's Registration Agreement unless they click on the hyperlink and furthermore, they can easily ignore the User's Registration Agreement by a direct click on the registration button.

[931] Hillman & Rachlinski (n 607) 479; see European Commission's 'Study on consumers' attitudes towards Terms and Conditions' (2016), 14 (n 602).
[932] See Interpretative notes to the PRC Consumer Protection Law (2013 Amendment) (n 871).
[933] *Sun Dingding v Jiangsu Su Ning Yi Gou E-commerce Co., Ltd.* (n 894).



An alternative that could better serve the conspicuousness requirement would be a specific reference to ADR clauses in the registration webpage with a hyperlink.[934] For example, the following screenshot on Taobao.com shows how a jurisdiction clause is specifically displayed on the registration webpage in order to draw a conspicuous notice to consumers. Therefore, a specific reference to the e-ADR clause that is incorporated in the main contract serves a better role in improving the conspicuousness.

934 Kaufmann-Kohler and Schultz (n 14) 144-145.

434. As a conclusion, businesses should harness various electronic forms (scroll-down menu, hyperlink, pop-up window or a tick box)[935] to ensure that the non-drafting parties receive sufficient notices as regards the essential dispute resolution clauses.

c. Binding effect of e-ADR agreements

435. Based on the study of case law and legislation,[936] adjudicative ADR clauses with binding effects (such as arbitration clauses) are more likely to be restricted by law than consensual ADR clauses as they may exclude the non-drafting parties from choosing other types of dispute resolution. It is confirmed in Chinese case law that B2C arbitration clauses that are presented in an inconspicuous manner to consumers can be held invalid by Article 26 of the PRC Consumer Protection Law. In order to increase the legal certainty of ADR clauses, the drafting party should either provide consensual ADR clauses in standard-form contracts or adjudicative ADR clauses on the conditions that both parties have the freedom to decide the dispute resolution method. An example of such a clause is the multi-tiered ADR clause that offers the party consensual ADR first and then an option to choose between arbitration and litigation.[937]

d. Cost of e-ADR

436. If the cost of e-ADR is unreasonably higher than the cost of litigation, the ADR clause in a standard form contract may also be challenged as the weaker party has been imposed with a heavy financial burden. In China, arbitration institutions charge a higher case handling fee than courts.[938] Although the PRC Arbitration Law is also applicable to consumer disputes, arbitration is more often used to resolve commercial disputes, which are often in higher value than other types of civil disputes.[939] Some arbitration institutions in China have introduced small-claim procedures with cheaper service (such as online arbitration procedures of the Guangzhou Arbitration Commission for online shopping disputes). Nevertheless, the handling

[935] Liu Kaixiang and Liu Chen, 'Validity standard and significance of Internet Third-party Platform Service Agreement' (2017) 3 China Legal Studies of Application 146-147. （刘凯湘、刘晨：互联网第三方平台服务协议效力的判断原则及其意义）

[936] See *Ningbo Jiangdong Hongcheng Information Technology Co., Ltd. v Chen Yongpei*, (n 896). SAIC Guidelines on Standard Clauses of Online Trading Platform, Article 12(4).

[937] See Securities Transaction Agency Model Agreement offered by Chinese Securities Regulatory Commission in Section 3.2.4.3.B. .

[938] For a claim with value of 10,000 RMB (approximately 1,428 EUR), the arbitration handling fee of CIETAC is 6,550 RMB (approximately 935 EUR) while the litigation handling fee is 50 RMB (approximately 7 EUR).

[939] The establishment of arbitration commissions was originally intended for resolving foreign-related commercial disputes which was later extended to domestic civil and commercial disputes. See Wei Sun and Melanie Willems, *Arbitration in China: A Practitioner's Guide* (Kluwer Law International 2015) 1-3; Wei Jiang and Yanbing Chang, 'The Construction of the System on the Consumer Arbitration' (2007)11 He Bei Fa Xue, 15. (江伟、常延彬：论消费者纠纷专门仲裁解决机制的构建)

fee for online arbitration is still considerably higher than litigation.[940]

3.2.4.4. Chinese regulation of e-ADR agreements

437. In China, the substantive validity of e-ADR agreements is regulated by standard form contract rules in PRC Contract Law for B2B contracts and the PRC Consumer Protection Law for B2C contracts. As the scope of "consumer" in China covers only purchases by individuals for private uses, the relationship between business users of the online trading platform and the platform operators will be regulated by PRC Contract Law. Legislation and case law reveal that standard ADR clauses are more strictly regulated in B2C contracts than in B2B contracts as the application scope of the conspicuousness requirement and the invalidity conditions of standard form terms in B2C contracts is wider than that of B2B contracts.[941]

438. Nevertheless, China does not provide a clear rule on the "conspicuousness" requirement in both Article 39(1) of the PRC Contract Law and Article 26(1) of the PRC Consumer Protection Law. Moreover, it is not clear as regards the criteria in deciding whether terms are unfair and unreasonable to consumers such that they can be challenged under Article 26(2) of the PRC Consumer Protection Law. Unlike the EU Unfair Terms in Consumer Contracts Directive, which provides an indicative list of terms that may be unfair, Chinese legislation provides neither a common standard for courts to assess the invalidity of standard-term clauses nor any indicative list of invalid clauses for courts to refer to.[942]

439. There are three suggestions that China can do to improve the certainty in assessing the validity of e-ADR agreements. First, a judicial interpretation could be issued to unify the case law with regard to the application scope of Article 26 of the PRC Consumer Protection Law and Article 31 of the *Judicial Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the PRC* in assessing the substantive validity of e-ADR agreements. Second, what China can learn from the EU legislation is to incorporate a black list of standard form clauses that shall be held void in violation of Article 26 paragraph 2 of PRC Consumer Protection Law. For example, Article 15 of the draft of Implementation Measures of the PRC

[940] Guangzhou Arbitration Commission provides online dispute resolution for small-claim online disputes (no more than 10,000 RMB, approximately 1,428 EUR) with a handling fee of 100 RMB (approximately 14 EUR) per case.

[941] See Section 3.2.4.2 Substantive validity examined by consumer protection law.

[942] Fan Xuefei, 'Discussion on the Unfair Terms Clauses Mechanism: the unconscionability principle', (2014) 6 Fa Lü Ke Xue, 110. （论不公平条款制度——兼论我国显示公平制度之于格式条款）

Consumer Protection Law provides a list of unfair and unreasonable terms, including "terms that exclude or limit consumers' rights to make complaints, report, choose litigation or arbitration" is provided.[943] Third, it is suggested that the trade association or the government should make model dispute resolution clause for the online trading platform to draft their terms and conditions as such: "in case that disputes arise between parties, the parties can choose to submit their disputes to ... (any type of dispute resolution clause proposed by the trader), without limiting the consumer's right to bring the dispute to the people's court of his/her domicile." This dispute resolution model clause takes into consideration of the flexibility of ADRs while ensuring protective jurisdiction rules in consumer disputes.

3.2.5. Sub-conclusion

3.2.5.1. Comparison between English law and Chinese law on the limitation of consent in e-ADR agreements

440. According to Professor Thomas Wilhelmsson, there are four models for approaching the issue of unfair terms in contracts:[944] (i) "no particular problem model", which supports contractual freedom and does not interfere with unfair contract terms except for particular reasons, such as the legislation in England;[945] (ii) "standard form contract model," which believes in the specific regulation on the control of standard terms in contracts based on the recognition of partial market failure, such as the legislation in Germany and China;[946] (iii) "Consumer protection model," which focuses on the imbalance between the parties in B2C contracts, such as the EU legislation on unfair terms in B2C contracts[947]; and (iv) "general fairness model" which applies the principle of fairness to the whole realm of contract law, rather than limiting it to consumer relations or standard form contracting, such as the legislation in Norway.[948]

441. These four approaches can be applied in combination depending on the legal culture and policy priorities of various nations. The EU legislation adopts the "consumer protection model" to ensure that consumers are granted fair and efficient ADR, leaving the member states the

[943] See (n 874).
[944] Wilhelmsson (n 751) 53-54.
[945] The Common Law jurisdictions such as England use a piecemeal approach in solving problems of unfair terms.
[946] For example, German Civil Code, Section 305 (2); Dutch Civil Code, Book 6: Article 233 and 234; PRC Contract Law, Article 39 and 40.
[947] For example, the EU Unfair Terms Directive in Consumer Contracts.; French Consumer Code (Code de la consummation), Article L 132.1-L 132.5.
[948] For example, Article 36 of the Nordic Contract Act has adopted the "general fairness model" that a contract term may be adjusted or set aside if the application of the term would lead to unfair results.

freedom to adopt different approaches in regulating unfair terms in B2B contracts. English law is reluctant to interfere in the free will of the parties and therefore uses the "no particular problem model." Despite being a Common Law jurisdiction, English law has also followed the EU legislative instruments in consumer protection, which carry some Civil Law features in the regulation of unfair terms in consumer contracts. Therefore, English law applies a combination of "no particular problem model" and "consumer protection model." The Chinese contract laws have been influenced by European civil laws, especially German law.[949] As a result, the standard form contract theory has been adopted in the PRC Contract Law.[950] Chinese law adopts both a standard form contract model and consumer protection model to limit the formal consent in e-ADR agreement. English law and Chinese law are therefore used for a comparative study to analyze the limitation of formal consent in e-ADR agreements in different jurisdictions.

A. Different approaches in English law and Chinese law to balance party autonomy and public policy in B2B ADR agreements

442. In England, party autonomy is closely linked to an objective interpretation of contracts that requires courts to strictly follow the terms agreed by the parties. Fairness control, on the other hand, is exerted by statutory rules such as the UTCCR and the CRA for regulating exemption clauses and consumer contracts, respectively. The validity of electronic B2B ADR agreements is regulated by Common Law rules (i.e. contractual incorporation and unconscionability principle) instead. However, in online trading platforms, business users are also in unequal bargaining positions vis-à-vis online trading platforms. The application of Common Law rules and the respect for contract freedom reduces the ability for courts to intervene on the substantive validity of B2B ADR agreements.

443. In Chinese law, standard contract theory is applied to limit the contract freedom of the drafting parties in order to protect the interests of weaker parties. The standard form contract rule can be used to assess the validity of B2B ADR agreements that are pre-formulated by one party. However, the people's court limits the application scope of invalidity to standard form ADR clauses,[951] therefore it is rare that B2B ADR agreements are invalidated under this rule.

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[949] Liang Huixing, 'The Reception of Foreign Civil Law in China' (中国对外国民法的继受), (2003)1 Shandong University Law Review 7-8; Xiangmin Xu et al., 'The Similarities between Civil Law Family and Chinese Legal Family' (大陆法系与中华法系的相近性), (2005) 5 Journal of Ocean University of China 48.

[950] Fan Xuefei, (n 942) 110.

[951] The right to choose dispute resolution is not regarded as the "substantive contractual rights" that is inherent from the nature of contracts but rather as a procedural right and therefore Article 40 is inapplicable to invalidate ADR clauses in standard contracts. See (n 862).

B. Clear standards in English consumer protection law by ascertaining the validity of B2C ADR agreements

444. Both the English law and Chinese law have taken measures in consumer protection to more restrictively assess the validity of e-ADR B2C agreements. The English law has followed the path of EU law, approaching the validity of e-ADR B2C agreements from the perspective of unfair terms control. The PRC Consumer Protection Law, on the other hand, has strengthened conspicuous requirements and extended the application scope of invalidity conditions of standard form clauses in consumer contracts, to cover all kinds of unfair or unreasonable terms that are unfavorable to consumers. Compared to the PRC Consumer Protection Law, the EU law in consumer protection prescribes more clarified rules on the binding effect of pre-dispute ADR agreements that have deprived consumers of their right to court.

445. English law has been influenced by the UCTA with regard to the control of unfair terms in standard form contracts and EU law in the area of consumer protection (Unfair Terms in Consumer Contracts Directive), adding statutory rules to assess unfair terms in standard form consumer contracts. In England, the CRA has unified regulation on standard form contract terms in consumer contracts by taking out the relevant parts in UCTA and the UTCCR.[952] Although the inequality of power imbalance does not itself constitute a Common Law ground to invalidate an unfair term, it has become one of the conditions for assessing the validity of unfair standard terms in consumer contracts. The case law of the CJEU has also contributed to the interpretation of the EU Unfair Terms in Consumer Contracts Directive in England. For example, the court is obligated to consider on its own the fairness of a contract term in a consumer contract regardless of whether parties have raised this issue or not. The English court is required to assess, on its own motion, whether an unfair e-ADR agreement, which has not been individually negotiated, is contrary to the requirement of good faith and causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

446. The PRC Consumer Protection Law provides consumer protection through the substantive standard form contract rule (Article 26) and dispute resolution rights that grant consumers a variety of dispute resolution methods including negotiation, mediation, complaint to the administrative authority, litigation, or arbitration (Article 39). However, the current legislation

[952] Christian Twigg-Flesner, 'Standard Terms in Consumer Contracts: The Challenges of Law Reform in English Law' in Larry A DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press 2016) 431-434.

does not provide a yardstick with which the people's courts can measure whether an ADR agreement is in compliance with the validity requirements. It could be argued that adjudicative ADR agreements that prevent consumers from resorting to courts shall be held void because they have breached the PRC Consumer Protection Law by limiting consumers' major rights.[953] However, it is still possible that people's courts employ different criteria to assess the validity of B2C ADR agreements due to diverse interpretations of "conspicuousness" as already explained in cases with regard to the jurisdiction clauses.[954] Although the Judicial Interpretations on the Civil Procedure Law clarified under what conditions exclusive jurisdiction clauses can be annulled by consumers, no rules have been specifically mentioned to regulate ADR agreements that have the effect of excluding a consumer's right to choose the appropriate court. In fact, the PRC Consumer Protection Law can borrow the idea of the grey and black list of unfair terms that has been used in the EU member states in Consumer Contracts. This provides clear instructions to the people's courts for adjudicating the validity of B2C ADR agreements and would warn traders against unfair practices. The draft of the Implementation Measures of the PRC Consumer Protection Law has already made a black list of standard form terms that traders are banned from using in drafting contracts, including terms "excluding or limiting consumer's right to file a complaint, to report, or to choose litigation or arbitration."[955]

3.2.5.2. Common denominators in regulating substantive validity of e-ADR agreements

447. The study of the current legislative framework of the EU, England and China reveal that mandatory rules have been used to ensure that certain mandatory ADR agreements, which have the effect of depriving weaker parties' right to resort to court, are regulated with limited effects. There are at least two reasons to have common denominators for determining the substantive validity of e-ADR agreements. First, to increase the efficiency of transactions and lower the transaction cost, many ADR clauses in electronic standard form contracts are not individually negotiated and pre-formulated by traders.[956] Therefore, there are concerns regarding the substantive validity of e-ADR agreements, especially with regard to whether real consent has been given by the non-drafting party. Second, e-ADR agreements are prevalent in cross-border

[953] PRC Consumer Protection Law, Article 26 paragraph 2 and 3.
[954] See Section 3.2.4.3.A. Electronic adjudicative ADR .
[955] The draft of the Implementation Measures of the PRC Consumer Protection Law, 16 November 2016. < http://www.chinalaw.gov.cn/article/cazjgg/201611/20161100482105.shtml>.
[956] Hasen (n 609) 426; Blake D Morant, 'Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses, The' (2003)7 J Small & Emerging Bus L 233, 262.

transactions where traders and customers are located in different countries with various substantive rules. The common denominators of substantive requirements, extracted from the practices in the EU and China, can be used to evaluate the substantive validity of e-ADR agreements in a cross-border context and bring more certainty to the effectiveness of ADR mechanisms.

A. Conspicuous presentation of terms prior to or at the time of contract conclusion

448. The first fundamental element of a binding standard form electronic contract is whether the terms are displayed in a conspicuous manner so that the non-drafting parties are reasonably notified before or at the time of the contract conclusion.[957] Before entering into a contract, the users shall be given a meaningful opportunity to read the terms and the terms should be drafted in a comprehensible manner. For example, for legal terms such as "arbitration," "mediation" and "conciliation", specific explanations should be provided on the process and legal consequences of these dispute resolution methods. It is necessary that a reasonable person without the background of legal education is also able to understand the terms without any difficulties.

449. The requirement that the terms should be displayed conspicuously is set forth both by the incorporation rules in Common Law jurisdiction and standard form contract rules in Civil Law jurisdiction.[958] Such a requirement ensures that parties are protected against terms that are pre-formulated by the drafting party without being individually negotiated by the non-drafting party. Both EU legislation and Chinese law have prescribed certain requirements for the drafting parties to bring sufficient notice of the non-drafting parties to the standard form terms. In the ECD (E-commerce Directive), contract terms and general conditions provided to the recipient must be available in a way that allows the recipient to store and reproduce them.[959] However, there are no sanctions available in case that the drafting party fails to fulfill the information obligation in the ECD whereas remedies are provided in the Unfair Terms in Consumer Contracts Directive. If a business fails to provide consumers with terms in plain and intelligible language, the terms will be interpreted more favorably to consumers.[960] In the PRC

[957] See Incorporation rules of English law and Article 39 of the PRC Consumer Protection Law. Faye Fangfei Wang, 'The incorporation of terms into commercial contracts: a reassessment in the digital age' (2015)2 Journal of business law 87, 90.
[958] See Section 3.2.3 & 3.2.4.
[959] ECD, Article 10, paragraph 3.
[960] Directive 97/7/EC on the Protection of Consumers in respect of Distance Contracts, No L 144/19 has been repealed and incorporated into the Consumer Rights Directive., Article 5.

Contract Law and PRC Consumer Protection Law,[961] the drafting parties are required to make an effort to present standard terms that are crucial to the non-drafting parties in a conspicuous manner. In the absence of such efforts, these standard terms are not incorporated into the contract. In case laws, there are different methods that traders can use to bring reasonable notice to the non-drafting parties to the terms of their contracts: for example, by displaying the terms in large font-size, bold font-style, prominent colors, or with underscores. However, depending on the unusual or onerous nature of the content, some terms demand higher conspicuousness requirements than these methods. In the Chinese case *Sun Dingding v. Jiangsu Su Ning Yi Gou E-commerce Co., Ltd.*,[962] the people's court held that "the fact that the exclusive jurisdiction clause is displayed in black font-style does not necessarily prove it is conspicuous since other terms are also displayed in black font-style." The more unreasonable and surprising the terms are to the non-drafting parties, the higher the conspicuousness standard is required for those terms as they have a great impact on the interests of the non-drafting parties.[963]

B. Clear and unambiguous consent of the parties in an affirmative manner

450. In Section 3.2.1, I have discussed electronic consent in click-wrap agreements and browse-wrap agreements. Compared with the consent in traditional contract formation, consent in electronic contracts is rather easy as it can be demonstrated by a click on the designated icon "agree" in click-wrap agreements or by a certain action such as the continuous use of the website in browse-wrap agreements. However, depending on the manner in which consents are obtained, the substantive validity of electronic contracts may vary. Traders should use clear signs, symbols or different font styles to ensure that the other party knows and understands the circumstances under which they have given their consent to the drafting party and the legal consequences of entering into a contract. For example, the stipulation of "by clicking on the 'order now button' on our website, you agree to be bound by the terms and conditions of the website" may be seen as a sufficient manner to show consent to the terms and conditions,[964] while a mere "buy now", "register" or "download" button cannot bind users to the terms available on the websites[965] because the website did not make it clear that such an action would

[961] PRC contract Law, Article 39, paragraph 1; PRC Consumer Protection Law, Article 26, paragraph 1.
[962] *Sun Dingding v Jiangsu Su Ning Yi Gou E-commerce Co., Ltd* (n 656).
[963] The "red hand rule" in *Spurling v Bradshaw*, see (n 783).
[964] *Nicosia v Amazon.com, Inc.*, No. 1:2014cv04513, Document 79, United States District Court for the Eastern District of New York 2015.
[965] *Specht v. Netscape Communications Corp.*, 306 F. 3d 17(2nd Cir. 2002); *Savetsky v. Pre-Paid Legal Services, Inc.*, 2015 WL 604767 (N.D. Cal. Feb 12, 2015).

be interpreted as signifying assent. The CJEU decision in *Jaouad v. CarsOnTheWeb*[966] confirms that by clicking the "agree" box on the seller's website, the purchaser expressly accepted the jurisdiction clause in the general terms and conditions via a click-wrap agreement.

451. Conducts and actions could constitute implied consent to the use of a website under its terms and conditions if sufficient notice was drawn to such terms and conditions.[967] Nevertheless, since the browse-wrap ADR clauses are not directly presented to users but rather are embedded in the terms and conditions at the bottom of the webpage, the non-drafting parties, especially consumers, are not expected to read the terms and conditions and understand the legal implication of their conducts. Therefore, the consent in browse-wrap agreements is less clear and conspicuous than the consent in the click-wrap ADR agreements.

C. Fairness of e-ADR agreements in substance

452. One last fundamental element of the substantive validity of e-ADR agreements is the determination of fairness by national courts in accordance with substantive rules. In the EU, although there is no harmonization in regulating unfair terms in general contract law (both B2B and B2C contracts),[968] there exists a legal regime for regulating unfair terms in consumer contracts. Pre-dispute B2C ADR agreements that have the effect of depriving the consumer of his right to bring an action before the courts are not binding on consumers.[969] In China, standard form clauses are void if they have been used to exempt liabilities of the drafting parties, or to exclude the non-drafting parties' major rights, or are unreasonable and unfair to consumers.[970] Factors to be considered when assessing the fairness of e-ADR agreements include whether e-ADR agreements can be individually negotiated between parties and whether e-ADR agreements have deprived weaker parties of their right to other legal remedies.

a. Whether e-ADR agreements are individually negotiated?

453. Most of the e-ADR agreements that are provided to buyers on third-party online trading platforms are contractual terms that were pre-formulated by the platforms and not individually negotiated as it is too costly and inefficient to negotiate over these terms with each buyer. They

966 See *Jaouad v CarsOnTheWeb* (n 649).
967 *Ryanair v Billigfluege de GmbH* (n 621).
968 The EU has proposed a draft regulation on a Common European Sales Law (CESL) but it was abandoned in late 2014. There are draft provisions on unfair terms in CESL, see Unfair Contract Terms Provisions in CESL (2012) PE 462.448.
969 Directive on Consumer ADR, Article 10(1).
970 PRC Contract Law, Article 40; PRC Consumer Protection Law, Article 26, paragraph 2 and 3.

are provided on a take-it-or-leave-it basis and shall be subject to the public policy of substantive national laws.

454. Both the Chinese contract law on standard form clauses[971] and the EU Unfair Terms in Consumer Contracts Directive[972] have limited their scope of application to contractual terms that have not been individually negotiated. An e-ADR agreement that can be individually negotiated between parties with equal bargaining powers shall be held valid on the basis of party autonomy. For example, the agreements are individually negotiated if the non-drafting party has the right to choose a dispute resolution method or is able to alter such terms.

b. Whether the e-ADR agreements have deprived weaker parties of their right to choose other legal remedies?

455. Another validity requirement of e-ADR agreements requires that ADR agreements do not limit the weaker party's right to choose other legal remedies especially the right to bring an action in court. Both EU law and Chinese law have set forth rules to regulate ADR agreements that may deprive the weaker party's right to choose other types of dispute resolution. In the EU, the ADR agreements are regulated by the EU Unfair Terms in Consumer Contracts Directive and the EU Directive on Consumer ADR. The EU Unfair Terms in Consumer Contracts Directive has stipulated a fairness standard for B2C contracts in Article 3 that have not been individually negotiated:

> *"A term in B2C contracts is unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing."*

The indicative list in Annex 1(q) suggests terms that exclude or hinder the consumer's right to take legal action or exercise any other legal remedy may be unfair in accordance with Article 3 of the Unfair Terms in Consumer Contracts Directive. It is up to the national court to decide whether such terms are unfair under the Unfair Terms in Consumer Contracts Directive.[973]

Article 10 of the EU Directive on Consumer ADR has further confirmed the legal effect of Annex 1 (q) of the EU Unfair Terms in Consumer Contracts Directive by stating that pre-dispute B2C ADR agreements that lead to a binding decision and which prevent consumers

[971] PRC Contract Law, Article 39, paragraph 2.
[972] EU Unfair Terms Directive in Consumer Contracts, Article 3, paragraph 1.
[973] *Océano Grupo Editorial SA v. Rocío Murciano Quintero* (n 684).

from bringing their claim to the court shall not be binding on consumers. In China, Article 15 of the draft on the Implementation Measures of the PRC Consumer Protection Law[974] also forbids traders to use standard form clauses to exclude or limit consumer's right to other legal remedies including litigation, arbitration, and complaint to an administrative authority.

456. E-ADR agreements are often pre-formulated by the drafters and have a mandatory nature which forces parties to participate in the designated ADR process before they can bring the dispute in court. The mandatory nature of the ADR agreements is a double-edged sword. On the one hand, it can increase the use of ADR and enhance public awareness of ADR.[975] On the other hand, it may deprive the non-drafting parties of their rights to other legal remedies, especially with regard to the right to the court. In order to determine the validity of these types of ADR agreements, factors that can be considered include: whether the ADR incurs a substantial delay and a high cost for the parties to bring the dispute to court; parties' full control of the proceedings; binding nature of decisions; and whether time of statutes are suspended.[976] For the efficiency and effectiveness of e-ADR agreements, mandatory ADR agreements shall be allowed on the condition that there is no binding result, the weaker parties have the option to choose other legal remedies, and that the ADR process is cost effective and would not delay court proceedings.

3.3. Preliminary Conclusion

457. For e-commerce transaction disputes that are typically small in value and large in volume, out-of-court dispute resolution is an effective measure to lower the cost and improve the efficiency of transactions. There is a tension between the need to regulate ADR by ensuring minimum quality standards and the necessity to allow ADR to grow by preserving its flexibility and creativity. On the one hand, there is a lack of trust in the privatization of dispute resolution because it may weaken the function of public justice to preserve social order and certainty, leaving ADR outside the realm of public law.[977] On the other hand, the flexibility and creativity of ADR save parties time and cost when settling disputes.[978] It is therefore important

[974] Draft on the Implementation Measures of the PRC Consumer Protection Law (n 874).
[975] Andrea Fejős and Chris Willett, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' (2016)24 European Review of Private Law 33, 48.
[976] See *Alassini v Italia* (n 729); *Menini & Rampanelli v Banco Popolare* (n 733).
[977] Harry T Edwards, 'Alternative dispute resolution: Panacea or anathema?' (1986)99 Harvard Law Review 668, 679.
[978] Kathleen Bryan and Mara Weinstein, 'The Case Against Misdirected Regulation of ADR' (2012)19 Dispute Resolution Magazine 8; Jonh Uff, 'Dispute resolution in the 21 st Century: Barriers or Bridges?' (2001)67 Arbitration.

to designate a regulatory regime for ADR agreements to provide protection for weaker parties while allowing different ADR mechanisms to flourish. The legislation should set a clear rule so that parties are able to predict the validity of e-ADR agreements and make the most use of the ADR. In order to facilitate the use of ADR in cross-border disputes, some guiding principles should be established for the courts to assess the validity of e-ADR agreements.

458. In Chapter 3, I discussed both the formal validity and substantive validity of e-ADR agreements in the EU and China. The formal validity requirements serve the objectives to establish the connection between ADR agreements in the offline world to e-ADR agreements via the legislation in ADR agreements and electronic communications, whilst the substantive validity requirements ensure the fairness of ADR agreements through the application of contract rules, unfair terms and standard contract rules. There are two main barriers to cross-border recognition of e-ADR agreements due to the electronic forms and substantive matters of e-ADR agreements. The first barrier relates to the disparate legislation on electronic communications, resulting in different admissibility of e-ADR agreements. The second barrier is the difference in the application of public policy to ensure that weaker parties' interests are protected in e-ADR agreements.

459. In Section 3.1.1, it is observed that the formal requirements of ADR agreements in paper form are equally applied to e-ADR agreements. While the Civil Law jurisdictions use legislation to embrace ADR agreements in electronic forms, the Common Law jurisdictions admit e-ADR agreements through a functional approach without special legislation. In both the EU and China, legal regimes of electronic communications (e-commerce law and/or electronic signature law) have been established to provide legal equivalence to the formal validity of e-ADR agreements in paper form and electronic form. In Section 3.1.2, the principles of technological neutrality and functional equivalence are used to fill the gap between the requirement in paper contracts and the requirement in electronic contracts.

460. Moreover, different electronic authentication means are used to prove the authenticity of electronic documents because the electronic documents are more easily duplicated and altered than paper forms. Electronic signature is one of the commonly used authentication means to prove the authenticity of electronic contracts. Due to the uneven development in information technology, different legislative approaches[979] are used to regulate electronic signature: some countries give preference to a specific type of electronic signature (digital signature) while

[979] See Section 3.1.2.1 D d: minimalist approach, prescriptive approach and two-tiered approach.

others grant all types of electronic signatures similar legal effects. The first barrier to cross-border recognition of e-ADR agreements arises from the divergent legislation on electronic communications where some formal requirements (e.g. qualified electronic signature with accreditation standard in the ECD) are stricter than others (e.g. reliable electronic signature standard in the PESL).[980] Electronic signatures that are recognized in one country may not be recognized with the same effect in other countries.[981] This may generate uncertainty as to the legal effect of e-ADR agreements that are concluded in a cross-border context. Therefore, a harmonized legal framework of electronic communication and authentication method is needed. For example, in electronic signatures, an international trust list of certification-service-providers can facilitate the cross-border recognition of foreign certified electronic signatures.[982]

461. In Section 3.2, a study was conducted on the substantive validity requirement of e-ADR agreements, focusing on the conflict between party autonomy of ADR agreement and the protection of public interest in e-ADR agreements. The second barrier to the cross-border recognition of e-ADR agreements lies in the different criteria adopted in substantive law to limit the formal consent[983] of ADR agreements. In regard to the substantive validity, both EU and China have consumer protection rules on substantive validity of e-ADR agreements but with different approaches. The EU law has explicitly excluded pre-dispute ADR agreements that have the effect of depriving consumers of their access to justice from having a binding effect on consumers.[984] In China, the consumer protection law does not explicitly exclude ADR clauses that have the effect of depriving consumer's legal rights in courts, but precludes in general standard form clauses in consumer contracts that are unfair or unreasonable in nature.[985] Therefore, pre-dispute arbitration agreement presented in a conspicuous manner to

[980] In Germany No.156, *Seller v Buyer*, Oberlandesgericht, Koblenz, Case No. 2 Sch 12/10, 31 January 2012, the enforcement application of a foreign arbitral award in Ukraine was denied by the German court in the absence of a valid arbitration agreement. The claimant argues that the arbitration agreement was sent from the defendant's email address. The German court denied such claim: "in the absence of a qualified electronic signature, there is no proof that the defendant's signature had not been forged."

[981] For example, the countries that adopt prescriptive approach in electronic signature legislation may deny electronic signatures that originate from the jurisdictions that adopt a minimalist approach. Promoting Confidence in E-commerce: Legal Issues on International Use of Electronic Authentication and Signature Methods (n 443), 67-69.

[982] Such initiative has been established in the eIDAS Regulation of EU where each member state is required to provide a trusted list of the trust service providers and notify the Commission and make it available to the public.

[983] See definition (n 598).

[984] EU Directive on Consumer ADR, Article 10(1); Unfair Terms Directive in Consumer Contracts, Article 3(3).

[985] PRC Consumer Protection Law, Article 26, paragraph 2.

consumers may be recognized in China but rejected in EU member states.

462. To overcome the two barriers in the formal and substantive validity of e-ADR agreements, I have made some proposals for the criteria to be used in assessing the validity of e-ADR agreements in cross-border contexts that take into account different legislation and jurisprudence of selected jurisdictions.[986] In evaluating whether the electronic authentication method is able to prove the formal validity of –e-ADR agreements, the courts should consider whether the selected electronic authentication method is able to identify the parties, ensure the integrity of the content of the contract and record the time of contract conclusion. In evaluating the substantive validity of e-ADR agreements, the courts should consider whether the terms are presented in a conspicuous manner to draw sufficient notice of the other party before or at the time of contract conclusion, whether clear and unambiguous consents of the parties are communicated in an affirmative manner and whether the terms are fair. These proposals provide guidelines for national courts to apply when assessing the validity of e-ADR agreements, which may enhance the use of e-ADR agreements in cross-border electronic transactions.

[986] See Section 3.1.2.5 C and Section 3.2.5.2.

Chapter 4. ODR Procedural Standards

463. After a valid e-ADR agreement has been concluded, parties will resolve disputes through ODR proceedings. As explained in Section 2.3, it is by nature more convenient and efficient to use ODR for disputes arising out of electronic transactions. Nevertheless, there are also challenges to the procedural fairness of ODR in comparison with traditional offline ADR procedures as the ODR is conducted in the virtual world and uses electronic communications during the procedures. First, there may be a lack of effective communication in ODR which may result in mistrust between parties as these parties do not meet each other face-to-face. Second, it generates concerns regarding party equality as these parties may not be equipped with similar technological skills and access. Third, there are security concerns as regards the confidentiality of the procedures. Last, some procedures such as hearings and cross-examinations may not be held in ODR for efficiency reasons. This Chapter seeks to determine what the minimum procedural requirements of ODR should be and whether they are respected in currently existing ODR procedure rules.

464. However, I want to point out from the outset that it is difficult to establish a common set of minimal procedural requirements and a set of internationally accepted ODR rules for three main reasons. First, there are different types of ODR, some based on adjudication and others are based on settlements. Depending on their different nature, different procedural guarantees are required. Second, the ODR rules may vary depending on the type of parties involved and their respective bargaining positions. For example, the procedural rules in B2C disputes need to take into consideration the unequal positions between businesses and consumers[987] and the protection of the interests of weaker parties. Third, given the international nature of this topic, one should take into account how the procedural rules of each country differ distinctively from one another. This may result in the fact that ODR rules that are valid in one country may not be in conformity with the mandatory rules of another.[988]

[987] Businesses are repeat players who have more experiences in resolving disputes. See Orna Rabinovich-Einy, 'Going public-diminishing privacy in dispute resolution in the internet age' (2002)7 Virginia Journal of Law and Technology, 33.

[988] One example is the two-track proposal of the UNCITRAL Working Group III on ODR procedures (negotiation, facilitated settlement, arbitration/recommendation) to include a binding arbitration process for ODR in jurisdictions such as the U.S. which allow pre-dispute B2C arbitration agreement and a non-binding recommendation process for ODR in jurisdictions such as the E.U. which forbid pre-dispute B2C arbitration agreement. See Report of Working Group III on the work of its twenty-seventh session, 20-24 May 2013, A/CN.9/769, paragraph 31.

465. Nevertheless, I am convinced that a set of minimum procedural requirements are needed as a benchmark for evaluating the legality of ODR decisions in the global context. Such quality control can further promote the development of ODR. The Technical Notes on Online Dispute Resolution (Technical Notes on ODR)[989] issued by the UNCITRAL Working Group III is perceived as a starting point for establishing a worldwide framework for ODR procedural standards. Lodder and Zelznikow correctly point out that private dispute resolution does not entail all the procedural safeguards of litigation, but in exchange offers a faster and cheaper dispute resolution.[990] The question is to what level the lowering of procedural fairness can be justified by a cheaper and faster dispute resolution?

466. In order to establish a minimum framework, I will conduct the following studies. In Section 4.1, a study of currently available procedural rules for civil procedure and (the less available) ADR legislation will be conducted. This will provide guidance as to what is considered a minimum standard of due process and could also be used as a benchmark for the ODR procedure rules. In Section 4.2, I will compare the existing ODR rules in light of the minimum framework defined in Section 4.1. This will show us which requirements are not met by current ODR rules and to what extent this would affect the procedural fairness of ODR. I will examine whether a deviation from the minimum procedural standards is justified in the specific ODR context. Section 4.3 will draw conclusions from the studies above to see how to balance the procedural fairness while maintaining the flexibility and efficiency in ODR.

4.1. Sources of ODR procedural justice

467. The goal of any type of dispute resolution is to achieve justice between the parties.[991] The fairness of the outcome of dispute resolution is closely connected to procedural justice. Legal institutions develop procedural rules to provide the necessary information and evidence, and to facilitate a sound and impartial judgement applying statutory criteria to the facts. As a result, these procedural rules can improve the certainty and stability of the results.

468. ODR is a form of dispute resolution and therefore should also be conducted within the parameter of a set of common values and fundamental principles of due process.[992] In the ODR

[989] United Nations Commission on International Trade Law, Working Group III (Online dispute resolution) Thirty-third session, A/CN.9/WG. III/WP. 140, UNCITRAL Technical Notes on Online Dispute Resolution, paragraph 3 (Technical Notes on ODR).
[990] Arno R Lodder and John Zeleznikow, *Enhanced dispute resolution through the use of information technology* (Cambridge University Press 2010) (n 990) 21.
[991] Denis James Galligan, *Due process and fair procedures: a study of administrative procedures* (Oxford University Press 1996) 89.
[992] Lodder and Zeleznikow (n 990) 20.

field, there is not a binding international legal instrument that regulates the procedural fairness of ODR rules. The Technical Notes on ODR issued by the UNCITRAL Working Group III on ODR set out rather general principles for ODR entities without any binding effect. Therefore, the sources of ODR procedural justice can only be sought from civil procedural rules and ADR rules. The European human rights laws have established the fundamental principle of access to justice to provide parties with a right to a fair trial and to an effective remedy.[993] ODR is not a hindrance to access to justice but instead broadens the scope of "access to justice." This constitutes the foundation of civil procedural rules in the EU member states. Moreover, civil procedure rules in England and China will be referred to explore civil procedure rules in national legislation. The Directive on Consumer ADR, as a legal instrument to harmonize ADR rules in various EU member states, will also be referred to as guidance for ADR procedural principles.

469. Section 4.1.1 will touch upon this tentative work of the UNCITRAL for a uniform standard of ODR procedures at the international level. As there are currently no binding legal instruments to regulate ODR, this section intends to find other sources of ODR procedural justice from both civil procedure rules (Section 4.1.2) and consumer ADR rules (Section 4.1.3). Moreover, some unique procedural matters of ODR will be specifically addressed in Section 4.1.4 in relation to procedural justice.

4.1.1. Technical Notes on ODR issued by UNCITRAL Working Group III

470. From 2010 to 2016, the UNCITRAL Working Group III on ODR has worked on formulating of a set of procedural standards for ODR in resolving disputes arising from e-commerce transactions. It covers both B2B and B2C disputes arising from both sales and services contracts which are low in value and high in volume. Although the original mandate of the Working Group III was to establish an international standard for ODR, this objective was not fulfilled due to the substantial differences in mandatory rules between jurisdictions. The main obstacle had to do with the pre-dispute B2C ADR agreements. An issue arose between jurisdictions in which pre-dispute arbitration agreements are binding on consumers (i.e. U.S.) or those where pre-dispute arbitration agreements are not allowed (i.e. E.U.).[994] That is why, initially, the Working Group III opted for a two-track system that proposed a different

[993] The Charter, Article 47; ECHR, Article 6 & 13.
[994] Report of Working Group III (Online Dispute Resolution) on the work of its twenty-seventh session (New York, 20-24 May 2013) A/CN.9/769, 5.

procedure (binding arbitration or non-binding recommendation in the last stage of the ODR) depending on whether the parties are situated in jurisdictions that permit or ban pre-dispute arbitration agreements.[995] However, the Working Group III concluded that this was not an optimal approach due to the difficulties to distinguish consumers from businesses and to determine the jurisdictions they are subject to. That is why the Working Group III decided to draft a non-binding descriptive document reflecting elements of an ODR process, excluding the nature of the final stage of the ODR process (binding arbitration or non-binding recommendation).[996]

471. The Technical Notes on ODR, which have been formulated at its forty-eighth session of the Working Group III in 2016, reflect the outcome of the UNCITRAL Working Group III's work on ODR. Although the Technical Notes on ODR is non-binding in nature, it can be adopted as a useful tool to establish a common understanding of ODR in resolving cross-border disputes. The Technical Notes on ODR are aimed to foster the development of ODR and to assist ODR administrators, ODR platforms, neutrals, and the parties to ODR proceedings.[997]

4.1.1.1. Procedures of ODR

472. As a starting point, the Technical Notes on ODR proposes a three-stage model for ODR procedures: negotiation, facilitated settlement and a third (final) stage (a binding arbitration or a non-binding recommendation).[998] During the first stage, the claimant submits a notice to the ODR administrator. The ODR administrator informs the respondent of the claim and the parties negotiate with each other on the ODR platform. If the parties fail to reach an agreement, the second stage will commence. During this stage, the ODR administrator appoints a third-party neutral who communicates with the parties in an attempt to reach a settlement. If no settlement is reached, the ODR administrator may remind the parties to choose options for the final

[995] The two-track approach is proved to be unrealistic and impractical. It is technically difficult for traders to differentiate customers from different jurisdictions when they provide products or services.
[996] United Nations Commission on International Trade Law, Report of Working Group III (Online Dispute Resolution) on the work of thirty-second session (Vienna, 30 November-4 December 2015) A/CN.9/862, paragraph 5.
[997] United Nations Commission on International Trade Law, Working Group III (Online dispute resolution) Thirty-third session, A/CN.9/WG. III/WP. 140, UNCITRAL Technical Notes on Online Dispute Resolution, paragraph 3 (Technical Notes on ODR).
[998] *Ibid*, Technical Notes on ODR, paragraph 18.

stage.[999]

4.1.1.2. Principles of ODR proceedings

473. The Technical Notes on ODR set out the principles that should underpin the ODR process including impartiality, independence, efficiency, effectiveness, fairness, transparency, due process and accountability.[1000] The Technical Notes on ODR, however, do not elaborate on the content of each of these principles. Only the principles of transparency, independence and expertise are defined in somewhat more details. With regard to the transparency principle, the Technical Notes on ODR state that the ODR administrator should disclose any contractual relationship between the ODR administrator and a particular seller to avoid a potential conflict of interests.[1001] While complying with the confidentiality requirements, the ODR administrator is encouraged to publish anonymous data, statistics and other information relevant to its decisions on its website to improve the parties' access to such information. In order to encourage independence, the ODR administrator may adopt a code of ethics for neutrals and adopt policies to identify and handle conflict of interests.[1002] In order to ensure expertise, the ODR administrator may implement policies governing the selection and training of neutrals.[1003] There should be an internal quality assurance process to ensure that the neutrals' decisions conform to the standards. Lastly, it is important to note that the ODR procedure should be based on the explicit and informed consent of the parties.[1004]

474. These principles are non-binding, descriptive, and reflect only general principles of ODR procedures.[1005] The Working Group III observed that the procedural standards for ODR would not necessarily be administered word-for-word by ODR administrators, but rather would be adapted, customized and improved upon by the private sector.[1006]

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[999] The nature of the final stage has not been agreed by the Working Group III and is expressly excluded from the scope of the Technical Notes on ODR. Depending on the jurisdictions whether a pre-dispute B2C arbitration agreement is allowed, the final stage may either be a non-binding recommendation or a binding arbitration.
[1000] Report of Working Group III on the work of thirty-second session (n 996) paragraph 27; Technical Notes on ODR, paragraph 4.
[1001] Technical Notes on ODR, paragraphs 10-12.
[1002] Technical Notes on ODR, paragraphs 13-14.
[1003] Technical Notes on ODR, paragraphs 15-16.
[1004] Technical Notes on ODR, paragraph 17.
[1005] Technical Notes on ODR, paragraph 7.
[1006] United Nations Commission on International Trade Law, Notes by the Secretariat on a non-binding descriptive document reflecting elements and principles of an ODR process, (Vienna, 30 November-4 December 2015) A/CN.9/WG.III/WP.137, Paragraph 6.

4.1.1.3. Technical Notes on ODR: A task unaccomplished

475. The mandate of the UNCITRAL Working Group III on ODR was quite broad, not only setting out rules and standards for the ODR *procedure*, but also extending to the *enforcement* of the outcome of such an ODR procedure.[1007] As stated above, the original intent was to establish a uniform ODR platform for cross-border, large volume, and small value disputes arising both in the B2B and B2C context. Due to the differing legislation regarding the validity of a pre-dispute B2C arbitration agreement, it was not possible to reach an agreement on the *procedural* design of the ODR platform nor was it possible to set out detailed procedural rules that are binding on ODR providers. That is why the Technical Notes on ODR provide only soft law and abstract guidelines for the *administration* of ODR services and do not amount to binding rules that regulate the ODR *proceedings*.

4.1.2. Procedural principles from civil procedure law

476. Accordingly, this is why it is important to look at the existing framework developed for civil procedure. All national laws have developed fundamental procedural standards and principles to establish fair procedures. These cornerstones of justice also delimit the parameters within which ADR procedures can be organized.

477. There is a significant consensus regarding the basic or minimum requirements to which a procedure must adhere in order to be considered in accordance with the principles of fair and due process. In fact, Professor Neil Andrews has identified four corner-stones in the context of civil justice.[1008] These four cornerstones are: (i) regulating access to court and to justice; (ii) ensuring the fairness of the process; (iii) maintaining a speedy and effective process; and (iv) achieving just and effective outcomes. As this Chapter focuses mainly on procedural justice, the fourth element about the fair outcome is not touched upon here. The first three cornerstones will be used to test whether selected ODR rules conform to procedural justice.

478. The first principle, access to justice, is the most important one in each judicial system and a fundamental human right as enshrined both in the ECHR and the Charter. The availability of ODR shall not deprive parties of their access to justice but rather enhance it. The second

[1007] United Nations Commission on International Trade Law, Report of Working Group III on the work of its twenty-second session (Vienna, 13-17 December 2010) A/CN.9/716, paragraphs 35-114.
[1008] Neil Andrews, 'Fundamental principles of civil procedure: Order out of chaos' in *Civil Litigation in a Globalising World* (Springer 2012) 20.

principle emphasizes the importance of fairness in the procedure. The third principle of procedural efficiency reflects the necessity to reduce time and cost in civil justice.[1009] I will examine this framework and evaluate its value and binding character in the context of ODR in what follows. To that end, I will divide this Section into three parts. Section 4.1.2.1 deals with access to justice and its connection to ADR and ODR. Section 4.1.2.2 focuses on the procedural fairness requirement. Section 4.1.2.3 emphasizes the procedural efficiency element. The jurisdictions that are selected for study are EU, England and China while references will also be drawn from the American Law Institute on the UNIDROIT Principles of Transnational Civil Procedure. Also, the EU has constructed a legal framework for the protection of human rights, in which the "access to justice" is enshrined.[1010] In addition, the legal reform of civil justice in England provides important insight into the role of ADR in "access to justice".[1011] Lastly, the civil procedure rules of China will also be touched upon as the selected ODR rules (GZAC Online Arbitration Rules and Taobao Rules) are located in the same jurisdiction.

4.1.2.1. Access to justice in the digital age

479. The first cornerstone of "access to justice" in the digital age has a broader scope that includes not only access to court, access to ADR, but also access to ODR. With the legal reforms in civil justice, ADR is viewed as an effective means to enhance access to justice by reducing cost and time in dispute resolution. I would argue that in the digital age, ODR also promotes access to justice as parties are able to settle disputes with fast speed and low cost, saving parties the trouble of travelling from one place to another to meet in person. Nevertheless, the benefits of ODR (efficiency and affordability) should be weighed against the limitations of ODR (time limits and document-based decision) to ensure a fair access to justice.

480. The fundamental procedural principle of access to justice is enshrined in Article 47 of the Charter, Article 6 and 13 of the ECHR, including the right to a fair trial and the right to an effective remedy. Access to justice aims to mitigate "any type of hindrances for citizens to have

[1009] The legal reform in civil justice initiated by Lord Woolf in English Civil Procedure Rules 1998 to improve the efficiency of civil procedure.
[1010] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms [1950], amended by protocol No. 14 on 1 June 2010; Charter of Fundamental Rights of the European Union [2012] OJ C326/02.
[1011] The legal reform in civil justice initiated by Lord Woolf in English Civil Procedure Rules 1998 to improve the efficiency of civil procedure. Hazel Genn, 'What is Civil Justice for-Reform, ADR, and Access to Justice' (2012)24 Yale JL & Human 397, 401.

a practical and usable way to realize their legal rights."[1012] Traditionally, the concept of "access to justice" was discussed in the context of court proceedings and thus referred to the possibility of receiving a judgment within a reasonable time and at a reasonable cost.[1013] The right to a fair trial also embodies the requirements of equality of arms, the right to adversarial proceedings, the right to reasoned judicial decisions and the impartiality of the tribunal.[1014]

481. In English civil procedure law, access to justice includes both formal access and economic access. Formal access concerns technical bars to potential litigants before the facts have been expensively adjudicated.[1015] Economic access concerns the practical capacity of litigants to hire lawyers, to pay court fees and meet any liability for the other party's costs that might be incurred if the case is lost.[1016] Thus, the concept of "access to justice" shall include both the accessibility to court and the economic capability of parties to afford a litigation fee. However, in reality, most disputes do not give rise to legal actions and most actions settle without trial.[1017] This does not mean that justice is not done. That is why a broader view of "access to justice" embodies non-judicial bodies as well as courts.[1018] There have been legal reforms in different parts of the world to improve access to justice in the broad sense through the introduction of ADRs. In the United Kingdom, Lord Wolff's reform and the implementation of English Civil Procedure Rules 1999 and the Access to Justice Act 1999 have shifted courts' attitude towards ADR. Similarly, in China, there is an urgent need to develop ADRs to improve judicial efficiency to handle the ever-increasing disputes arising from the country's economic growth.[1019]

482. The notion of "access to justice" does not preclude parties from using alternative modes of

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[1012] Nylund (n 735) 327.
[1013] Nuala Mole & Catharina Harby, 'The right to a fair trial: A guide to the implementation of Article 6 of the European Convention on Human Rights', Council of Europe 2006, 39. < http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-03(2006).pdf> accessed 21 March 2017.
[1014] Guide on Article 6 of the ECHR, Right to a fair trial (civil limb), Council of Europe 2013, 33-54, <http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf > accessed 23 March 2017.
[1015] Neil Andrews, *English civil procedure: fundamentals of the new civil justice system* (Oxford University Press 2003), 108.
[1016] *Ibid*.
[1017] Andrews, *English civil procedure: fundamentals of the new civil justice system*, (n 1015)211.
[1018] European Union Agency for Fundamental Rights, 'Handbook on European Law relating to access to justice' (2016) 48.
[1019] Opinions of the Supreme People's Court on Further Deepening the Reform of Diversified Dispute Resolution Mechanism of the People's Courts (关于人民法院进一步深化多元化纠纷解决机制改革的意见), Fa Fa [2016] No. 14; Several Opinions on Further Advancing Optimization of Judicial Resources by Distinguishing Complicated and Simple Cases (最高人民法院关于进一步推进案件繁简分流优化司法资源配置的若干意见) Fa Fa [2016] No. 21, paragraph 20.

settling their disputes by an umpire or other third-party intervention, such as arbitration, tribunals, ombudsman or mediation. The scope of "access to justice" is no longer limited to the judicial system but is also extended to ADR.[1020] There is a tendency to use ADR as a supplement to the civil justice system.

483. In England, under the old English Civil Procedure Rules, there were primarily three issues that would prevent access to justice, namely the problems of delay, cost, and complexity.[1021] Delay was said to cause personal stress and financial hardship to ordinary people and force economically weaker parties to accept unfair settlements.[1022] The cost of litigation was often disproportionate to the value of claims. At the same time, procedures for handling small-claim disputes were disproportionately complex. Lord Woolf's Access to Justice interim and final reports provided blueprints for the reform in civil procedure rules and have encouraged parties to use ADR procedure if the court considers it appropriate.[1023] These reports provided that the access to the court should be a last resort and ADR should be attempted before or after the initiation of court proceedings in order to achieve an early settlement.[1024] "Access to justice" in modern civil justice is multi-faceted with a portfolio of processes including both judicial and non-judicial aspects.[1025]

484. In the EU, ADR is perceived as a means to improve the access to justice by implementing the judicial procedures insofar as the selected ADRs is better suited to the nature of the dispute involved.[1026] Moreover, ADR is recognized as an effective way to resolve cross-border civil and commercial disputes, especially cross-border consumer disputes. This initiative resulted in two recommendations respectively in consensual ADR and adjudicative ADR,[1027] which were subsequently transformed into the Directive on Consumer ADR.

[1020] Lola Akin, 'Improving Access to Justice Through Alternative Dispute Resolution: the Role of Community Legal Centres in Victoria, Australia' (2010), 11. Lord Wolf, Access to Justice Final Report (Stationery Office 1996). American Bar Association Section of Dispute Resolution, Access to Justice through Alternative Dispute Resolution White Paper.

[1021] Civil Justice Review: Report of the Review Body of Civil Justice (CM 394, 1988), Chapter 3, paragraph 48.

[1022] *Ibid*, paragraphs 67 & 68.

[1023] English Civil Procedure Rules, 1.4(2) (e).

[1024] Hazel Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2013)24 Yale Journal of Law & the Humanities, 401.

[1025] Neil Andrews, *Andrews on civil processes*, vol I (Intersentia 2013) 694.

[1026] Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, COM (2002) 196 final, paragraph 9 (Green Paper on ADR).

[1027] EC Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and EC Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.

485. Similar changes in broadening the scope of "access to justice" also occurred in China. The Supreme People's Court of the PRC has issued Certain Opinions to establish a mechanism to combine litigation and out-of-court dispute resolution in 2009.[1028] In order to improve the dispute resolution mechanism in China, the Opinions encourage parties to use out-of-court dispute resolution mechanisms such as arbitration, administrative conciliation, people's mediation, commercial mediation, and industrial mediation.[1029]

486. As long as there are procedural safeguards to ensure Article 47 of the Charter, Article 6 and Article 13 of the ECHR are observed, like ADR, ODR has the ability to improve parties' access to justice as it provides parties with a low-cost and efficient dispute resolution. In other words, ODR can improve parties' access to justice if parties have the freedom to refer to the judicial redress at any time.

487. The Council of Europe has produced a report on "Access to justice and the Internet: potential and challenges" concluding that ODR can also improve parties' access to justice.[1030] This conclusion is derived from ODR's potential to lower economic and geographical barriers to access to justice. Nevertheless, ODR possesses some pitfalls, such as the unequal digital divide, the lack of inter-personal communication and fairness standards. The report calls on the member states of the Council of Europe to develop common minimum standards for ODR providers in order to ensure that their procedures do not treat repeat-players more favorably.[1031] In the Rapporteur's view, the government should play an important role in accrediting ODR providers and monitoring their compliance with standards of due process, transparency, impartiality and consistency.[1032] Therefore, ODR should be treated as a tool to facilitate "access to justice" rather than a hindrance to "access to justice" because parties are provided with alternatives to dispute resolution which are less costly and more efficient.

4.1.2.2. Procedural fairness

488. Our second cornerstone of procedural justice is procedural fairness. Procedural fairness has a

[1028] Certain Opinions of the Supreme People's Court on the Establishment and Improvement of a Mechanism for Dispute Resolution through a Combination of Litigation and Non-Litigation Strategies, Fa Fa [2009] No. 45.
[1029] *Ibid*, Article 1(2).
[1030] Council of Europe, Committee on Legal Affairs and Human Rights, Access to justice and the Internet: potential and challenges Report, 5 <http://website-pace.net/documents/19838/1085720/20151026-InternetAccess-EN.pdf/8d3c44d4-da6c-4dac-ab15-94dc1fcc5d48> accessed 15 June 2017.
[1031] *Ibid*, paragraphs 7.4.
[1032] *Ibid*, paragraph 7.

wide scope which includes affordable access to justice,[1033] notice of claims, opportunity to be heard and right to cross-examine witnesses, the appointment of unbiased decision makers, process transparency, a requirement for written, reasonable, and published opinion, right of appeal, etc.[1034]

489. Researchers have found that the disputants' satisfaction with dispute resolution decisions and their adherence to them in both judicial and ADR mechanisms would be influenced by their perceptions about the fairness of the dispute resolution process.[1035] Four factors are summarized below that affect whether people feel they have been treated fairly in the dispute resolution process: (i) whether the parties have an opportunity to present their case to the court; (ii) whether the decision maker was neutral; (iii) whether the decision maker was trustworthy and has taken into consideration what the disputants have said; (iv) whether the decision maker treats the disputants with dignity and respect.[1036] These psychological elements are also reflected in the civil procedure rules that are aimed to guarantee procedural justice. Think of the rules regarding judicial independence, the right to be heard and procedural equality. The following three procedural fairness principles (notably the principle of judicial independence, the requirements of due notice and the right to be heard, and the principle of procedural equality) in dispute resolution are minimum procedural guarantees that are highly relevant for various types of dispute resolution procedure, including both ADR and ODR.

490. The first procedural fairness principle requires independence and impartiality of the third-party neutral. Both requirements are also enshrined in Article 6(1) of the ECHR. First, the judges should have judicial independence to decide the dispute according to the facts and the law, free from improper internal and external influences.[1037] In order to determine whether a tribunal is 'independent', one must consider the manner of the appointment of its members and their term of office, the existence of guarantees against outside pressures and whether the adjudicative body presents an appearance of independence.[1038] Second, with regard to the impartiality requirement, there are two criteria: a subjective test and an objective test.[1039] The subjective

[1033] It has been discussed in Section 4.1.2.1.
[1034] Elizabeth G Thornburg, 'Going Private: Technology, Due process, and Internet Dispute Resolution' (2000) University of California at Davis Law Review 151, 196.
[1035] Thibaut and Walker; Lind and Tyler; Vidmar 877; Hollander-Blumoff and Tyler 5.
[1036] Tom Tyler and Steven L Blader, 'Justice and negotiation' in Michele J. Gelfand and Jeanne M. Brett (eds), *The handbook of negotiation and culture* (Standford Business Books 2004) 300.
[1037] ALI/UNIDROIT Principles of Transnational Civil Procedure, Principle 1.1, Unif. L.Rev. 2004-4 < http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf> accessed 4 April 2017.
[1038] *Langborger v Sweden* App no. 1179/84 (ECHR 22 June 1989) *paragraph 32; Kleyn and Others v the Netherlands* App nos. 39343/98, 39651/98, 43147/98 and 46664/99 (ECHR 6 May 2003) *paragraph 190.*
[1039] *Micallef v Malta* App no. 17056/06 (ECHR 15 October 2009), paragraph 93.

test takes into account whether the third-party neutral held any personal prejudice or bias in a given case. The objective test considers whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.

Although there is no express judicial independence and impartiality principle in the context of Civil Procedure Law of the PRC, the recusal requirement of the judge has a similar objective and ensures that judges shall have no conflicts of interest when adjudicating the case.[1040] Judges are required to recuse themselves from the case if there is any conflict of interest involved including: being a relative of the parties concerned, being the witness of the case, etc.[1041] The parties concerned or the legal representatives of the concerned parties may require the judges to recuse themselves from the case if the judges privately meet one of the parties, introduce lawyers to the parties, or have any financial relationship with the parties, etc.[1042] There are a set of procedures for the determination of recusal. These procedures prevent judges from abusing their powers and ensure procedural justice.[1043]

491. The second procedural fairness principle includes requirements of due notice and right to be heard. The due notice demands that proceedings should not be conducted without both parties enjoying reasonable notice of the case.[1044] The parties shall be notified of all the factual information (such as statements of facts) and legal information (such as legal claims, grounds, and available remedies) that is necessary for the parties to present or defend for themselves.[1045] By giving notice to the affected parties, the parties are able to prepare their cases and collect evidence which will be relevant to the decision.[1046] Both English Civil Procedure Rules[1047]

[1040] Civil Procedure Law of the PRC, Chapter IV. Withdrawal; Provisions of the Supreme People's Court on Several Issues Concerning the Implementation of the Withdrawal System of Judges in Litigation Activities, No. 12[2011] of the Supreme People's Court (Withdrawal Provisions of the Supreme People's Court)
[1041] *Ibid*, Withdrawal Provisions of the Supreme People's Court, Article 1.
[1042] *Ibid*, Withdrawal Provisions of the Supreme People's Court, Article 2.
[1043] Chang Yi, 'On the impartiality of judges: from the perspective of civil procedure' (2008) 8 Journal of Kunming University of Science and Technology 5, 74.（常怡，《论法官的中立——以民事诉讼为视角》，昆明理工大学学报）
[1044] Andrews, *English civil procedure: fundamentals of the new civil justice system*, (n 1015) 85.
[1045] Xandra E Kramer, 'The structure of civil proceedings and why it matters: exploratory observations on future ELI-UNIDROIT European rules of civil procedure' (2014)19 Uniform Law Review 218, 226. Shao Ming, 'On the principle of participation in civil litigation' (2009) Fa Xue Jia 3, 116. （邵明，《论民事诉讼程序参与原则》，法学家）
[1046] Galligan (n 991)356.
[1047] Andrews, *English civil procedure: fundamentals of the new civil justice system*, (n 1015) 87.

and the Civil Procedure Law of the PRC[1048] have stipulated the notification period to prevent parties from surprise.

The right to be heard is a natural procedural right that enhances parties' perception of justice and increases the procedural fairness. [1049] The parties shall have the right to submit relevant contentions of fact and law and to offer supporting evidence.[1050] A party should have a fair opportunity and reasonably adequate time to respond to contentions of fact and law, to evidence presented by another party, and to orders and suggestions made by the court.[1051] It is also essential for the third-party neutral to hear the facts and evidence submitted by each party in such proceedings. The court should consider all the contentions of the parties and address those concerning substantial issues.[1052] The parties may, by agreement, and with the approval of the court, employ expedited means of communications, such as telecommunications or electronic communications.[1053] It is required in the Civil Procedure Law of the PRC that parties are entitled to defend and argue for themselves, even in summary procedures.[1054]

492. The third procedural fairness principle demands that the court should ensure equal treatment to the parties during civil proceedings.[1055] According to Professor Neil Andrews, there are three elements of procedural equality. First, it requires the legal system to treat parties on an equal footing and without discrimination, regardless of the litigant's "sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."[1056] Second, it requires the legal system to ensure the quality of justice is not improperly affected by economic or procedural disparities between the parties. The control of economic resources can be a source of inequality in procedure.[1057] Third, it requires the legal system to promote equal access to litigation, regardless of linguistic or geographic difficulties.[1058] This is why the English Civil Procedure Rules require the court to

[1048] In Civil Procedure Law of the PRC, the right of due notice includes for example: Article 126 Acceptance of the case; Article 136 Notification of the hearings and Article 148 Issuance of judgements.
[1049] Hollander-Blumoff and Tyler (n 1035) 5; Nancy A Welsh, 'Remembering the role of justice in resolution: Insights from procedural and social justice theories' (2004)54 Journal of Legal Education 49, 52.
[1050] ALI/ UNIDROIT Principles of Transnational Civil Procedure, Principle 5.4.
[1051] ALI/ UNIDROIT Principles of Transnational Civil Procedure, Principle 5.5.
[1052] ALI/ UNIDROIT Principles of Transnational Civil Procedure, Principle 5.6.
[1053] ALI/ UNIDROIT Principles of Transnational Civil Procedure, Principle 5.7.
[1054] Civil Procedure Law of the PRC, Article 12 on right to be heard in civil proceedings and Article 159 on summary procedure.
[1055] ALI/ UNIDROIT Principles of Transnational Civil Procedure, Principle 3.1.
[1056] Article 14 of the ECHR; Schedule 1 (1) of the Human Rights Act 1998 of the United Kingdom.
[1057] Adrian AS Zuckerman, *Zuckerman on civil procedure: principles of practice* (sweet & Maxwell 2003) 105.
[1058] Andrews, *English civil procedure: fundamentals of the new civil justice system*, (n 1015) 115.

adopt measures enabling it to handle the case without the necessity for the parties to attend at court.[1059] Parties are able to use electronic communication or other long distance communications in civil proceedings.

The Civil Procedure Law of the PRC stipulates that parties shall have equal litigation rights.[1060] The people's court shall, in conducting the trials, safeguard their rights, facilitate their exercising rights, and apply laws equally to them. The procedural equality principle requires the people's court to treat parties equally in litigation and shall apply applicable laws to the parties on an equal footing.[1061]

4.1.2.3. Procedural efficiency

493. It is a well-known principle in procedural law that "justice delayed is justice denied."[1062] Procedural efficiency, as the third cornerstone of procedural fairness, requires the procedure to be held within a reasonable time.[1063] There are two elements of procedural efficiency: namely the judicial control of the process and avoidance of undue delay.

494. First, the court should exercise discretion to achieve disposition of the dispute fairly and efficiently and ensure that the case proceeds in a measured way so as to avoid unreasonable delay.[1064] In civil proceedings, the freedom for the parties to agree on or vary time limits of the procedure is fairly limited.[1065] The legal reform by Lord Woolf proposes that one of the overriding objectives in civil procedure rules is to allot to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.[1066] English judges have a large responsibility for the management of procedure in accordance with the proportionality principle, taking into consideration the importance, economic value, and financial positions of the parties as well as the complexity of the cases.[1067] The English civil

[1059] (English) Civil Procedure Rules, Section 1.4(2)j.
[1060] The Civil Procedure Law of the PRC, Article 8.
[1061] Xiao Yuan and Deng Huihui, 'Discussion on the equal principle of parties in civil procedures', (2011) 5 Fa Zhi Yu Jing Ji71. （肖媛、邓辉辉，《浅谈民事诉讼当事人诉讼权利平等原则》，法制与经济）
[1062] It is a legal maxim often attributed to William Ewart Gladstone, which means if a legal redress is available for a party that has suffered some injury, but is not forthcoming in a timely manner, it is effectively the same as having no redress at all.
[1063] Right to a speedy trial is a fundamental procedural principle enshrined in Article 6 of the ECHR. Ola Johan Settem, *Applications of the 'Fair Hearing'Norm in ECHR Article 6 (1) to Civil Proceedings* (Springer 2016) 65.
[1064] ALI/ UNIDROIT Principles of Transnational Civil Procedure, Principle 14.1.
[1065] The (English) Civil Procedure Rules, Section 2.11: Unless these Rules or a practice direction provides otherwise or the court orders otherwise, the time specified by a rule or by the court for a person to do any at may be varied by the written agreement of the parties. Zuckerman (1057) 420.
[1066] The (English) Civil Procedure Rules, Section 1.1.
[1067] Andrews, *English civil procedure: fundamentals of the new civil justice system*, (n 1015) 121.

procedure has moved closer to the procedural rules of the Civil Law legal system because of the shift in process control by the judges.[1068] According to the tradition of English law, the judge plays a passive role in directing the case. With Wolff's civil procedure reform, the court must actively manage the case and encourage the parties to co-operate with each other in the conduct of proceedings.[1069] Accordingly, both lawyers and judges perceived a marked difference in the role of the court in case management.[1070]

In the Civil Procedure Law of the PRC, the process control can also be found in the procedural requirements such as the timeframe of the provision of evidence. The people's court shall set the time limit for the parties to produce evidence depending on the progress of the proceedings.[1071] It may also extend the time limit if a party submits an application to extend the time limit when the party failed to provide evidence within the designated time limit. The judges have the discretion to determine the appropriate time limit while conforming to the legitimate period of producing evidence.[1072]

495. Second, the court should resolve the dispute within a reasonable time.[1073] A similar requirement has been stipulated by Article 6 (1) of the ECHR, which provides protection for both claimants and defendants to a fair trial within a reasonable time. The legal reform in civil procedure proves the need for more procedural efficiency. In the English civil procedural reform, Lord Woolf pointed in his Interim Report on Access to Justice that the civil justice system is too slow and there is a need to speed up the civil litigation.[1074] Geoffrey Hazard proposed two solutions to resolve the problem of undue delay: the first is to increase the availability of adjudicative resources through case management, and the second to reduce the number of cases or the scope of consideration given to the average case.[1075] One effective way is to adopt a document management system, which accelerates the process of adjudication

[1068] In Common Law jurisdictions (adversarial system), the opposing parties act as adversaries who compete to convince the judge. In Civil Law jurisdictions (inquisitorial system), the court is actively involved in investigating the facts of the case and the role of judge is not limited to hearing the submissions of the parties but can direct lawyers to address specific points and to call particular witnesses.
[1069] The (English) Civil Procedure Rules, Section 1.4(1), (2).
[1070] John Peysner and Mary Seneviratne, 'The management of civil cases: the courts and post-Woolf landscape (DCA Research Series 9/05), 11, November 2005.
[1071] The Civil Procedure Law of the PRC, Article 65.
[1072] Provisions of the Supreme People's Court on Evidence in Civil Proceedings, Fa Shi [2001] No. 33, Article 33, paragraph 3: In the event that the people's court specifies a time limit for production of evidence, such time limit shall not be less than 30 days.
[1073] ALI/ UNIDROIT Principles of Transnational Civil Procedure, Principle 7.1.
[1074] Lord Woolf, *Access to Justice: Interim Report* (Stationery Office 1995).
[1075] Geoffrey C. Hazard, 'Court delay: toward new premises' (1986) 5 Civil Justice Quarterly 236, 237.

because both judges and parties can have improved access to electronic files.[1076] Another effective way to reduce the number of cases is to encourage parties to resolve disputes by using ADR or ODR.

In China, the latest amendment to Civil Procedure Law also reflected the trend of improving judicial efficiency through facilitated ADR,[1077] small-claim litigation,[1078] and enlarging the scope of summary procedure.[1079] Moreover, the Supreme People's Court of the PRC has issued a policy document on diversified dispute resolution to strengthen the connection between litigation and other types of dispute resolution such as arbitration, mediation and conciliation.[1080] The aim of this opinion is to enhance the interplay between ADR and court proceedings to achieve greater efficiency in dispute resolution. It also demonstrates the direction of civil procedure reform of China towards judicial efficiency.

4.1.3. ADR principles and rules

496. As Professor Carrie Menkel-Meadow pointed out, there is a need to develop ethical rules and standards in non-judicial dispute resolution because certain quality requirements are missing due to the flexibility and variable nature of ADR.[1081] The ODR procedure is deeply rooted in ADR with an application of information technology. What distinguishes ODR from ADR is the element of information and communication technology. This creates different conditions in which disputants resolve their problems by ODR than by regular ADR which involves face-to-face interaction.[1082] Of course, there will be different needs and options due or thanks to the technology that is put in place to facilitate the ODR process. Nevertheless, ODR must also adhere to the basic principles of due process that are applicable to ADR.

497. In its Green Paper on ADR, the EU introduced a set of ADR standards for use in cross-border B2C disputes. The Green Paper on ADR has emphasized the need to establish a set of minimum

[1076] Viktória Harsági, 'Digital technology and the character of civil procedure' in *Electronic Technology and Civil Procedure* (Springer 2012) 129.
[1077] Civil Procedure Law of the PRC: Article 122 requires pre-trial mediation if appropriate; Article 194 and Article 195 permits parties to apply for judicial ratification of mediation agreement which is enforceable.
[1078] Civil Procedure Law of the PRC, Article 162.
[1079] Civil Procedure Law of the PRC, Article 157: the parties can also choose to use the summary proceeding, before only the people's court can decide whether or not to use the summary proceeding.
[1080] Supreme People's Court Opinion on the People's Courts more deeply reforming the diversified dispute resolution mechanism, Fa Fa [2016] No. 14. (关于人民法院进一步深化多元化纠纷解决机制改革的意见)
[1081] Carrie Menkel-Meadow, 'Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities' (1997)38 South Texas Law Review 407, 452.
[1082] Leah Wing & Daniel Rainey, 'Online Dispute Resolution and the Development of Theory' in Wahab, Katsh and Rainey (n 148) 41.

quality standards as necessary guarantees to ensure that "the settlement of disputes by extrajudicial bodies enjoys the degree of reliability which the administration of justice requires."[1083] The Green Paper on ADR explained that, with the necessary adaptations and extension to other branches of law, the ADR principle confirmed in consumer law can also benefit ADRs in general.[1084] The EU issued two recommendations for consumer ADR, one in adjudicative ADR and the other in consensual ADR.[1085] The EU Directive on Consumer ADR, further building on those two recommendations, has developed seven guiding principles in an effort to overcome the disparities in ADR coverage, quality and awareness in the member states, which constitute a barrier to the internal market.[1086] These principles only provide minimum standards to ADR entities and therefore member states can implement more restrictive quality standards to ADR services in consumer disputes.[1087] The principles do not differentiate between various forms of ADR as in the two recommendations (between adjudicative ADR and consensual ADR) but provide the same quality requirements to consumer ADR in general.[1088] The uniform quality standard of consumer ADR establishes the minimum common denominators for all forms of ADR. This may diminish the role of the EU Directive on Consumer ADR in persuading stakeholders of the legitimacy and effectiveness of ADR as the minimum quality standards do not connect sufficiently to a certain type of ADR scheme.[1089] Moreover, the EU Directive on Consumer ADR has a limited scope of application. It only applies to ADR service providers who are certified by the national competent authority, excluding ADR service providers who are non-certified and internal complaint mechanism established by the traders.[1090]

498. Among these consumer ADR principles, some are not relevant to procedural fairness (such as the principle of liberty that is relevant to the ADR agreement[1091] and the principle of

[1083] Green Paper on ADR (n 1026) paragraph 76.
[1084] *Ibid*.
[1085] See two Recommendations on the principles for out-of-court dispute resolution bodies for consumer disputes (n 195).
[1086] Directive on Consumer ADR, Article 5-11.
[1087] Cortés, 'The New Landscape of Consumer Redress' in *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 22; Directive on Consumer ADR, Recital 38.
[1088] Felix Steffek, *The Relationship between Mediation and Other Forms of Alternative Dispute Resolution* (2016) The Implementation of the Mediation Directive Workshop 29 November 2016, PE 571.395, 52.
[1089] Richard Kirkham, 'Regulating ADR: Lessons from the UK' in *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 302-303.
[1090] Directive on Consumer ADR, Article 2(2)(a).
[1091] See discussion in Section 3.2.2.2.B. .

accessibility[1092] that is particularly designed for the functioning of consumer ADR schemes) and therefore are not the focus of this part. In the subsequent sub-sections, the common procedural principles of expertise, independence and impartiality, transparency, effectiveness, fairness and legality will be introduced and used as a guidance in assessing the selected ODR rules in Section 4.2.

4.1.3.1. Principle of expertise, independence, and impartiality

499. The third-party neutral[1093] should possess the necessary knowledge and skills in the field of consumer dispute resolution as well as a general understanding of the law.[1094] The independence of ADR requires third-party neutrals to make decisions without being influenced by other persons or entities. The principle of impartiality is to ensure that the neutral third-party treats parties equally, maintains an open mind and does not take into account irrelevant factors.[1095] This is in accordance with the procedural fairness requirement in civil procedure law.

500. The third-party neutrals are appointed for a term of office of sufficient duration to ensure independence and are remunerated in a way that is not linked to the outcome of the procedure to ensure impartiality. When the ADR entities or third-party neutral are funded by traders, three conditions are imposed.[1096] First, the national legislation of the member states allows such ADR procedures. Second, the ADR entities should be certified by the competent authority. Third, the ADR entities should comply with extra requirements on independence. Such requirements, for example, require the ADR entity to have a separate budget from the traders, at their disposal, which is sufficient to fulfill their tasks unless there are equal representatives of the traders and consumers.[1097]

4.1.3.2. Principle of transparency

501. Each ADR entity shall provide information of the ADR entities and their third-party neutrals, the scope and length of their mandate, the source of financing, the method of appointment, the

[1092] The principle of accessibility in Article 5 of the Directive on Consumer ADR requires member states to facilitate access by consumers to ADR by providing certified ADR entities and services.
[1093] Note that the "third-party neutral" will be used interchangeably with "adjudicator" and "decision maker".
[1094] Directive on Consumer ADR, Article 6(1)a.
[1095] Julia Hörnle, Cross-border Internet Dispute Resolution (Cambridge University Process 2009) 13.
[1096] Directive on Consumer ADR, Article 6(3).
[1097] Directive on Consumer ADR, Article 6(4).

procedural rules of the proceedings, the legal effect and enforceability of ADR decisions on their websites and in durable medium if requested by the parties.[1098] The ADR entities are also required to provide an annual activity that reflects not only the number and type of disputes they handled each year but also recommendations for the parties on how to avoid these disputes.[1099] The purpose of the transparency requirement is to enhance public awareness of ADR, inform parties of their procedural rights and to educate the public on how to prevent disputes. Although people would assume ODR rules are easily accessible, it is surprisingly difficult for the parties to obtain these rules on ODR entities' websites.[1100] ODR rules are not directly available to the general public either because they are buried in a large number of transaction rules, making them difficult pinpoint or only available to industry insiders.[1101]

4.1.3.3. Principle of effectiveness

502. The principle of effectiveness requires ADR entities to provide consumers with a speedy and low-cost dispute resolution so that they are able to effectively use the ADR services. The service must be free or at a nominal fee for consumers. The ADR decisions should be available to consumers within 90 days from the ADR entity receives the complaint.

503. In ODR, both time and money can be saved through the application of information technology. First of all, by using electronic communications, parties and third-party neutrals can eliminate time they would have been spent in travelling and mailing hard copy documents to each other. Secondly, the procedural rules of ODR have been designed to be adaptable to ODR proceedings. For example, most ODR decisions are made based on documents only. There is also a delimitation of the type of disputes that an ODR entity will handle. Last but not least, time limits have been imposed in each stage of the proceeding. By using one third-party neutral or a public jury instead of a whole tribunal consisted of three judges or professionals, ODR becomes an affordable option.

4.1.3.4. Principle of fairness

504. Similar to the principle of procedural fairness in civil procedure rules, the fairness principle in

[1098] Directive on Consumer ADR, Article 7(1).
[1099] Directive on Consumer ADR, Article 7(2).
[1100] Ruha Devanesan and Jeffrey Aresty, 'ODR and Justice' in Ethan Katsh, *et al., Online Dispute Resolution: Theory and Practice*, Eleven International Publishing 2013) 279.
[1101] For example, only 1 (eJust) out of 5 (Virtual Courthouse, eJust, People Claim, Settle-Now and online-schlichter.de) ODR service providers provide their ODR rules online.

ADR requires parties to be given the opportunity to comment on the evidence and documents submitted by the other party.[1102] The fairness principle has different requirements in the context of consensual and adjudicative ADR. In case that the decisions are binding on the parties, the parties should be notified of them in writing or on a durable medium, and be given a statement of the grounds on which the outcome is based.[1103] In consensual ADR procedures, the parties shall be well informed of the possibility to withdraw from the procedure at any stage and the legal effect of accepting the proposed solution.[1104] It is essential that parties do not feel coerced into reaching a settlement in consensual ADR procedures and are aware of the possibility to seek redress through court proceedings.

4.1.3.5. Principle of legality

505. The legality principle is specifically designed for the protection of consumers and applies to ADR processes that impose a decision on the parties. For domestic disputes, the principle of legality ensures that ADR decisions do not deprive the consumers of the protection granted by their national law.[1105] In cross-border disputes, the consumer cannot be deprived of the protection afforded by mandatory provisions of their law of residence, if that law provides better protection than the law of the country where the ADR is established.[1106] In e-commerce transactions, disputes often arise in a cross-border context. In these cases, mandatory national law should be used to protect weaker parties' interests especially in consumer disputes.

4.1.4. Special procedural matters of ODR

506. The online feature of ADR is a double-edged sword. On the one hand, it improves the efficiency of dispute resolution, or at least that is its aim. On the other hand, it may challenge the procedural justice in ODR procedures. Think for instance of the facts that parties are usually not represented by lawyers in an ODR proceeding, that third-party neutrals are sometimes not selected by the parties, and that some of neutrals do not have enough expertise in dispute settlement.[1107] Also, there is added risk that evidence may be falsified as the evidence is quite often also presented in electronic form. Moreover, one could also wonder whether simplified

[1102] Directive on Consumer ADR, Article 9(1)(a).
[1103] Directive on Consumer ADR, Article 9(1)(c).
[1104] Directive on Consumer ADR, Article 9(2)(a)(c).
[1105] Directive on Consumer ADR, Article 11(1)(a).
[1106] Directive on Consumer ADR, Article 11(1)(b)(c).
[1107] This is especially the case in crowd-sourced ODR. See Jaap Van den Herik and Daniel Dimov, 'Towards crowdsourced online dispute resolution' (2012)7 J Int'l Com L & Tech 99.

ODR proceedings give parties sufficient opportunities to present their arguments. Furthermore, the decisions of ODR are oftentimes made merely based on written submissions.

507. Of all these issues, I will address three specific concerns that clearly illustrate the interplay between technology innovation and procedural justice and that must be addressed.

First, there are concerns regarding the security of the ODR process due to its use of information technology for transmission and storage of information. Second, one should also examine whether the new technology can facilitate communication and build trust between the parties in ODR. Last but not least, there is an interesting private international law question of whether the non-territoriality feature of ODR releases it completely from the jurisdictional control.

4.1.4.1. Security of data collected from ODR proceedings

508. The confidentiality principle is a unique feature in ADR which requires the ADR entities to ensure the information disclosed between parties during the process of ADR are kept private.[1108] The purpose of confidentiality is to protect business secrets and to prevent reputational damages to the parties. Parties in a dispute resolution process with confidentiality assurance are more likely to reach out an agreement than those in a dispute resolution process without such guarantee.[1109]

509. In cyberspace, ensuring the confidentiality of communication is a challenging task. In traditional ADR, all the communication is recorded physically. There it is easy to destroy all the information at one time. The destruction of ODR records is more difficult because all the communications are digitized and saved on a server or hard drive.[1110] Moreover, even though the encryption technologies enhance the security of communication, there is always a way to decrypt the data.[1111] Schaumann and Burger-Scheidlin have indicated the challenges of securing electronic communications in emails, messaging, and via telephones and video-conferences.[1112] Therefore, the use of information technology requires higher security standards in both the transmission and storage of information produced during the ODR

[1108] Brown and Marriott (n 184) 37.
[1109] Lawrence R Freedman and Michael L Prigoff, 'Confidentiality in Mediation: The Need for Protection' (1986)2 Ohio State Journal on Dispute Resolution 37; Camille Pecnard, 'The issue of security in ODR' (2004)7 ADR bulletin 1, 2.
[1110] Solovay and Reed (n 62) 8-21.
[1111] Hans Delfs and Helmut Knebl, *Introduction to cryptography: principles and applications*, vol 3 (Springer 2015) 4-5.
[1112] Philipp Schaumann & Max Burger-Scheidlin, 'The security and reliability of electronic communication' in Piers and Aschauer (n 171) 69-73.

proceedings.

A. Protection of information transmission

510. During the ODR process, parties will inevitably submit claims, counter-claims and evidential documents to support their arguments via email correspondence or web-based platforms. It is widely acknowledged that the unprotected email and web-based communications are more vulnerable than communications on paper documents.[1113] In order to improve parties' trust in using ODR, the ODR entities should provide secured infrastructure to protect information exchange between the parties. Asymmetry encryption technology (such as electronic signature) has been used to ensure the identity of the senders and integrity of email correspondence while the Hypertext Transfer Protocol has become the transmission protocol for web-based communication.[1114]

B. Protection of information storage

511. On the EU ODR platform, personal data related to a dispute was stored in the database of the ADR entity to which the dispute was submitted.[1115] The EU Commission shall have access to such personal data in so far as it is necessary to monitor the use and functioning of the ODR platform.[1116] Personal data related to a dispute shall be kept in the database only for the time necessary to achieve the purposes for which they were collected and to ensure that the parties are able to access their personal data. However, such data shall be deleted automatically, at the latest, six months after the data was transmitted to the ODR platform.[1117] Article 13 of the Regulation on Consumer ODR specifically requires the EU Commission to take appropriate technical and organizational measures to ensure the security of information processed on the ODR platform.

512. Besides the information that has been exchanged between the parties during the ODR process, there is additional information that should remain confidential including the electronic record of the ODR proceedings, the ODR decisions, the settlements that have been reached by the parties and the personal data of the parties. Unlike the physical world where documentation of

[1113] Thomas Schultz and others, 'Electronic communication issues related to online dispute resolution systems' (2002).
[1114] *Ibid*.
[1115] Regulation on Consumer ODR, Article 12 (1).
[1116] Regulation on Consumer ODR, Article 12 (2).
[1117] Regulation on Consumer ODR, Article 12 (3).

the disputes can be stored with a lock, electronic data is prone to leakage.[1118] The ODR entities shall employ a confidentiality policy and take responsibilities to secure the information enumerated by the parties during ODR proceedings against hacking or malicious attacks.[1119] The ODR entity may be liable if the information exchanged by the parties have been accessed by unauthorized persons because the ODR entity did not take preventive measures to ensure the security of the website.[1120] These preventive measures include using a closed system, building firewalls or encryption to the storage site systems, or using latest technology such as blockchain. For example, Nanjing Arbitration Committee in China has launched an online arbitration platform using blockchain technology to store electronic data for the parties.[1121] The Supreme People's Court of China has issued a Judicial Interpretation to recognize the evidentiary value of electronic data stored or authenticated by the blockchain technology.[1122] These technological security enhancement can improve the competitiveness of ODR entities, which ultimately attract more businesses for the ODR entities in the long run.

4.1.4.2. Online communication and trust in ODR proceedings

513. Marshall McLuhan states in his book "The medium is the message" that a medium is more than a vessel for a message and he asserts that it actually shapes the way people think.[1123] Electronic communication not only forms a new medium for people to exchange their thoughts but also plays an important role in building trust between disputed parties in ODR proceedings. That is why I will examine online communication and its role in building trust among parties.

514. Thibaut and Walker suggested that procedural factors affect people's perceptions of the fairness of dispute resolution events and outcomes.[1124] According to Lind and others, the procedural justice depends not only on how decisions are made but also on how people are

[1118] Data leakage report, see <https://www.techworld.com/security/uks-most-infamous-data-breaches-3604586/> accessed 10 October 2018.
[1119] The ODR entities such as arbitration institutions use an online platform for parties to make electronic filings. This is the case for JAMS, ICC and GZAC.
[1120] Kaufmann-Kohler and Schultz (n 688)191.
[1121] 'Nanjing Arbitration Committee in China Trials Blockchain-Based Online Ruling System', <https://news.8btc.com/nanjing-arbitration-committee-in-china-trials-blockchain-based-online-ruling-system> accessed 10 October 2018.
[1122] Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts, Interpretation No. 16 [2018] of Supreme People's Court, Article 11.
[1123] Marshall McLuhan and Quentin Fiore, 'The medium is the message' in Meenakshi Gigi Durham and Douglas M Kellner, *Media and cultural studies: Keyworks* (John Wiley & Sons 2009) 107.
[1124] Thibaut and Walker (n 1035).

treated in dispute resolution.[1125] ODR is facilitated by electronic communications that give parties opportunities to communicate with each other and to the neutral.[1126] However, there is a gap between ADR and ODR because electronic communications have reduced interpersonal trust between parties. Unlike in ADR, people in ODR procedures do not see each other in person, but at a distance. Research revealed that people communicating at a distance using electronic communication are likely to experience lower levels of interpersonal trust and higher rates of disruption and deterioration than those engaged in face-to-face communication.[1127]

515. Therefore, the use of electronic communication in dispute resolution is a double-edged sword. On the one hand, electronic communication allows parties to participate in dispute resolution process from different locations at any time. It also helps the parties to overcome social inhibitions by using computer-mediated communication.[1128] On the other hand, there are concerns about the effectiveness of the online communication in human-mediated communication. In electronic communication, there is a lack of non-verbal/social cues.[1129] As a result, the "rapport"[1130] between parties in building trust and facilitating dispute resolution is disconnected.

516. There are two ways to reduce the gap between screen-to-screen communication (electronic communications) and face-to-face communication in order to facilitate ODR proceedings. The first effective way to enhance trust in electronic communications is to use the latest information technologies to simulate face-to-face communications. With the use of virtual reality technology, the interpersonal trust can be enhanced by allowing parties to "meet" each other

[1125] E Allan Lind and others, 'Individual and corporate dispute resolution: Using procedural fairness as a decision heuristic' (1993) Administrative Science Quarterly 224, 226. Lind and Tyler (n 1035) 217.
[1126] Schultz and others (n 1113); Noam Ebner, 'ODR and Interpersonal Trust' in Ethan Katsh, *et al., Online Dispute Resolution: Theory and Practice*, Eleven International Publishing 2013).
[1127] Ebner (n 1126)223. Aimee L Drolet and Michael W Morris, 'Rapport in conflict resolution: Accounting for how face-to-face contact fosters mutual cooperation in mixed-motive conflicts' (2000)36 Journal of Experimental Social Psychology 26, 46. (Tilburg Inst. for Interdisc. Stud. of Civil Law & Conflict Resol. Sys., Working Paper No. 002/2010, 2010), available at <http://ssrn.com/abstract=1618719>.
[1128] Sara Kiesler and Lee Sproull, 'Group decision making and communication technology' (1992)52 Organizational behavior and human decision processes 96, 104.
[1129] Jelle van Veenen, 'From:-(to:-) Using Online Communication to Improve Dispute Resolution' (2010) 15 (Tilburg Inst. for Interdisc. Stud. of Civil Law & Conflict Resol. Sys., Working Paper No. 002/2010, 2010), available at <http://ssrn.com/abstract=1618719>; Jens Mazei and Guido Hertel, 'Trust in Electronically Mediated Negotiations' in *Trust and Communication in a Digitized World* (Springer 2016) 196.
[1130] Rapport is "a state of mutual positivity and interest that arises through the entertainment of non-verbal expressive behavior in an interaction." See Linda Tickle-Degnen and Robert Rosenthal, 'The nature of rapport and its nonverbal correlates' (1990)36 Journal of Experimental Social Psychology 26, 28.

through 3D video-conferencing. [1131]

517. Another important way to enhance trust is to adopt non-verbal communication tactics in electronic communication. Non-verbal gestures, such as nodding or eye contact, are elements that naturally occur in face-to-face interactions and can facilitate the establishment of rapport among parties.[1132] The theory of social information-processing, as the leading model in studying the impression formation of the parties in computer-mediated communication, was proposed by Walther.[1133] This theory holds that computer-mediated communication retards the rate at which impression-relevant cues are exchanged during social interaction.[1134] It is therefore possible to improve non-verbal cues by developing tactics for the parties to implement in electronic communications. For example, Noam Ebner and Jeff Thompson have proposed to incorporate five elements of non-verbal communication in online video-based meditation to build trust among parties.[1135] These five elements are: (i) movement: make eye contact with the webcam, use open-handed gestures, orient your body towards the computer, nod your head occasionally while listening, sit up right while occasionally leaning forward; (ii) environment: ensure each party participates from a quiet location to limit distractions; (iii) touch: avoid fidgeting or playing with jewelry or hair, avoid frequently touching of your face and your clothing; (iv) tone: be prepared and confident, this helps ensure tone and paralanguage is positive; (v) appearance: dress suitably, just as one would conduct a face-to-face mediation process. Although it is possible to enhance trust in electronic communication and reduce the gap between screen-to-screen communication and face-to-face communication, ODR is foreseen to settle disputes with simplified facts and small value, notably B2C disputes and small claims B2B disputes.[1136] For large-claim B2B commercial disputes which require exchange of evidence, cross examination and sophisticated thinking, face-to-face

[1131] Wall Street Journal, 'Virtual Reality Takes on the Videoconference', < https://www.wsj.com/articles/virtual-reality-takes-on-the-videoconference-1474250761> accessed 21 April, 2017.
[1132] Morris, M., Nadler, J., Kurtzberg, T. R., & Thompson, L. L. (2002). Schmooze or lose: Social friction and lubrication in e-mail negotiations. Group Dynamics: Theory, Research, and Practice, 6, 89-100.
[1133] Joseph B Walther and Judee K Burgoon, 'Relational communication in computer-mediated interaction' (1992)19 Human communication research 50.
[1134] Jeffrey T Hancock and Philip J Dunham, 'Impression formation in computer-mediated communication revisited an analysis of the breadth and intensity of impressions' (2001)28 Communication research 325, 328.
[1135] Noam Ebner and Jeff Thompson, '@ Face Value: Non-Verbal Communication and Trust Development in Online Video-Based Mediation' (2014)2 International Journal of Online Dispute Resolution 103, 120.
[1136] Louis F Del Duca, Colin Rule and Brian Cressman, 'Lessons and Best Practices for Designers of Fast Track, Low Value, High Volume Global E-Commerce ODR Systems' (2015)4 Penn St JL & Int'l Aff 242. Pablo Cortés and Fernando Esteban de la Rosa, 'Building a Global Redress System for Low-Value Cross-Border Disputes' (2013)62 International and Comparative Law Quarterly 407.

communication or a hybrid proceeding (which combines screen-to-screen communication with face-to-face communication) may serve a better role to avoid trust concerns.[1137]

4.1.4.3. Non-territoriality feature of ODR

518. Cross-border e-commerce has challenged the application of traditional conflict of laws rules as the parties are located in different parts of the world and the contracts were often concluded by the parties who are more often located in different locations. There are no uniform jurisdiction or choice-of-law rules with regard to e-commerce disputes arising from the Internet.[1138] However, it has been put forward that the use of ODR can avoid the determination of jurisdiction and hence do not require such uniform rules.[1139] Katsh and others argue that ADR is conducted in the shadow of the "eBay law", which results from the users' agreeing to the terms and conditions provided by eBay.[1140] Other ODR rules (such as Taobao Rules, Online Arbitration Rules of GZAC and Domain Name Dispute Resolution Policy) have also designed a set of substantive or/and procedural rules which are directly applicable to dispute settlement. These ODR rules have indeed improved the efficiency of ODR procedures without having to refer to national laws of each jurisdiction where the disputed parties are located.

519. Nevertheless, ODR is not completely detached from national laws and jurisdictions. In the area of B2C disputes, mandatory rules may still be applicable to ODR. For example, in the EU, the principle of legality requires that the ADR decisions cannot result in the consumer being deprived of the protection afforded to him by virtue of the national consumer law where the consumers habitually reside.[1141] Similarly, from a procedural perspective, the principle of liberty requires that the decision of the third-party neutral in B2C disputes is binding on the parties only if the parties have been informed of its binding nature in advance and have specifically accepted it.[1142] Moreover, some ODR procedures (such as online arbitration proceedings) still require judicial support in order to have a binding and enforceable

[1137] Kiesler and Sproull (n 1128) 118.
[1138] Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Cambridge University Press 2010) 18. Common Law system and Civil Law system use quite different jurisdiction and choice-of-law rules in internet disputes.
[1139] Rafal Morek, *Regulation of online dispute resolution: between law and technology* (2005) 34. José Edgardo Muñoz-López, 'Internet Conflict of Laws: A Space of Opportunities for ODR' (2009) 14 International Law, Revista Colombiana de Derecho Internacional, 163-190.
[1140] Katsh, Rifkin and Gaitenby (n 152) 731.
[1141] Directive on Consumer ADR, Article 11.
[1142] Directive on Consumer ADR, Article 10 (1).

decision.[1143]

4.2. Application of ODR principles to selective ODR rules in e-commerce disputes

520. The following section will discuss three main types of ODR that are most popularly used to resolve disputes, namely online arbitration, internal complaint mechanism and domain name dispute resolution. These ODR rules will be studied to reflect the procedural justice in current ODR practice. The study will examine, to what extent, the procedural efficiency can be achieved while ensuring a minimum procedural fairness standard in ODR. Procedural efficiency means the ODR procedures can be conducted with reduced cost, shortened time and streamlined procedures. Procedural fairness means the ODR procedures are in compliance with the procedural principles stipulated in Section 4.1.

4.2.1. Online arbitration

521. "Online arbitration" refers to the use of information technology in arbitration. Depending on the extent to which information technology is used, Mohamed Wahab has divided ODR into two general categories[1144]: (a) technology-assisted ODR[1145] where the role of human factor in resolving dispute is significant and the use of technology is limited to facilitating communication and information exchange, as well as to ensuring the confidentiality and security of the proceedings (such as online arbitration and online mediation); (b) technology-based ODR,[1146] where a fully-fledged application of information technology is utilized to conduct the arbitration proceedings online and computers and software programs are designed to replace any human neutral or minimize their role (such as automated negotiation by blind bidding or automated decision making by algorithm)[1147]. The following study will be focused

[1143] In arbitration, the seat of arbitration determines a number of issues such as arbitrability, determination of the governing law in the absence of choice, nationality of arbitral awards.

[1144] Mohamed S. Adbel Wahab, 'ODR and E-Arbitration: Trends & Challenges' in Ethan Katsh, *et al., Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2013) 402; Farzaneh Badiei, 'Using Online Arbitration in E-commerce Disputes: A Study on B2B, B2C and C2C Disputes' (2015)2 International Journal of Online Dispute Resoltuion 88, 98.

[1145] For example, the NetCase system developed by International Chamber of Commerce Court of Arbitration and the WebFile system developed by the American Arbitration Association. These electronic document management systems facilitate information and document exchange between parties, arbitrators and the institution in a private, secure and user-friendly environment.

[1146] Online arbitration rules that have been issued by arbitration institutions are for example, Hong Kong International Arbitration Center Electronic Transaction Arbitration Rules of 2002, Czech Republic Additional Procedures for Online Arbitration of 2004, China International Economic and Trade Arbitration Commission Online Arbitration Rules of 2009 and Guangzhou Online Arbitration Rules of 2015.

[1147] Blind bidding is used to settle monetary disputes where a computerized program will select the price from the range which both parties agree on.

on the online arbitration which belongs to technology-assisted ODR as the human arbitrator still plays a crucial role in the proceedings and the information technology is used to facilitate online arbitration proceedings. The Online Arbitration Rules of Guangzhou Arbitration Commission will be used to illustrate how a workable procedure is set up in an online environment.

522. On 23 June 2015, the China's Guangzhou Arbitration Commission (GZAC) published its online arbitration rules, which has come into effect since 1 October 2015.[1148] GZAC Online Arbitration Rules consist of one set of general online arbitration rule for all type of disputes, as well as three distinct sets of online arbitration rules that can be used for specific types of disputes, namely small claim online shopping disputes, online loan disputes and credit card disputes. In addition, GZAC established an online arbitration platform (https://www.gzyijian.com/site/index) to accept cases, collect evidence and hold online arbitration proceedings. In 2017, GZAC had settled 70,979 cases with a total claim value of 3.561 billion RMB (around 0.448 billion EUR).[1149] The major terms of GZAC Online Arbitration Rules will be discussed hereunder to illustrate how online arbitration incorporates information technologies and determine whether these rules are sufficient to secure a valid and enforceable arbitral award.

523. "Online arbitration" is defined in GZAC Online Arbitration Rules as online alternative dispute resolution that uses information technology to provide professional knowledge and arbitration service to disputing parties.[1150] It is stipulated that online arbitration rules apply to disputes both arising from electronic transactions or other type of non-electronic transaction disputes.[1151] GZAC Online Arbitration Rules are more suitable for small-claim Internet disputes such as online shopping disputes and online loan disputes owing to its efficiency, low cost and compatibility with electronic evidence.[1152] As the issues with regard to the validity of electronic arbitration agreements and the enforceability of online arbitral awards are respectively dealt with in Chapter 3 and Chapter 5, the following discussion regarding GZAC

[1148] Guangzhou Arbitration Commission (GZAC) Online Arbitration Rules, 23 June, 2015, available at: < http://14.23.88.135:81/WEB_CN/AboutInfo.aspx?AboutType=4&KeyID=100b1ae3-9f15-4bfc-bf59-a90273778fa5>. (GZAC Online Arbitration Rules)

[1149] 'Online Arbitration: A new trend in internet finance disputes' (网络仲裁：互金案件审理), Legal Weekly, March 28, 2018, < http://www.legalweekly.cn/article_show.jsp?f_article_id=15818> accessed 10 September 2018.

[1150] GZAC Online Arbitration Rules, Article 2.

[1151] GZAC Online Arbitration Rules, Article 4(4).

[1152] Guangzhou Internet Finance Association, 'Guangzhou Arbitration Commission: online arbitration is the most effective way to solve P2P online loans', 23 June 2015, < http://www.gzifa.org/hynews/32> accessed 23 October 2016.

Online Arbitration Rules will concentrate on procedural requirements that are distinctive from offline arbitration rules.

524. GZAC Online Arbitration Rules have provided flexibility in online arbitration proceedings by means of facilitating electronic communication. They rendered online arbitration proceedings more convenient and efficient by, for instance, designating email addresses in the absence of choice, by electronic delivery of documents and by using online arbitration platform to exchange evidence. Nevertheless, the GZAC Online Arbitration Rules may run the risk of violating procedural fairness in online arbitration given the widely-used electronic communications. Parties may challenge the validity of arbitral awards claiming that they are not properly informed by electronic communications and that there is a lack of equality between the parties. In that regard, four procedural issues will be identified in the following sections: the right to be notified, the right to be heard, time limits and seat of online arbitration.

4.2.1.1. Right to be notified

525. The right to be notified is an important procedural right of the parties. An arbitral award could be set aside if the party was not notified of the appointment of the arbitrator or of the arbitral proceedings.[1153] GZAC Online Arbitration Rules have adopted a combination of different notification methods (email and mobile phone) to ensure that parties are properly notified. Arbitration documents are communicated through email, mobile phone or any other communication means that have been provided by the parties in the arbitration agreement.[1154] The default delivery time of the arbitration documents shall be the time when the online arbitration platform indicates that arbitration documents have been successfully delivered to the parties.[1155] Meanwhile, GZAC shall send text messages to the mobile device provided by the recipient as a reminder. In case of any inconsistency between the delivery time between the system of GZAC and the recipient's system, the delivery time of the recipient's system prevails provided that sufficient evidence has been provided by the recipient.

526. If a party has not indicated any communication means, nor can any communication means be found by the other party or by GZAC, GZAC will create an email address via the online arbitration platform for that party as his/her designated email address.[1156] After GZAC has

[1153] UNCITRAL Model Law on International Commercial Arbitration, Article 34(2)(a)(ii)(iv); PRC Arbitration Law, Article 58(3); New York Convention, Article V(1)(b).
[1154] Nowadays, there are various of social medium applications such as WhatsApp, Wechat and QQ.
[1155] GZAC Online Arbitration Rules, Article 10.
[1156] GZAC Online Arbitration Rules, Article 11.

notified the parties of the designated email address and password by postal delivery, any documents delivered to the designated email address shall be deemed to have been delivered to the parties. Problems may still arise when there is technical breakdown with the email delivery system and a party claims that he/she failed to receive important documents. In such cases, it is a matter of evidence to prove when exactly the electronic documents have been delivered.

527. In *Cosmos Marine v. Tianjin Kaiqiang* case, the People's Court of China refused to enforce an arbitral award due to a lack of due notice based on Article V(1)(b) of the New York Convention.[1157] Although the applicant notified the respondent by email three times to appoint an arbitrator, there is no evidence that can prove the successful delivery of these emails. As a result, these emails could not be considered duly delivered. This is an example of how the use of electronic communications may affect the procedural consequence of an arbitral award.

528. Similar to postal mail, it is uncertain when an email has been successfully delivered because the process of email deliveries may pass through an infinite number of servers before it reaches its destination.[1158] The recipient needs to retrieve the email from his/her Internet Service Provider by downloading the email from his/her computer. Usually, the sender will receive a notification of delivery failure if the email has not reached the recipient. The sender can also request a delivery report or a read receipt to confirm when the email has been delivered and when it has been read. Owing to the advanced technological innovation, there are new technologies available now to prove the delivery of electronic documents. One is the electronic registered service that can provide evidence relating to the handling of the transmitted data including proof of sending and receiving the data messages. This also protects transmitted data messages against the risk of loss, theft, damage or any unauthorized alternations.[1159] Another option is to create an electronic delivery system on the online arbitration platform where the parties can receive and send documents through this electronic delivery system.[1160] This is the

[1157]《最高人民法院关于是否裁定不予承认和执行英国伦敦“ABRA 轮 2004 年 12 月 28 日租约”仲裁裁决的请示的答复》[2006]民四他字第 34 号(Reply of the SPC to a Request for Instructions on Recognition and Enforcement of a London Ad Hoc Arbitral Award regarding 'ABRA Charter Party of 28 December 2004', (2007) SPC 4th Civil Chamber, Others No. 34] (WAN E'xiang (ed.), Guide on Foreign-related Commercial and Maritime Trial vol. 14, 83-86 (People's Court Press, 2007:1)).

[1158] Sharen Christensen, 'Formation of Contracts by Email-Is it Just the Same as the Post' (2001) 1 Queensland University of Technology Law & Justice Journal, No.1, 32.

[1159] Council Regulation (EU) No 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in Internal Market and Repealing Directive 1999/93/EC [2014] OJ L 257/73 (eIDAS), Article 3(36).

[1160] GZAC, 'The development and improvement of electronic delivery in commercial arbitration in China'(我国商事仲裁电子送达方式的推行和完善), (2016) Zhong Cai Yan Jiu (仲裁研究) 42, 52.

mechanism through which GZAC used to permit parties to exchange electronic documents.

4.2.1.2. Right to be heard

529. The right to be heard is one of the main principles embodied in the due process requirement of the arbitration proceedings.[1161] It ensures that each party has enough time to present its case. It covers a wide scope of content, including: the right to challenge the jurisdiction, right to argue, right to select arbitrators, and right to examine the evidence.[1162] In China, a denial of the right to be heard constitutes legal grounds[1163] to set aside an arbitral award both in domestic and foreign-related arbitration[1164]. It is one of the grounds used to set aside an international arbitral award under Article V(1)(b) of the New York Convention.

530. Most disputes that are resolved today through online arbitration proceedings involve simple facts (such as sales contracts, loan contracts and payment contracts) and concern a small claim. That is why these cases are usually decided by the arbitral tribunal based on the written submissions of the parties and how it is justified that parties have limited time to submit evidence and respond to claims. The question may arise, however, whether parties have been given the opportunity to present their cases during online arbitration.

531. Most national arbitration laws expressly require arbitral tribunals to conduct a hearing if requested by the parties.[1165] In some countries, the arbitral tribunal is not required to hold oral hearings in an arbitration if they conclude that a hearing is unnecessary. [1166] Parties are also free to agree to dispense with an oral hearing as 'documents-only' arbitrations are valid and

[1161] Lew *et al* (n 296) 524; Article 18 of the UNCITRAL Model Law on International Commercial Arbitration provides that 'each party shall be given a full opportunity to present his case.'

[1162] Beijing People's High Court, Several Opinions on the Trial for the Judicial Review on the Validity of Arbitration Agreement and the Set-aside of Arbitral Awards (北京市高级人民法院关于审理请求仲裁协议效力、申请撤销仲裁裁决案件的若干问题的意见).

[1163] The legal grounds to set aside domestic arbitral awards are stipulated in Article 58(3) of the PRC Arbitration Law, while the legal grounds to set aside foreign-related arbitral awards are stipulated in Article 274 (2) of the Civil Procedure Law of the PRC. (Order No. 59 of the President of the People's Republic of China, effective from 1 January 2013).

[1164] Foreign-related civil relations are i) either one of the parties is a foreigner, stateless person, or foreign legal person; or ii) the subject matter is located in a foreign country; or iii) the legal fact that the civil rights or obligations are established, changed, or terminated is in a foreign country.

[1165] Belgian Judicial Code, Article 1705(1): "unless the parties have agreed that no hearings shall be heard, the arbitral tribunal shall hold such hearings...if so requested by a party"; Spanish Arbitration Act, 2011, Article 30(1); Gary B. Born, *International Commercial Arbitration* (Kluwer Law International 2014) 3235; Matti Kurkela and Santtu Turunen, *Due process in international commercial arbitration* (Oxford University Press 2010) 157.

[1166] Dean Witter Reynolds, Inc. V. Eno, 669 N.Y.S. 2d 42, 43 (N.Y. App. Div. 1998); O' Donoghue v. Enter. Inns. Plc [2008] EWCH B15 (Ch) (English High Ct.); Judgement of 21 June 1990, Compagnie Honeywell Bull SA v. Computacion Bull de Venezuela CA, 1991 Rev. arb. 96 (Paris Cour d'appel); Kaufmann-Kohler and Schultz (n 688) 207.

enforceable in general.[1167] Under the PRC Arbitration Law, arbitration shall be conducted by holding hearings. However, parties are allowed to dispense with oral hearing and the arbitral tribunal may therefore render an arbitral award based on the written submission, written defense and other material under this circumstance.[1168] If the arbitral tribunal deems it appropriate to hear the case on the basis of written submissions, it should notify the parties and ensure that the parties do not object to the hearing on the basis of the documents.[1169] Under the UNCITRAL Model Law on International Commercial Arbitration, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence and arguments, or whether the proceedings shall be conducted solely on the basis of documents and other materials subject to any contrary agreement by the parties.[1170] Although the arbitral tribunal can decide whether or not to hold hearings, parties can still request oral hearings at an appropriate stage of the proceedings.[1171]

532. Under GZAC Online Arbitration Rules, the arbitral awards are typically made based on written submissions, and oral hearings are only conducted if the arbitral tribunal considers it necessary.[1172] Although the hearing is only part of the right to be heard, it can be argued that GZAC Online Arbitration Rules risk denying parties' request to hold hearings, leaving parties with certain grounds to challenge the validity and enforceability of the arbitral award. The People's Court has set aside the arbitral awards in cases that the arbitral awards were made by the tribunal on the basis of documents, in the absence of parties' approval to dispense with the oral hearing.[1173]

533. It could be argued that the parties have agreed to dispense with the oral hearings by selecting GZAC online arbitration.[1174] Nevertheless, in my opinion, the parties should still be given the

[1167] Belgian Judicial Code, Article 1705(1): "unless the parties have agreed that no hearings shall be held."; Spanish Arbitration Act, 2011, Article 30(1).
[1168] PRC Arbitration Law, Article 39.
[1169] 'Chapter 7: Arbitral Procedures', in Lin Yifei, *Judicial Review of Arbitration: Law and Practice in China* (Kluwer Law International 2018) 172; CIETAC Arbitration Rules (2015), Article 35(2).
[1170] UNCTIRAL Model Law on Arbitration, Article 24(1).
[1171] *Ibid*; Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 2010) 312.
[1172] GZAC Online Arbitration Rules, Article 24(1).
[1173] In Ye Qing Plastic Products Co., Ltd.'s application to annul arbitral award, (2002) Er Zhong Min Te No.06244(桦庆塑胶制品有限公司申请撤销仲裁裁决案) and Renren Xing Technology Stock Co., Ltd and Fang Yan on the Enforcement Application of arbitral award, (2018) Gui 07 Zhi No. 147 (人人行科技股份有限公司、方燕执行实施类执行裁定书), the People's Court has declined the enforcement of the arbitral award due to a lack of parties' agreement to dispense with the oral hearings in arbitration proceedings.
[1174] Pursuant to Article 4(3) of GZAC Online Arbitration Rules, when the parties have submitted the dispute to GZAC online arbitration, they are presumed agree to use GZAC Online Arbitration Rules.

option to hold oral hearings during online arbitration proceedings.[1175] This is a compromise between procedural efficiency and procedural fairness. While documents-only arbitration could enhance efficiency of arbitration proceedings in most cases, giving parties the option to hold oral hearings during online arbitration proceedings can ensure that parties are able to present themselves properly.

4.2.1.3. Time limits of online arbitration

534. The parties should use the online arbitration platform (https://www.gzyijian.com/site/index) to submit their arbitration applications and relevant documents. Upon the receipt of an arbitration application and case handling fee, GZAC should decide within 3 days whether or not to accept the case if all the necessary conditions are fulfilled.[1176] After accepting the case, GZAC should notify the parties of its decision on whether to accept the case, together with the Online Arbitration Rules and the list of arbitrators, within 5 days.[1177] The respondent shall submit his/her statements of defense and evidence within 5 days after receiving the arbitration notification and relevant documents submitted by the claimant to GZAC. The claimant shall respond to the statements of defense and evidence within 5 days after receiving these documents from GZAC. GZAC Online Arbitration Rules provide alternatives for the parties to present their arguments other than oral hearings. During the arbitration proceedings, the arbitral tribunal may issue a question list to the parties via the online arbitration platform in order to investigate unclear facts.[1178] The parties are obliged to answer the relevant questions within 5 days. If it is not necessary to issue a question list to the parties, the tribunal shall make a decision within 30 days after establishing the arbitral tribunal. An extension for decision making can be requested by the sole arbitrator or the chairman of the arbitral tribunal and such request is approved by the chairman of GZAC. The main difference between GZAC Online Arbitration Rules and GZAC Arbitration Rules is the time limit for parties to answer the

[1175] In Switzerland, England and Italy, an oral hearing is not a necessary requirement for arbitration, provided that the tribunal must hold a hearing on request of one party and it may do so on its own initiative. Norbert Horn, 'Arbitration and Electronic Communications: Public policy' (2009)12 International Arbitration Law Review 107, 109. In Article 32 of CIETAC Online Arbitration Rules (2015), the arbitral tribunal shall hear the cases on a document-basis unless the parties agree to hold oral hearings or the arbitral tribunal decides it is necessary to do so.
[1176] GZAC Online Arbitration Rules, Article 17.
[1177] GZAC Online Arbitration Rules, Article 18.
[1178] GZAC Online Arbitration Rules, Article 24(1).

question list and for decision making.[1179]

535. Whether the time limit for parties to answer the question list is proportionate should be assessed by examining the value of the claim,[1180] the difficulty level of the question list and whether parties can apply for extensions in certain circumstances. Online arbitration shares common features (such as simplified procedural rules and strict time limits) with fast-track arbitration. The arbitration process may be accelerated by reducing the parties' procedural rights to the extent that such limitation is allowed.[1181] A similar ideology applies to online arbitration which is also geared for more efficiency. It has been found that the imposition of a time limit is less of a concern than the removal of the party's opportunity to comment on evidence.[1182] The minimum requirement is that the parties are offered at least one opportunity to allege facts and submit evidence, and that parties are allowed to present pertinent evidence on relevant facts.[1183] In the current GZAC online arbitration rules, both parties are given opportunities to submit evidence and present their statements against the evidence of the counter-party. The time limit imposed by GZAC Online Arbitration Rules is justified if parties are given sufficient notice of such time limit and the party or the arbitral tribunal has the flexibility to extend the time limit where the facts specifically demand it.[1184] When the arbitral tribunal deems it necessary, it can use various electronic communications such as online video conferencing, online communication or telephone conferencing to hold oral hearings on the condition of equal treatment to the parties.[1185] The parties have the right to postpone a hearing if such request is made 2 days in advance and approved by the tribunal.

536. Owing to the use of online arbitration platform and streamlines of online arbitration proceedings, the arbitral tribunals are able to make decisions more efficiently. Nevertheless,

[1179] In accordance with Article 70(1) of GZAC (offline) Arbitration Rules, the arbitral award shall be made within 4 months upon the composition of arbitral tribunal.
[1180] Martin (n 34)33.
[1181] Thomas Schultz, 'Human rights: A speed bump for arbitral procedures? An exploration of safeguards in the acceleration of justice' (2006)9 American University International Law Review, 10-11. Mohamad Salahudine Abdel Wahab, 'Chapter 6: Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation', in (eds), *Expedited Procedures in International Arbitration*, Dossiers of the ICC Institute of World Business Law, Volume 16 (Kluwer Law International2017)145-146; Klaus Peter Berger, 'The Need for Speed in International Arbitration', 25 Journal of International Arbitration 5, (Kluwer Law International 2008) 595-612.
[1182] Irene Welser and Christian Klausegger, 'Fast Track Arbitration: Just fast or something different?' (2009)259 Austrian Arbitration Yearbook 267, 271; Herbert Kronke, *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York Convention* (Kluwer Law International 2010) 387.
[1183] Schultz (n 1181) 10.
[1184] Mauro Rubino Sammartano, *International Arbitration Law and Practice* (Kluwer Law International 2001)835; Kronke (n 1182) 244.
[1185] GZAC Online Arbitration Rules, Article 24 (2).

online arbitration proceedings are more suitable for small claim disputes with simple legal relationships and clear evidence.[1186] For disputes that involve complicated legal relationships or unclarified matters, GZAC Online Arbitration Rules provide both the parties and the arbitral tribunal with the option to convert online arbitration to offline arbitration as this allows the tribunal to have sufficient time to investigate the case.[1187]

4.2.1.4. Seat of online arbitration

537. The "seat of arbitration" is where an international arbitration has its legal domicile or judicial home.[1188] It normally determines the nationality of an arbitral award, which affects the extent to which an arbitral award may be challenged.[1189] In online arbitration, in the absence of a party's choice on the seat of arbitration, additional rules are needed to identify the seat of arbitration. In most jurisdictions, arbitration is not allowed to float without attaching itself to a national jurisdiction.[1190] This is to ensure a legal framework in which arbitration agreements and arbitral awards can be recognized and enforced. In GZAC general online arbitration rule, if the parties have not designated the place of arbitration, the location of GZAC (Guangzhou, a city in China) shall be the seat of arbitration.[1191] GZAC may also designate other places as the seat of arbitration taking into consideration other connecting factors of the disputes. The online arbitral award shall be deemed to be made at the place of arbitration.

538. In online arbitration, the parties and the arbitrator(s) might be located in different places, and the hearings and deliberations may take place in various jurisdictions. Whether the non-territoriality feature of ODR has challenged the selection of the seat of online arbitration? It is a well-established rule held by academia and arbitration institutions that an arbitration is largely determined by the "seat of arbitration" in international arbitration.[1192] The seat theory

[1186] GZAC Online Arbitration Rules, Article 28(3). See also Wang Xiaoli, 'A study on the establishment of online arbitration rules: a perspective from GZAC Online Arbitration Rules' (探析网络仲裁规则的构建——以《中国广州仲裁委员会网络仲裁规则》为视角), (2016) Zhong Cai Yan Jiu (仲裁研究) 42, 7.
[1187] GZAC Online Arbitration Rules, Article 25.
[1188] Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International 2015) 111-128.
[1189] Mohamed S. Abdel Wahab, 'ODR and E-Arbitration' *in* Ethan Katsh, *et al., Online Dispute Resolution: Theory and Practice*, Eleven International Publishing 2013) 422.
[1190] Hong-lin Yu and Motassem Nasir, 'Can Online Arbitration Exist Within the Traditional Arbitration Framework?', *Journal of International Arbitration*, Vol. 20, No. 5, 465-466.
[1191] GZAC Online Arbitration Rules, Article 7.
[1192] See Born (n 1165) 2053 ; Alexander J Bělohlávek, 'Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth' (2013)31 ASA Bulletin 262, 264. See institutional rules: for example, Article 16 of LCIA Arbitration Rules, Article 21 of SIAC and Article 14 of HKIAC.

identifies the law of the seat of arbitration (*lex loci arbitri*) with the law governing the arbitration (*lex arbitri*) to safeguard due process and prevent arbitrators from abusing their power.[1193] As Professor Born summarized, the law of the seat of arbitration not only governs the internal matters of arbitration which includes arbitrability, determination of the governing law (whether substantive or procedural), but also the external matters of arbitration including the judicial supervision of the arbitral proceedings.[1194]

539. There are growing concerns with regard to the selection of the seat of online arbitration as there are several connecting factors within online proceedings.[1195] For example, the parties and the arbitral tribunal are located in different places, the servers of the institution are located in different places and the arbitration process is held online without a fixed location.[1196] Arguably, the seat of arbitration could be the place where the servers are located, where the arbitrators are located, or even where the owner or controller of the website is located.[1197] The theory of "seat of arbitration" has therefore been challenged by the "delocalization theory"[1198] in online arbitration, holding that instead of forcing online arbitration into the existing arbitration framework, one should detach it from the controls imposed by the law of the place of arbitration and jurisdiction should be exercised by the country where the recognition or enforcement of arbitral awards is sought.[1199]

540. Although the delocalization theory seems to provide a virtual framework for online arbitration, it may encounter practical problems in conducting the arbitration proceedings and supervising the arbitral awards. There is not any legal framework that could conduct the judicial review of arbitral awards and support the recognition and enforcement of the arbitral award. Therefore, the seat of arbitration theory should still play an important role in supporting and supervising

[1193] Alexander J Belohlavek, 'Seat of Arbitration and Supporting and Supervising Function of Courts' (2015) Czech (& Central Europea) Yearbook of Arbitration: Interaction of Arbitration and Courts 21.
[1194] Gary Born, *International arbitration: cases and materials* (Kluwer Law International 2015) 599-600.
[1195] Jasna Arsić, 'International Commercial Arbitration on the Internet–Has the Future Come Too Early?' (1997)14 Journal of International Arbitration 209, 218-219.
[1196] *Ibid*; Maurice HM Schellekens, 'Online Arbitration and E-commerce' (2002)9 Electronic Communication Law Review 113, 122.
[1197] Wahab (n 1144) 422; Li Hu, Study on Legal Issues in Online Arbitration (网上仲裁法律问题研究) (Zhong Guo Min Zhu Fa Zhi Chu Ban She 民主与法制出版社 2005) 137-138; Arsić (n 1195).
[1198] Delocalization theory held that the development of international commercial arbitration may be impeded by the restrictions imposed on arbitration procedures by national laws. See Jan Paulsson, 'The extent of independence of international arbitration from the law of the situs' in *Contemporary Problems in International Arbitration* (Springer 1987). Jan Paulsson, 'Delocalisation of international commercial arbitration: when and why it matters' (1983)32 International & Comparative Law Quarterly 53.
[1199] Hong-lin Yu and Motassem Nasir, 'Can online arbitration exist within the traditional arbitration framework?' (2003)20 Journal of International Arbitration 455, 463.

online arbitration proceedings for at least three reasons. First of all, the arbitration institutions do not possess any judicial power to issue injunctions (such as the seizure of goods and freezing of property) to facilitate arbitration proceedings.[1200] Instead, the national courts of the seat of arbitration can support the arbitration proceedings in this regard. Second, the judicial review by the national court of the seat of arbitration can ensure that the arbitral awards are conducted in due process and in accordance with procedural fairness standards. According to Article V(1)(d)(e) of the New York Convention, the court of the country where the enforcement is sought may reject enforcement if the award has not become binding or has been set aside under the law of the country in which the award was made. In addition, under Article VI, a national court can stay enforcement proceedings if an action to set aside is pending in the country of the seat. These rules demonstrate the importance of the seat of arbitration in assessing the validity of arbitration agreements and arbitral awards. Third, the determination of the seat of arbitration in online arbitration does not deviate significantly from offline arbitration because of its virtual character. The fact that the online proceeding is conducted online is similar to having the offline hearing held in one place while deliberation is made in another one. The arbitral tribunal can meet at any place (other than the seat of arbitration) it considers appropriate for the hearings of witnesses, experts or the parties, or for the inspection of goods, other property or documents, without touching upon the essence of the seat of arbitration.[1201]

541. As a default rule, the location of GZAC (Guangzhou) will be the seat of online arbitration if the parties have not designated the seat of arbitration in the agreement. In addition, Article 7 of the GZAC Online Arbitration Rules provides that the institution has the discretion to determine other places as the seat of arbitration by considering all the connecting factors of the dispute. This is intended to facilitate the arbitration proceedings for the convenience of the parties.[1202]

4.2.2. Internal complaint mechanism of third-party online platform

542. Third-party online platforms[1203] can be described as "software-based facilities offering an online trading venue where providers and users of content, goods and services can meet".[1204] There are different types of online platforms: such as social media platforms, application stores,

[1200] Bělohlávek (n 1192) 268.
[1201] UNCITRAL Model Law on International Commercial Arbitration, Article 20(2).
[1202] Article 20 (1) of the UNCITRAL Model Law on International Commercial Arbitration
[1203] "Third-party online platform" will be interchangeably used with "online trading platform".
[1204] 'A Digital Single Market Strategy for Europe-Analysis and Evidence' (n 928) 52.

audiovisual and music platforms, e-commerce platforms (marketplaces), or the platform providing services such as Airbnb and Uber.[1205] This study will focus on e-commerce platforms (also called "marketplaces") on which buyers and sellers trade goods or services.

543. The marketplace operator, who acts as an intermediary of the transactions between sellers and buyers, has customarily designed an internal dispute resolution mechanism to handle disputes arising from transactions concluded on the marketplaces.[1206] Effective internal complaint system is beneficial both to consumers and marketplaces. On the one hand, it increases consumers' confidence in marketplaces. On the other hand, it increases the financial performance of the marketplace as a result of consumer's satisfaction with marketplaces.[1207]

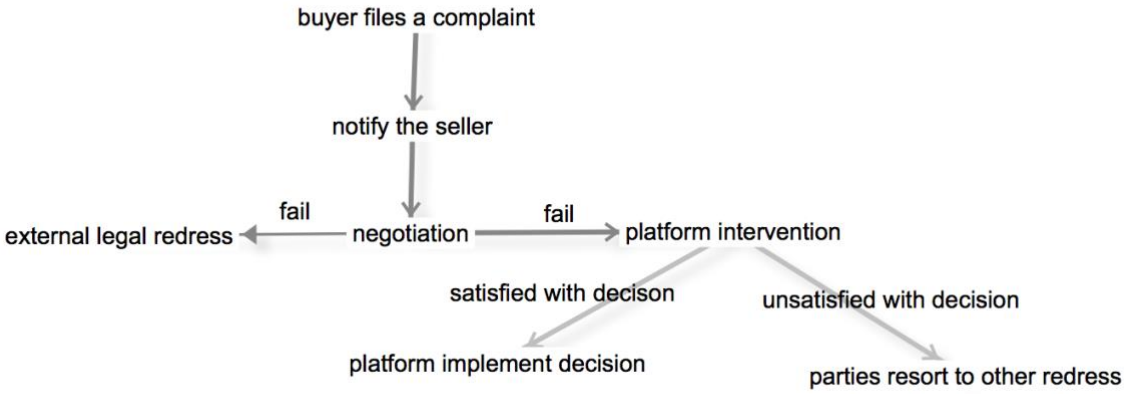
544. The internal complaint mechanism designed by the marketplace is a private dispute resolution system which follows a set of procedures and transaction rules. The successful story of eBay dispute resolution shows that the internal complaint mechanism can enhance consumer confidence and facilitate transactions.[1208] However, the internal complaint mechanism of the marketplace also faces challenges as to the legality of decisions and fairness of such a procedure.[1209] In what follows, I will analyze the internal complaint mechanism of Taobao marketplace[1210] and discuss its compliance with ODR principles stipulated in Section 4.1.

545. Marketplaces such as Taobao handle around 3 million cases each year.[1211] This high number of cases proves the necessity of an internal dispute resolution mechanism offered by the

[1205] Commission Staff Working Document: Online Platforms Accompanying the document Communication on Online Platforms and the Digital Single Market, COM (2016) 288, 1 & 45.
[1206] Del Duca, Rule and Rimpfel (n 916) 205; Zhang Juanjuan, 'On China Online Dispute Resolution Mechanism: Following UNCITRAL TNODR and Alibaba Experience' (2017)4 Journal of Online Dispute Resolution 14, 26.
[1207] Christian Homburg and Andreas Fürst, 'How organizational complaint handling drives customer loyalty: an analysis of the mechanistic and the organic approach' (2005)69 Journal of Marketing 95; Merlin Stone, 'Literature review on complaints management' (2011)18 Journal of Database Marketing & Customer Strategy Management 108, 116.
[1208] Katsh, Rifkin and Gaitenby (n 152); Louis F Del Duca, Colin Rule and Zbynek Loebl, 'Facilitating expansion of cross-border e-commerce-developing a global online dispute resolution system (Lessons derived from existing ODR systems-work of the United Nations Commission on International trade law)' (2011) Penn State Law Legal Studies Research Paper.
[1209] See Noam Ebner and John Zeleznikow, 'Fairness, Trust and Security in Online Dispute Resolution' (2015)36 Hamline Journal of Public Law and Policy.
[1210] Taobao is a Chinese C2C marketplace established by Alibaba group in 2003. < https://world.taobao.com/> accessed 12 January 2016. Its business scope has been enlarged into B2C services via Tmall.com < https://www.tmall.com/> accessed 12 January 2016.
[1211] Survey and Analysis of Internal Dispute Resolution Mechanism of E-commerce Platform conducted by Hangzhou Municipality Yuhang District People's Court (关于电子商务平台争议处理机制的调查与分析), < http://www.hzcourt.cn/art/2016/9/8/art_51_12633.html> accessed 12 January 2016.

marketplaces. The question is whether the current internal complaint mechanism of the marketplaces has fulfilled the minimum procedural fairness requirements for dispute resolution?

546. Marketplaces have designed an internal complaint mechanism (embedded ODR) to handle disputes between sellers and buyers arising from the transactions taking place in the marketplace. This type of ODR is also called "embedded ODR" [1212] or "in-house ODR"[1213], which is provided by the marketplace operators to facilitate transactions and handle disputes more efficiently. The minimum procedural standards in the internal complaint mechanism should not be to the same degree as in civil procedure rules as the value of disputes is small, the time for dispute settlement is short, and the cost of such dispute resolution is zero for both parties. The question remains as to what extent, the efficiency and flexibility of the internal complaint mechanism are proportionate to meet the minimum procedural fairness requirement?



547. The general process of the internal complaint mechanism is composed of several stages (as summarized in the flow chart above). When a dispute arises, the consumer may file a complaint via the platform. The platform will notify the seller and allow parties to negotiate within a certain amount of time.[1214] If the parties fail to reach an agreement, the platform will intervene and act as a third-party neutral to handle the dispute. The decisions are made based on the internal transaction rules of the platform. When parties are satisfied with the decision, the platform will implement the decision. Otherwise, the parties may resort to other redresses such as negotiation, arbitration or litigation.

[1212] Jonathan Hill, *Cross-border consumer contracts* (Oxford University Press 2008) 285.
[1213] Kaufmann-Kohler and Schultz (n 688) 44.
[1214] For Alibaba.com, the negotiation period is 30 days after the party makes a complaint. (See Alibaba.com Online Transactions Dispute Rules, dated 17 September 2015, General Guidelines).

548. The internal complaint mechanism handles only sales disputes arising from the marketplaces. These sales disputes can be divided into three major types[1215]: (i) delivery disputes, (ii) product quality disputes and (iii) payment disputes. However, it does not involve other types of disputes such as intellectual property infringements and product liabilities. The platform limits itself to resolving sales-related disputes because this type of disputes arises more often than others and the value of remedies in this type of disputes are usually within the price range of the disputed product/service.

549. The platform has the right to review the supporting documents provided by the parties and decide, in its discretion, whether further supporting documents are necessary. If the party fails to provide supporting documents as required by the platform within the prescribed period, the platform shall have the right to handle disputes in accordance with the available documents and platform transaction rules.[1216] Decisions are divided into two major types: (i) order traders to refund consumers entirely or partially depending on whether the transaction has been cancelled, the merchandise has been returned or a refund condition has applied; (ii) the consumer's refund request is denied.[1217]

550. The procedure of the internal complaint procedure can be terminated if the parties agree to negotiate or if one party notifies the platform that he/she decides to submit the dispute to the people's court or report the case to the police.[1218] However, if the disputes are not settled by the parties within 30 days or the party cannot provide the proof that the dispute has been handled by the people's court or the police within 7 working days, the internal complaint mechanism will resume.[1219]

551. The connection between internal complaint mechanism and another type of dispute resolution has improved the efficiency of dispute resolution. On the one hand, the internal complaint mechanism allows parties to choose their preferred dispute resolution. On the other hand, it is intended to settle disputes within the platform if parties fail to seek redress from outside so that the dispute can be resolved without any delay.

[1215] Please refer to Taobao Dispute Resolution Rules, Chapter 3 and Alibaba.com Trade Dispute Rules, dated September 17, 2015, Article 7.
[1216] For example, both Taobao and Alibaba provide detailed transaction rules with regard to the delivery, quality, and payment of the products.
[1217] *Ibid*, see Taobao Dispute Resolution Rule, Chapter 3.
[1218] For example, Taobao Dispute Resolution Rule, Article 104.
[1219] For example, Taobao Dispute Resolution Rule, Article 105.

4.2.2.1. Access to justice

552. One of the first question challenging the procedural fairness of the internal complaint mechanism is whether it deprives a party's access to justice. When a dispute arises, the parties have several options for dispute resolution including without limitation to negotiation, litigation and internal complaint mechanism. If the parties are able to bring the dispute in court at any time, the internal complaint mechanism is considered to be complied with the principle of access to justice.

553. It is stipulated in Taobao Dispute Resolution Rules that "in case that either one of the parties requires Taobao to intervene in the dispute settlement, Taobao shall handle the dispute in accordance with the platform internal rules."[1220] This stipulation is questionable because literally this allows Taobao to intervene to resolve disputes even if the other party does not consent. However, it could also be argued that the internal complaint mechanism will cease if both parties request to resolve the dispute themselves through negotiation or when one party informs Taobao that the dispute will be resolved by courts. Moreover, if the parties are not satisfied with Taobao's decision, they can bring the dispute via other redresses. Nevertheless, the parties should follow Taobao's decision before a final decision has been made via other redresses. The requirement of Taobao to intervene in disputes upon one party's request is to enhance the efficiency of the internal complaint mechanism. Therefore, the internal complaint mechanism shall not be interpreted as a hindrance to parties' access to justice.

4.2.2.2. Fairness in procedure

A. Impartiality and expertise of the adjudicator

554. There are two types of third-party neutral: the staff of the marketplace ("Dian Xiao Er"[1221]) or the public juror ("Da Zhong Ping Shen Yuan"). In the internal complaint mechanism, the most common type of adjudicator is usually the staff of the marketplace. Once the parties submit the dispute to the platform, the staff adjudicator will be automatically assigned by the platform. In other cases, the disputes will be decided by the public jurors composed of representatives from both sellers and buyers.

[1220] Taobao Dispute Resolution Rule Article 58.

[1221] "Dian Xiao Er"(店小二) is a nickname for the staff of the marketplace who handles internal complaints. It literally means the "waiter of the restaurant" who serves for the customers.

555. The first type of adjudicator is the staff of the marketplace. Although the marketplace, acting as a third-party intermediary between sellers and buyers, seems to be neutral from the view that it provides only a trading venue for the parties to conclude transactions and is not involved in transactions between buyers and sellers, it can sometimes play the roles of both a referee and a player depending on the business scope of the marketplace. Some platforms such as Amazon and JingDong,[1222] have their own business activities over the platform and act as a marketplace and a retailer at the same time.[1223] In addition, the marketplace may have a conflict of interests in preserving the business relationship with the seller or the buyer. The staff of the marketplace could be bribed to make decisions more favorably to the party with more financial resources, namely the sellers.[1224] One might wonder whether the commercial interests of the marketplace impair its impartiality in the context of the internal complaint mechanism. This was apparent in the case of *Wang Xiao Ke v Alibaba*[1225], where a seller sued AliExpress concerning 21 disputed orders on AliExpress's platform. In these 21 orders, AliExpress and its payment partner PayPal rendered decisions in favor of the buyers and refunded all the payments to the buyers. However, according to the judgements of the people's court, among these 21 orders, 15 orders of them were not properly handled by AliExpress and PayPal. The seller had not been properly informed of the reason why the buyers requested a refund and therefore could not defend himself. AliExpress also did not inform the seller of the reason why the refund had been rendered to the buyer. The People's Court, therefore, decided that AliExpress should return the payment to the seller in these 15 orders due to their infringement of the seller's procedural right to be informed.

556. The second type of adjudicator is Taobao public jurors (pan.taobao.com). In order to ensure the quality of public jury adjudication, Taobao has established a credit system (sesame credit) to evaluate the qualification of its users (both buyers and sellers) who want to become a public juror. Both buyers and sellers have a credit ranking system (called "sesame credit"[1226]) in accordance with their transaction records. Parties can apply to become a public juror.

[1222] Jingdong is one of the massive B2C online retailers in China. It is not only a third-party trading platform but also a seller on its own.

[1223] 'A Digital Single Market Strategy for Europe-Analysis and Evidence' (n 928) 55. See Article 37 of the E-commerce Law of the PRC requires the e-commerce platform business (marketplace) that conduct businesses in its own platform to distinguish its own business from other traders' business in a conspicuous manner and shall not mislead consumers.

[1224] 'Alibaba severely punished bribed internal adjudicator' <http://tech.sina.com.cn/i/2015-03-26/doc-iavxeafs2489565.shtml> accessed July 4, 2018 （阿里严打淘宝腐败店小二）

[1225] *Wang Xiao Ke v Alibaba* (2016) Zhe 0108 Min Chu No. 2373 (浙 0108 民初 2373 号).

[1226] "Sesame credit" is a credit system established by Taobao.

To be qualified as a public juror, both buyers and sellers should have a membership of no less than one year and possess a sesame credit of over 600 points.[1227] For buyers, there is an additional requirement that the buyer must not have brought more than three disputes in the past three months. For sellers, there is a requirement that the seller has no serious violation of Taobao transaction rules in the current calendar year and the seller has a below average dispute/refund rate for the past 20 days. The qualified sellers and buyers constitute a qualified public jury pool of nearly two million volunteers.[1228] There are eight levels used to evaluate the juror's performance during adjudication and determine which type of adjudication a juror can participate in. When dispute resolution tasks are posted on the website, the public jurors can select the relevant task according to their performance level. There is also a kick-out mechanism when the jurors have made serious mistakes during the adjudication process.[1229]

Before 2016, each dispute task was assigned to a jury with 31 jurors. The disputed party who obtained the majority votes (over 16 votes) will win the case. In 2016, the jury pool has been reduced to 13 adjudicators. The disputed party whoever gains 7 votes win the case. There is no restriction on the proportion to distribute buyers and sellers acting as jurors. The composition of jurors is random, as either the seller or the buyer, whoever selects the task first, can join the jury to decide the case.

557. Like staff adjudicators, similar doubts can be cast on the impartiality of public jurors. As there is no requirement regarding the proportion of buyers to sellers acting as jurors, the composition of public jurors can be disproportionate given that juror selection is random, on a first-come and first-served basis. The number of buyers generally outweighs that of sellers.[1230] The jurors may also be biased in rendering decisions in favor of consumers and may treat them as weaker parties.[1231] Moreover, these jurors lack professional knowledge of dispute resolution and may not be familiar with platform transaction rules.

[1227] Taobao Crowd-sourced Convention (interim), Article 4. The sesame credit system is established by Ant financial services group, the parent company of Alipay, based on the online data and offline data to generate individual credit scores for consumers and small businesses.

[1228] Lizhi Liu and Barry R Weingast, 'Taobao, Federalism, and the Emergence of Law, Chinese Style' (2017)102 Minnesota Law Review, 1581.

[1229] Taobao Crowd-sourced Convention (interim), Article 8.

[1230] 2016 Alibaba Ecosystem Internal Volunteers Research Report （2016 阿里巴巴生态系统互联网志愿者研究报告）, < http://i.aliresearch.com/file/20161010/20161010180743.pdf> assessed 8 May 2017. After one year of operation in public jury, there are 480,000 buyers and 300,000 sellers participated in the process.

[1231] The Guardian, 'If eBay's customers are always right, who'll protect its sellers?' < https://www.theguardian.com/money/2014/jul/11/ebay-buyer-complained-decide-against-seller> accessed 8 May 2017.

558. Above, I have seen how Taobao and Alibaba group used their specially designed internal complaint mechanism to settle disputes between sellers and buyers on the marketplaces. By using public jury adjudication, the marketplaces have increased the efficiency of the internal complaint mechanism and reduced their staff workload. As of March 31, 2016, there are over 3.67 million cases being adjudicated by public jurors.[1232] Nevertheless, the impartiality and expertise of the adjudicators in the internal complaint mechanism remain a challenge to the fairness of decisions. First of all, although public jurors are selected by their credit scores and evaluated by their performance during adjudication, such a review system is absent in staff adjudication. In order to combat the bribery issues with staff adjudicators, Alibaba has even set up a website (jubao.alibaba.com) for users to report unethical conduct of its staff during adjudication. Alibaba has also taken actions to cease the activities of the party who has bribed the staff.[1233] The effect of the supervisory mechanism is yet to be seen. Secondly, in the absence of proportion requirement for the composition of public jurors, the public juror system may result in unfavorable treatment to businesses given that the number of consumer users outweighs that of business users. Last but not least, the public jurors' lack of expertise may also influence the fairness of the results. It could be argued that the expertise requirement in the internal complaint mechanism is not the same as the requirement in litigation as the decisions that public jurors made are related to simple facts and the application of platform rules. Therefore, Alibaba could simply improve the expertise of public jurors by providing them the knowledge of transaction rules and dispute resolution rules.

B. Principle of due notice and right to be heard

559. The internal complaint mechanism of Taobao has prescribed evidentiary rules and time limits for the parties to submit their claims, counter-claims and relevant evidence. The marketplace will send notifications to the parties through various means (such as via a designed program of the platform, text messages, phone calls or emails) to remind them of submitting necessary evidence within the prescribed time. When the prescribed time limit exceeds, Taobao will make decisions based on the available documents submitted by the parties.

560. Unlike the external ODR services, parties can communicate with each other via the platform and send all the evidential documents to the adjudicator in the internal complaint mechanism

[1232] 2016 Alibaba Ecosystem Internal Volunteers Research Report （2016 阿里巴巴生态系统互联网志愿者研究报告）, < http://i.aliresearch.com/file/20161010/20161010180743.pdf> assessed 8 May 2017.
[1233] Sun Hongchao, 'Anti-corruption of Alibaba', < http://tech.qq.com/a/20150325/026972.htm>, accessed 25 March 2015.

as these documents were recorded by the platform during transactions. The built-in communication tools of the marketplace can not only facilitate the electronic transactions but also record the evidence that is essential for adjudication. Besides evidence preservation, the communication tools also allow parties to present themselves in adjudication. For example, on the Taobao platform, chat programs such as AliWangWang are designed to allow sellers and buyers to communicate with each other, together with the adjudicators during the decision making process.[1234] The communication tools designed by the platform have provided parties with convenient access to voice their opinions and submit their evidence.

4.2.2.3. Procedural efficiency

A. Time limit

561. In order to improve the efficiency of dispute resolution and facilitate transactions in the marketplaces, the platform has set time limits to handle the internal complaints. In Taobao Dispute Resolution Rules, the buyer has 15 days for general products or services and 6 months for durable products (such as automobiles, computers, televisions, air-conditioners or washing machines) to submit his/her complaint after the conclusion of the transaction.[1235] When a party submits a complaint, he/she shall fill out a complaint submission form using the online system for filing complaints. The platform will notify the disputed parties within 2 business days from the receipt of notice of the dispute via email or telephone.[1236] Parties are required to submit supporting documents of the dispute within 7 calendar days of Taobao's notice of dispute.[1237] If the parties fail to submit supporting documents in time, or if the supporting documents are insufficient to support or defend the claim, Taobao shall make its decision based on the available documents within 45 calendar days from its receipt of notice of dispute.[1238]

562. The platforms provide detailed rules with regard to the time limit for the parties to negotiate, initiate the dispute, and submit evidence, and with regard to the duration of the internal complaint mechanism. If parties fail to submit their views within the prescribed time, the adjudicator will make decisions based on written submissions. The time limit is used to speed

[1234] Ali Wangwang（阿里旺旺）is an application for buyers to communicate with sellers while Qian Niu (千牛) is an application for sellers to communicate with buyers: <http://wangwang.taobao.com/> accessed 9 May 2017.
[1235] Taobao Dispute Resolution Rule, effective from 1 January 2015 <https://rule.taobao.com/detail-191.htm> accessed 19 October 2016, Article 21.
[1236] Alibaba.com Online Transactions Dispute Rules, Article 8.1, dated 17 September 2015, < https://rule.alibaba.com/rule/detail/2058.htm> accessed 19 June 2018.
[1237] *Ibid*, Article 8.2.
[1238] *Ibid*, Article 8.3.

up the internal complaint mechanism, which serves as an effective tool to facilitate transactions via the platform. Moreover, the internal complaint mechanism serves as a back-up option when the parties have chosen to negotiate or litigate in court. If parties cannot resolve disputes through negotiation or the case has not been opened by the court, the internal complaint mechanism will be resumed to ensure disputes can be settled on the marketplace.

B. Document-based adjudication

563. Both Taobao and public jurors will make decisions based on the written documents submitted by the parties without giving parties any opportunity to present their cases at hearings. Unlike external ODR services, the hearing session is unavailable in the internal complaint mechanism due to time and cost considerations. Although it could be argued that the parties' rights to be heard is not entirely guaranteed in the internal complaint mechanism of the platform, one needs to take into account of the huge caseload of the platform[1239] and the fact that the internal complaint mechanism is reserved for small claims of B2C disputes. Since the internal complaint mechanism incurs no extra cost for the parties and the purpose of the internal complaint mechanism is to enhance consumer confidence and facilitate transactions, the availability of a written submission can only be viewed as a compromise made between procedural efficiency and procedural fairness so long as the parties are able to communicate supporting evidence and present their claims and counter-claims to the adjudicators.[1240]

C. Applicable rules of the platform

564. The transaction rules govern various issues, such as the conformity of the products, delivery requirement, transfer of risk, product quality, inspection, payment, and product return. For each type of issue, the rules provide for a specific solution. For instance, if the buyer rejects the products or returns the products, the seller should refund the buyer and bear the delivery cost.[1241] In these cases, the adjudicator could not order other measures, such as compensation for damages.

565. There is also a set of the burden of proof rules provided by the platform to guide disputed

[1239] Taobao handles around 3 million cases each year, according to Survey and Analysis of Internal Complaint Mechanism of E-commerce Platform conducted by Hangzhou Municipality Yuhang District People's Court (n 1211).

[1240] The EU Directive on Consumer ADR in Article 9(1)(a) simply requires the Member States to ensure that "in ADR procedures the parties have the possibility, within a reasonable period of time, of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents and facts put forward by the other party and of being able to comment on them."

[1241] Taobao Dispute Resolution Rule, effective from 1 January 2015 <https://rule.taobao.com/detail-191.htm> accessed 19 October 2016, Article 26.

parties in the internal complaint mechanism. Where a buyer claims that it has not received the merchandise, the seller bears the burden in proving that the buyer had already acknowledged receipt of such merchandise. While the buyer should take the responsibility to prove the formal inconsistency of the merchandise with its product description, the seller should prove the quality and authenticity of the merchandise by providing supporting documents such as product quality certificate and commercial invoices when the quality of the merchandise cannot be determined from the appearance of the merchandise.[1242] Once the sellers have provided the supporting documents, buyers are then required to provide inspection certificates to prove the merchandise is either faulty or counterfeit.[1243]

566. Taobao has created a set of both substantive and procedural rules (including transaction rules and dispute resolution rules) applicable to the internal complaint mechanism based on their experience of handling disputes over the marketplaces.[1244] The users of the marketplaces are bound by these rules through the user's agreement when they register on the websites. These transaction rules and dispute resolution rules have constituted the private order of the marketplaces. These private rules have brought efficiency to the internal complaint mechanism by allowing adjudicators to apply a single set of rules rather than going through national laws in different jurisdictions. [1245]

567. On the one hand, these rules provide staff adjudicators and public jurors (who do not necessarily have knowledge of contract law or consumer protection law) with clear instructions on how to allocate the burden of proof and make decisions. On the other hand, one may still suspect the legality of such transaction rules as they are made by private entities which may not be in compliance with national legislation.[1246] If the substantive transaction rules are in conflict with national mandatory laws (such as consumer protection law), the mandatory national laws shall prevail. However, the parties are unable to apply mandatory national laws to their disputes unless they file a legal action in the court which is a quite costly and time-consuming process.

[1242] Taobao Dispute Resolution Rule, Article 94, 95.
[1243] Taobao Dispute Resolution Rule, Article 96.
[1244] See Taobao Dispute Resolution Rules (n 1220) and Alibaba.com Online Transactions Dispute Rules (n 1236).
[1245] Schultz, 'Internet Disputes, Fairness in Arbitration and Transnationalism: A Reply to Julia Hornle' 162.
[1246] Zhejiang Online (www.zjol.com.cn) , 'The Administration of Industry and Commerce of Zhejiang Province has examined transaction rules of marketplace websites within the province among which 87 marketplaces has amended unfair terms accordingly,' <http://biz.zjol.com.cn/zjjjbd/xfwq/201711/t20171108_5565000.shtml> accessed 7 March 2018.

4.2.2.4. Principle of transparency

568. Taobao tried to enhance the transparency of their rules by establishing a Taobao Rules Center[1247] and by allowing the users to vote and give comments on the promulgation and amendments of new rules.[1248] The Rules Center provides users with easy access to various types of platform rules (such as transaction rules, dispute resolution rules, consumer protection rules and market supervision rules). However, doubts may still be cast upon the transparency of the platform rules.

569. First of all, the platform can revise dispute resolution rules at any time, and it only publishes these new rules on their website without sending users any notifications about these amendments.[1249] However, given the number of transaction rules updated each day, it is also technically difficult to send all the amended rules to users. Secondly, with amendments and new rules arising every few days, the parties may not be aware of the amendments unless they check the rules from time to time. Thirdly, Taobao provides no information about the adjudicators (staff or public jurors) who are automatically selected when the dispute arises. The parties are unable to know whether the assigned adjudicators have any conflict of interests to decide the case. Last but not least, the internal complaint mechanism does not provide sound legal reasoning for decisions as the decisions are fact-based and are in accordance with transaction rules.[1250]

4.2.3. Domain name dispute resolution

570. A domain name is a unique address that guides a user to the computer on which the website resides. The development of the domain name system is an important means to facilitate electronic transactions by guiding users to identify the website and to exchange information online.[1251] The domain name is an important asset of the company with the branding or identification function. As domain name disputes deal with the dispute arising from the internet between a domain name registrant and a trademark holder, domain name disputes also belong

[1247] Taobao Rules Center（淘宝规则众议院）publishes all the transaction rules and provides users, < https://zhongyiyuan.alitrip.com/index.htm> accessed 9 January 2019.
[1248] See Taobao Rules, < https://rule.taobao.com/index.htm> Alibaba Rules, < https://rule.alibaba.com/> and Taobao Rules for Public Consultation < https://rule.taobao.com/rulecycle.htm?spm=a2177.7231177.1998145874.2.71iOtg > accessed 9 May 2017.
[1249] See Taobao Rules, Article 78 and Alibaba Terms of Use (effective as of May 25, 2018), Article 1.3.
[1250] Rory Van Loo, 'The Corporation as Courthouse' (2016)33 Yale Journal on Regulation, 578.
[1251] Rowland, Kohl and Charlesworth (n 703) 170.

to the scope of e-commerce disputes.[1252] The domain name dispute resolution mechanism designed by the Internet Corporation for Assigned Names and Numbers (ICANN) allowed cross-border domain name disputes to be resolved by a set of procedural rules. The focus of this section is the Uniform Domain Name Dispute Resolution Policy (UDRP Policy) and the Rules for UDRP established by ICANN, a non-profit enterprise responsible for managing the domain name system, for dispute resolution regarding the registration of internet domain names.[1253]

571. As commercial activities have increased on the Internet, domain names have become the symbol of the identity of a company's products and services. Customers may be misled by the source of a product or service when a trademark is used by abusive registrants (who do not own such trademarks) as a domain name and the trademark owner did not consent to this use.[1254] While a domain name registration can be obtained easily via Internet applications at a low cost, it is costly and time consuming for a trademark owner to respond to the abusive registration and to bring a claim in a foreign jurisdiction. In light of the special features of domain name disputes, it is necessary to develop an expeditious and inexpensive dispute resolution procedure at an international level.

572. The World Intellectual Property Organization (WIPO) is an agency of the United Nation that promotes the protection, dissemination, and the use of intellectual property throughout the world.[1255] The WIPO conducted an extensive consultation and published a final report in 1999 containing recommendations on domain name issues. The final report recommends ICANN to adopt a dispute resolution policy with a uniform procedure for domain name disputes in all gTLDs.[1256] A mandatory administrative procedure was proposed by the WIPO under which the registrants are obliged to follow when domain name disputes arise. This became the foundation of the UDRP established by ICANN. The UDRP is an adjudicative procedure where

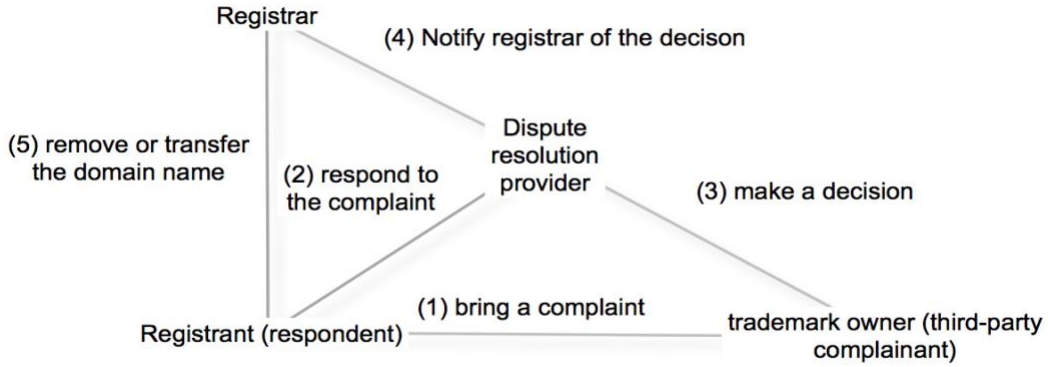
[1252] UNCTAD, E-commerce and Development Report 2002 (UNCTAD/SDTE/ECB/2, 40-41, 48.
[1253] Alan Davidson, *The law of electronic commerce* (Cambridge University Press 2009) 135.
[1254] Final Report of the WIPO Internet Domain Name Process, 'The management of Internet names and addresses: intellectual property issues' <http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.pdf> accessed 14 November 2016. ("WIPO Final Report") page vi.
[1255] Convention Establishing the World Intellectual Property Organization, July 14, 1967 < http://www.wipo.int/treaties/en/convention/> accessed 15 November 2016.
[1256] Domain names are divided into two categories: the generic top-level domains (gTLD) and the country code top-level domains (ccTLD). The gTLDs include various domain name types. Some of these gTLDs are open to all registrants such as: .com, .net, and .org; others such as .edu, .gov and .int are restricted, in the sense that only certain entities meeting certain criteria may register names in them. The ccTLDs are derived from a two-letter country code such as .cn, .ca, .us, .eu, etc.

the decision maker appointed by the parties have the power to impose binding decisions on the parties.[1257] However, the UDRP decisions do not exclude the jurisdiction of the courts.

573. The specific registration of a new domain name is handled by a registrar upon the registrant's application. This registration is subject to the terms of a contract between the registrar and ICANN, which set forth rules and procedures regarding the provision of registrar services.[1258] According to Article 3.8 of the Registrar Accreditation Agreement entered into between the registrar and ICANN, the registrar is required to have in place a policy and dispute resolution procedure for registered domain name disputes. In this way, the registrar is required to enter into an agreement with registrants by adopting the UDRP Policy when a dispute arises with regard to the domain name. The UDRP Policy is automatically incorporated into the registration agreement when a registrant registers a domain name. The UDRP Policy sets out the legal framework for the resolution of disputes between a domain name registrant and a third party over the abusive registration and use of a domain name.[1259]

574. ICANN has currently assigned five service providers[1260] to handle domain name disputes by using the Rules for UDRP, which set out procedural rules for handling domain name disputes.[1261] Each service provider has its own supplemental rules to conduct dispute resolution. However, these supplemental rules drafted by the assigned service provider are used to facilitate dispute resolution and therefore shall be in compliance with the UDRP Policy and the Rules for UDRP.

[1257] WIPO Final Report, Paragraph 153.
[1258] ICANN Registrar Accreditation Agreement 2013 < https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#raa> accessed 18 November 2016.
[1259] WIPO Guide to the Uniform Domain Name Dispute Resolution Policy (UDRP Policy) <http://www.wipo.int/amc/en/domains/guide/#a> accessed 14 November 2016.
[1260] The list of approved domain name service providers includes National Arbitration Forum, WIPO Arbitration and Mediation Center, the Czech Arbitration Court Arbitration Center for Internet Disputes and Arab Center for Domain Name Dispute Resolution. <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en> accessed 18 November 2016.
[1261] Rules for Uniform Domain Name Dispute Resolution Policy, 28 September 2013 (Rules for UDRP), Article 1.



575. The UDRP requires the registrant (the respondent) to participate in a mandatory administrative proceeding when a trademark holder (the complainant) brings a claim against the registrant to one of the UDRP service providers, and to prove that all the requirements for submission are met.[1262] However, the mandatory administrative proceeding shall not prevent either the respondent (registrant) or the complainant (trademark owner) from submitting the dispute to a court of competent jurisdiction for independent resolution before or after the UDRP proceeding.[1263] The parties are granted 10 business days to respond before the Registrar cancel or remove domain names in accordance with the panel's decision.

576. The UDRP dispute resolution is a quasi-arbitration procedure with three major differences from arbitration. Firstly, parties are not bound to submit the disputes to UDRP service providers as there is no dispute resolution agreement concluded between the registrant and the trademark holder. Instead, it is a set of contractual provisions incorporated by reference to the domain name registration agreement between ICANN approved registrars and domain name registrants.[1264] The trademark holders are outside the scope of these contractual arrangements and can initiate the claim with UDRP service providers by a submission agreement. Secondly, the trademark holder, as the complainant can lodge a claim with any of the ICANN approved service providers.[1265] Different from arbitration that requires mutual consent of the parties to submit the dispute for arbitration, the UDRP service provider is chosen solely by the

[1262] Uniform Domain Name Dispute Resolution Policy ("UDRP Policy"), Article 4(a), approved by ICANN on 24 October 1999.
[1263] UDRP Policy, Article 4(k).
[1264] Anri Engel, 'International Domain Name Disputes: Rules and Practice of the UDRP' (2003)25 European Intellectual Property Review 351, 352.
[1265] Stephen J Ware, 'Domain-Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in, the UDRP' (2002)6 Journal of Small and Emerging Business Law 129, 161.

complainant. Thirdly, the UDRP decision is subject to challenge in a specified court of Mutual Jurisdiction[1266] while the arbitral awards are binding and can only be challenged with limited grounds.

577. The structure the UDRP is designed to resolve a specific type of domain name disputes (disputes between trademark holders and domain name registrants in bad faith). It sets a good example of how ODR rules can be drafted in resolving cross-border disputes by weighing a balance between procedural fairness and procedural efficiency.[1267] The following section will analyze UDRP rules by the application of procedural standards established in Section 4.1. The assessment of UDRP dispute resolution rules will be evaluated from three perspectives: procedure efficiency, procedural fairness and transparency principle.

4.2.3.1. Procedural efficiency

578. The UDRP mechanism is successful in providing a fast and efficient dispute resolution to cyber-squatting. In 2015, trademark owners filed 2,754 cases under the UDRP with WIPO.[1268] A trademark owner (complainant), who finds that his trademark right has been infringed by the abusive registration of the domain name, can file a complaint with one of the authorized dispute resolution service providers authorized by the ICANN. The complainant shall submit documents and evidence in electronic form, either by emails or via the internet-based case filing system. After accepting the case, the service provider shall submit a request to the Registrar of the domain name in dispute to lock the domain name. Within 2 business days of receiving the service provider's verification request, the Registrar shall confirm that a lock of the main name has been applied. The lock shall remain in place during the UDRP proceeding.[1269]

[1266] Mutual Jurisdiction means a court jurisdiction at the location of either (a) the principal office of the Registrar (provided the domain-name holder has submitted in its Registration Agreement to that jurisdiction for court adjudication of disputes concerning or arising from the use of the domain name) or (b) the domain-name holder's address as shown for the registration of the domain name in Registrar's Whois database at the time the complaint is submitted to the Provider.

[1267] John Magee, 'Domain Name Disputes: An Assessment of the UDRP as Against Traditional Litigation' (2003) U Ill JL Tech & Pol'y 203, 211.

[1268] Cyber-squatting Cases Up in 2015, Driven by New gTLDs, PR/2016/789 < http://www.wipo.int/pressroom/en/articles/2016/article_0003.html> accessed 18 May 2017.

[1269] Lock means a set of measures that a registrar applies to a domain name, which prevents the respondent from any modification to the registrant and registrar information at a minimum. Refer to Section 5.2.1.2 for a detailed explanation of the lock mechanism in the UDRP.

579. After the service provider reviews the complaint for its administrative compliance[1270] with the UDRP Policy and the Rules for UDRP, the service provider shall forward the complaint electronically to both the respondents and the registrar and then send written notice of the complaint (together with the supplemental rules of the service provider) to the respondent within 3 calendar days following the receipt of payment by the complainant. The Rules for UDRP has streamlined the proceedings by requiring the respondents to submit their response within 20 days from the commencement of the administrative proceeding and by asking the panel to make decisions within 14 days of the appointment.[1271] The UDRP mechanism also ensures the disputed domain names are locked during the dispute to prevent any modifications regarding the registrant and the registrar.

580. The efficiency of the UDRP dispute resolution mechanism is also owing to its delimitation of the disputes and remedies. First, the UDRP administrative procedure is only applicable to the abusive registration of domain names in bad faith, which violates trademark rights (namely "cyber-squatting").[1272] Second, the remedies available in the administrative procedure are limited to the registration, transfer or modification of the domain names and not do not include any monetary damages or rulings concerning the validity of trademarks.[1273]

581. Nevertheless, there are concerns with regard to the efficacy of the UDRP as parties can terminate the UDRP proceedings or challenge the decisions of the service provider by lodging a claim in court.[1274] If the court judgments overturned the UDRP decisions, the UDRP procedure is a waste of time. However, taking into account that a large number of cyber squatters are individuals acting in bad faith who do not have the financial capabilities to file in courts, the number of UDRP decisions, which are challenged in courts, is really small.[1275]

4.2.3.2. Procedural fairness

A. Procedural equality of parties

[1270] The administrative review is only a formal review to check if the submitted documents are in compliance with the requirement of Article 3(b) of the Rules for UDRP.
[1271] Rules for UDRP, Article 5(a) and 15(b).
[1272] Uniform Domain-Name-Dispute Resolution Policy ("UDRP Policy"), Paragraph 4(a).
[1273] WIPO Final Report Paras 182-187.
[1274] Chad D Emerson, 'Wasting Time in Cyberspace: The UDRP's Inefficient Approach Toward Arbitrating Internet Domain Name Disputes' (2004)34 University of Baltimore Law Review 161, 162-184.
[1275] Patrick D Kelley, 'Emerging Patterns in Arbitration Under the Uniform Domain-Name Dispute-Resolution Policy' (2002) Berkeley Technology Law Journal 181, 191.

582. In the UDRP, the complainants and respondents are not on an equal footing as the procedure is intended for cyber-squatting disputes rather than trademark disputes (where both disputants have longstanding trademark rights in the name when the trademark was registered as a domain name).[1276] The complainants have the freedom to decide the UDRP service provider to which they would like to bring a claim against the domain name registrants. In the absence of mutual agreements, the registrants are forced to participate in the UDRP proceedings in accordance with the registration agreement entered into with the registrar. It is argued that the complainants, as the trademark holders, can go forum shopping and choose the UDRP service provider that is likely to issue more favorable decisions.[1277]

583. After being notified by the UDRP service provider of the commencement of the proceeding, the respondent has only 20 days to submit a response with the possibility to extend for an additional 4 days.[1278] In the absence of a response, the panel will make decisions based on the submission of the complainants.[1279] According to NAF, of the 1,836 cases filed with it in 2014, the respondent failed to submit a formal response in 56.9% of cases.[1280] As the UDRP decisions are made solely based on the written submissions of the parties and most respondents fail to submit their response, it is doubtful whether the respondents are given sufficient time to prepare their submissions. However, as the UDRP is designed to combat cyber-squatting, it is expected that the respondents who registered the domain names in bad faith will not respond to the complaints. This hypothesis is supported by a declining number of UDRP cases, which reflects a reduction of cyber-squatting conducts.[1281]

B. Impartiality of the panel

584. Depending on the parties' selection, the panel can be composed of either one or three members. Each service provider shall maintain and publish a list of panelists and their respective qualifications, but parties can also choose panelists outside the scope of such lists. If neither the complainant nor the respondent has selected a three-member panel (in the circumstance of

[1276] Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy, October 24, 1999 < http://archive.icann.org/en/udrp/udrp-second-staff-report-24oct99.htm> accessed 18 May 2017.
[1277] Thornburg (n 1034) 210; Milton Mueller, 'Rough justice: An analysis of ICANN's uniform dispute resolution policy' (2000)17 The Information Society 151; Michael Geist, 'Fair. Com: An examination of the allegations of systemic unfairness in the ICANN UDRP' (2001)27 Brooklyn Journal of International Law 903, 906.
[1278] Rules for the UDRP, Article 5(e) allows for an extension of the response filing period in exceptional cases.
[1279] Rules for the UDRP, Article 5(f).
[1280] Micah Ogilvie, 'The UDRP: a dispute resolution policy to stand the test of time?' in (2017) Online Brand Enforcement, World Trademark Review.
[1281] Ned Branthover and INTA Committee, 'UDRP–A Success Story: A Rebuttal to the Analysis and Conclusions of Professor Milton Mueller in "Rough Justice "' (2002) International Trademark Association (INTA) Internet Committee 1

a single panelist), the service provider shall appoint, within 5 calendar days following the receipt of the response from the respondent or the lapse of the time for submission, a single-member panelist from its list. If either the complainant or the respondent selects a three-member panel, the service provider shall endeavor to appoint one panelist from the list of candidates provided by each of the complainant and the respondent. In case that the provider is unable to secure the appointment of panelists from the lists of candidates provided by the parties, the provider shall make that appointment from its own list of panelists. The third panelist shall be appointed by the provider from a list of three or five candidates submitted by the provider to the parties. The provider's selection should be made in a manner that reasonably balances the preferences of both parties. The cost distribution in the UDRP is different from arbitration in that the complainants are responsible to bear all the service fees except in rare cases.[1282] It is criticized that the UDRP service providers and their panelists may render favorable decisions to the complainants who continuously use their services due to economic incentives. [1283]

585. The earliest empirical research was conducted by Professor Milton Müller, who is also an UDRP panelist.[1284] He selected the three then-existing UDRP service providers, eResolution, NAF and WIPO to determine whether the complainant's ability to choose an UDRP service provider would bias the decision.[1285] The statistical analysis revealed that NAF and WIPO, with respectively 81% and 82%, render a higher percentage of decisions in favor of the complainants than the eResolution (51%). Professor Michael Geist, discovered that the caseload of WIPO and NAF which is more favorable to trademark holders is higher than eResolution which is the least complainant-friendly service provider.[1286]

586. Professor Geist has investigated 4,332 UDRP decisions rendered by NAF, WIPO and eResolution and found that a composition with three panelists is less biased than the composition with one panelist. He deducted this conclusion from the fact that complainants win 83% of the time where a single panelist determines the outcome, compared with 58% when

[1282] In WIPO Guide to the UDRP, the only time the respondent has to share the case handling fee with the complainants is when the respondent chooses to have the case decided by 3 panelists while the complainant had chosen a single panelist.
[1283] John G White, 'ICANN's Uniform Domain Name Dispute Resolution Policy in Action' (2001)16 Berk Tech LJ 229, 238; David E Sorkin, 'Judicial review of ICANN domain name dispute decisions' (2001)18 Santa Clara Computer & High Tech LJ 35, 48.
[1284] Mueller (n 1277).
[1285] *Ibid* (n 1277).
[1286] Geist (n 1277) 906. The previous UDRP service provider, eResolution was closed down in 2011.

a three-member panel is responsible for the decision. [1287] The composition of the panel is either with one single panelist or with three panelists. Parties have better control over the selection of panelists in cases of three panelists. Unlike the single panelist who is selected by the service provider, in the case of a three-member panel, two panelists may be respectively selected by the complainant and respondent from the ICANN accredited provider's list of panelists.

587. Nevertheless, the fact that WIPO and NAF have higher reputation and significant experience in dispute resolution may also explain for the reason why they are preferred by the complainants than eResolution. Moreover, as indicated by Ned Branthover from the International Trademark Association, statistics alone cannot prove the bias without taking into account the merits of the UDRP cases and relevant analysis in decisions. [1288] The UDRP rules make sure that the panelist shall be impartial and independent, and must disclose any circumstances that may give rise to unjustifiable doubts on the panelist's impartiality and independence. [1289] The higher winning rate in one-member panel is simply not enough to justify that the three-member panel is fairer considering that one of the three-members panel is still designated by the service provider. The major function of the UDRP mechanism is to conquer cyber-squatting and therefore it is natural to see a higher rate on the wining complainants.

C. Time limits and the right to be heard

588. Another criticism of the UDRP is the potential insufficient time for the respondent to submit arguments, which may constitute a violation of the right to be heard. The Respondent shall submit a response to the service provider within 20 days of the date of the commencement of the administrative proceeding. The respondent shall submit a response to the complaints, including any bases on which the respondent could retain registration and continue to use the disputed domain name. In the UDRP, the decisions are rendered based on the written documents submitted by the parties. There are no in-person hearings unless the panel decides in its sole discretion that such hearings are necessary. [1290] In the absence of exceptional circumstances, the panel shall forward its decision to the service provider within 14 days upon its appointment. If a decision is made in favor of the complainant, the respondent has 10 days

[1287] Geist (n 1277) 922.
[1288] Branthover (n 1281) 6.
[1289] Rules for UDRP, Article 7.
[1290] Rules for UDRP, Article 13.

to file a domain name lawsuit in the jurisdiction where the registrar is located.[1291] Otherwise, the domain name will be transferred to the complainant or removed by the registrar.

589. According to ICC Arbitration Rules,[1292] the respondent has 30 days from the receipt of arbitration request to submit his/her answer to the claims. The difference of 10 days between the UDRP and institutional arbitration does not make a significant difference. Moreover, the imposed time limit does not necessarily indicate the unfairness of UDRP decisions considering the efficiency of the UDRP. One could argue that giving the respondent only 10 days to appeal may be insufficient given that the court proceedings demand more filing requirements.[1293] Nevertheless, since the purpose of UDRP is to fight against cyber-squatting, a majority of UDRP cases are relevant to respondents who are cyber-squatters.[1294] Therefore, the time limit for respondents to submit their appeal is a balance between the trademark owner's legitimate need for a speedy dispute resolution and the protection of legitimate domain name registrants who constitute only a minority of the respondents.

4.2.3.3. Principle of transparency

590. The practice of the UDRP is considered to be in compliance with the transparency requirement which keeps parties informed of all their procedural rights and the procedural rules of ADR entities. First of all, parties can access information regarding the ICANN accredited service providers on the ICANN website. Secondly, the ICANN accredited service providers are required to provide UDRP rules and their own supplemental rules on their websites.[1295] Thirdly, there are detailed procedural rules on the selection of one-member panelist and three-member panelist. The list of panelists and their qualifications is also available to the parties.[1296] Finally, the service provider shall publish the full decision and its implementation on its website.[1297] Within 3 business days after receiving the decision from the panel, the service provider shall communicate the full text of the decision to each party, the concerned registrar and ICANN.[1298] Except if the panel determines otherwise, the service provider shall publish

[1291] Sorkin (n 1283)54.
[1292] ICC Arbitration Rules 2017, Article 5.
[1293] A Michael Froomkin, 'Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution' (2000) Duke Law Journal 17, 100-101.
[1294] Elizabeth C Woodard, 'The UDRP, ADR, and arbitration: Using proven solutions to address perceived problems with the UDRP' (2008)19 Fordham Intell Prop Media & Ent LJ 1169, 1194.
[1295] Registrar Accreditation Agreement (n 1258) Article 3.8.
[1296] Rules for UDRP, Article 6(a).
[1297] *Ibid*, Article 16(b).
[1298] *Ibid*, Article 16(a).

the full decisions with reasoned opinions and the date of its implementation on a publicly accessible website. The respondent will also be informed in the UDRP decision of their right to appeal in court.

4.3. Preliminary Conclusion

4.3.1. Challenges to the ODR development

591. Based on the study of the three above-mentioned types of ODR rules (namely GZAC online arbitration, Taobao internal complaint mechanism and UDRP), it turns out that ODR is especially suitable for resolving disputes arising from similar types of legal relationship (such as sales disputes, online loan disputes, and domain name disputes), clear facts and evidence, and low-value claims.[1299]

592. Despite the success of ODR in certain types of disputes, there are three main challenges to the development of ODR: the lack of uniform procedural rules, the conflict between procedural fairness and procedural efficiency, as well as the tension between flexibility and transparency in ODR. As Amy Schulz proposed, the delivery of justice in ODR should add transparency and fairness standards to ODR while preserving the low cost and efficiency features of ODR.[1300]

4.3.1.1. Lack of uniform procedural rules in ODR

593. One of the mandates of the UNCITRAL Working Group III was to form a set of procedural rules for ODR relating to cross-border e-commerce transactions including B2B and B2C transactions.[1301] Nevertheless, no consensus has been reached on the legal nature of the final stage of ODR proceeding (being a binding arbitration or a non-binding recommendation) mainly due to the disparity between the US and the EU on whether a pre-dispute B2C arbitration agreement is admissible.[1302] The diversified forms of ODR make it difficult to make a uniform set of ODR procedural rules.

[1299] In case of domain name disputes, the complainants seek remedies in registration, transfer or modification of the domain names, without incurring any monetary damages concerning the infringement of trademark rights.
[1300] Amy Schultz, 'Building trust in ecommerce through online dispute resolution' *in* John A. Rothchild, *Research Handbook on E-commerce Law* (Edward Elgar2016) 328.
[1301] Report of UNCITRAL WGIII (ODR) on the work of its twenty-second session, Vienna, 13-17 December 2010, A/CN.9/716, paragraph 21, it was suggested that four instruments might be considered: fast-track procedural rules which complied with due process requirements, accreditation standards for ODR providers, substantive principles for resolving cross-border disputes, and a cross-border enforcement mechanism.
[1302] Cortés, 'The Consumer Arbitration Conundrum: A Matter of Stautory Interpretation or Time for Reform?' (n 699) 74.

594. ODR can take rather diversified forms depending on the nature of ODR and the extent to which information technology is integrated. As ODR originates from ADR, the distinction between adjudicative dispute resolution and consensual dispute resolution also exists in ODR.[1303] There are two major differences between adjudicative ODR and consensual ODR. Firstly, the adjudicative ODR has more procedural requirements than consensual ODR. The greater the third-party neutral's power and the more rigid the procedures, the more adjudicatory they may be viewed.[1304] Secondly, the adjudicative ODR typically involves a binding decision while the outcome of consensual ODR is non-binding. Thirdly, the development of artificial intelligence has shifted ODR's reliance on human intervention to reliance on automated processes.[1305] This further divides ODR into technology-assisted ODR with human intervention on the one hand, and technology-based ODR with entire automation on the other hand. The technology-assisted ODR system adopts communication tools such as chatting software and online platform merely to manage documents and hold online proceedings. The technology-based ODR system employs more powerful ODR tools (namely artificial neutral networks, intelligent software agents, case-based reasoning mechanisms, methods for knowledge representation and reasoning, argumentation, learning and negotiation) to settle disputes.[1306] For example, some ODR providers such as SmartSettle, family-winner, ALIS and PERSUDER have already used artificial intelligence to make decisions by automation.[1307]

595. The three types of ODR previously studied in Section 4.2 each carry different features in respect of the nature of ODR providers, the composition of third-party neutrals, parties' process control and the finality of decisions. The following section tries to compare these features of the selected ODR rules in order to better understand the difficulty of drafting uniform ODR procedural rules.

[1303] See Section 2.3.1.2 Forms of ODR.
[1304] Brown and Marriott (n 184) 19.
[1305] Katsh and Rabinovich-Einy (n 182) 163.
[1306] Davide Carneiro and others, 'Online dispute resolution: an artificial intelligence perspective' (2014)41 Artificial Intelligence Review 211, 228.
[1307] *Ibid.*

Comparison of ODR Rules / **ODR Providers**	Online arbitration (GZAC Online Arbitration Rules)	Internal complaint mechanism (Dispute Resolution Rules of Taobao)	Domain name dispute resolution (UDRP Rules)
I. Type of ODR provider	ADR institution	Marketplace	Private ODR entity
II. Initiation of ODR	The applicant files an application with GZAC via online arbitration platform	The consumer files a claim to the marketplace	The claimant (trademark holder) files a claim to one of the approved UDRP service providers
III. Notification and communication tools	Via online arbitration platform, Emails, mobile phones	Via internal communication tools such as AliWangWang	Via Emails or the internet-based case filing system
IV. Composition and appointment of neutral	1 or 3 arbitrator(s) depending on the value of the claim, jointly appointed by the parties	1 decision maker, designated by the marketplace, who is mainly the staff of the third-party service providers; 13 public jurors randomly constituted by representatives of sellers and buyers;	1 or 3 decision maker(s) depending on the parties, appointed by the service provider (taking into consideration of the parties' preference)
V. Applicable rules	GZAC Online Arbitration Rules; Applicable law chosen by the parties or the law selected by the arbitral tribunal in the absence of parties' choice	Taobao Dispute Resolution Rules and Taobao Rules	UDRP Policy and Rules for UDRP

VI. Proceedings	Oral hearing; Written submission; Question list;	Written submission	Written submission
VII. Finality of decisions	Binding and final	Can be challenged in court	Can be challenged in court

596. The parties can submit their application electronically and receive notifications from the third-party neutral via electronic communication. Online arbitration rules have stricter procedure rules than the other two forms of ODR rules with regard to the selection of third-party neutrals, the requirement of oral hearings, and the question list as a supplementary document to written submissions. While the third-party neutral is designated by the marketplace without giving parties the right to choose in the internal complaint mechanism, the parties in UDRP domain name dispute resolution own a partial right to appoint third-party neutrals.[1308] The parties in online arbitration have the right to select the arbitrator(s) on their own.

597. All the ODR service providers have designed a set of procedural rules that should be applied to settle disputes by third-party neutrals without the necessity referring to laws or regulations of the states. While the applicable law can be decided by the parties in GZAC online arbitration, for other two types of ODR the substantive rules are designated by the ODR service providers. Decisions in both the Internal Complaint Mechanism and UDRP are made based on the submissions of the parties, whereas in online arbitration, a quasi-judicial proceeding is provided for the parties to defend for themselves and provide additional evidence. All three types of ODR are private dispute resolution mechanisms that are provided by non-judicial institutions, among which only the outcome of online arbitration has a binding effect which can be directly enforced in court. Other two types of ODR are not final and can be challenged by parties in national courts. The varied forms of ODR and the flexibility of ODR procedures become sources of strife when it comes to developing a set of uniform procedural rules as in the Technical Notes on ODR.[1309]

4.3.1.2. Conflict between procedural fairness and procedural efficiency

[1308] The parties have partial right in the sense that the service provider will select the neutral from a list provided to the parties in a manner that reasonably balances the preferences of the parties.

[1309] A two-track proposal was made to include both an ODR ending in an arbitration and an ODR ending in non-binding recommendations, but it was not passed because of practical inconvenience. See Report of Working Group III (Online Dispute Resolution) on the work of its thirty-first session (New York, 9-13 February 2015), A/CN.9/933, 6-11.

598. It has been found that ODR itself is not a hindrance to access to justice but rather an enhancement to the party's access to justice. The ODR procedural rules have been drafted to accommodate the requirement of a fast and low-cost dispute resolution for e-commerce disputes. In the selected ODR rules, the procedural rules have been tailored to reduce time and save cost. For example, most ODR decisions are made based on written submissions without oral hearings. The electronic communications are used to facilitate ODR proceedings by allowing parties to exchange documents remotely and receive notifications of their procedural rights electronically. However, since there are shorter time limits for procedural rights, it also brings concerns as regards whether parties are given proper time and opportunities to present themselves in ODR proceedings.[1310] This may generate concerns regarding the procedural fairness of ODR rules.[1311] In order to balance procedural fairness and procedural efficiency, it is important to ensure that ODR rules have met minimum procedural fairness requirement by giving parties certain procedural autonomy. For example, whether parties are aware of these special procedural rules before they agree to use ODR rules, whether parties have the choice to hold an oral hearing on reasonable grounds, and whether parties can apply for extensions for time limits.

4.3.1.3. Weighing flexibility and transparency in ODR procedures

599. Another challenge that ODR faces is the tension between flexibility and transparency of ODR procedural rules. On the one hand, ODR is attractive to the parties for its flexibility in procedures. It has been held by Del Duca, Rule and Rimfel that the ODR entities (especially the marketplaces such as eBay) need the flexibility to design, build and deploy non-binding and binding ODR systems in order to adapt their services to many different types of disputes.[1312] On the other hand, the principle of transparency requires the ODR service provider to disclose information on the contact details of ODR entities, third-party neutrals, the scope and length of their mandate, the source of financing, the method of appointment, the procedural rules of the proceedings, the legal effect and enforceability of ODR decisions. This

[1310] Christoph Busch and Simon Reinhold, 'Standardisation of Online Dispute Resolution Services: Towards a More Technological Approach' (2015)4 Journal of European Consumer and Market Law 50, 57; Martin (n 1180) 33-38.
[1311] Mueller (n 1277); Martin (n 1180); Julia Hornle, 'Online Dispute Resolution–More ThanThe Emperor's New Clothes' (Online Dispute Resolution (ODR): Technology as the "Fourth Party", Papers and Proceedings of the 2003 United Nations Forum on ODR, available at <www odr info/unece2003>); Youseph Farah, 'Critical analysis of online dispute resolutions: the optimist, the realist and the bewildered' (2005)11 Computer and Telecommunications Law Review 123, 124-125.
[1312] Del Duca, Rule and Rimpfel (n 916) 219.

is not only important for keeping parties informed of their procedural rights but also serves an educational purpose for outside observers to be familiar with ODR rules.[1313] While most ODR providers disclose information on the services they offer, inadequate information is given on their fees, procedural rules and the results of ODR.[1314]

4.3.2. Proposed solutions to improve justice in ODR proceedings

600. Despite the challenges to ODR, there are still lessons that can be learned from current ODR rules for the design of ODR rules. The proposed solutions to improve justice in ODR proceedings will be established firstly on the success of current ODR rules in Section 4.3.2.1. Secondly, recommendations will be made in Section 4.3.2.2 on how to regulate ODR by joint efforts between the ODR industry and the government.

4.3.2.1. Lessons from successful ODR procedural rules

601. Rabinovich and Katsh have argued that ODR has challenged the traditional boundaries between formal and informal, public and private dispute resolution by introducing technology as the fourth party.[1315] ODR has created venues to handle disputes which are small in value and large in volume and to allow parties to provide feedback on satisfaction, fairness and accountability of these mechanisms. There are four features that are essential in providing efficiency in ODR from the study of current ODR rules: the identification of types of disputes, limited availability of remedies, a set of applicable rules and effective electronic communication tools to facilitate ODR.

A. Identification of types of disputes

602. The first common feature is that the ODR rules are designed for certain types of e-commerce disputes. GZAC Online Arbitration Rules are designed for small-claim disputes such as online shopping disputes, online loan disputes, credit card disputes. Taobao dispute resolution system is designed to resolve certain types of sales disputes arising from delivery, inconformity with product description and payment over the trading platform. The UDRP dispute resolution system is designed to resolve domain name disputes with regard to cyber-squatting (certain

[1313] Rule, *Online dispute resolution for business:B2B, E-Commerce, Consumer, Employment, Insurance and other Commercial Conflicts* 274.
[1314] Pablo (n 17) 201; Rafal Morek, 'The regulatory framework for online dispute resolution: A critical view' (2006)38 University of Toledo Law Review 163, 186.
[1315] Orna Rabinovich-Einy and Ethan Katsh, 'Digital Justice: Reshaping Boundaries in Online Dispute Resolution Envrionment' (2014)1 International Journal of Online Dispute Resolution 5, 32.

types of domain name disputes including cases of bad faith and abusive registration of domain name that infringes trademark rights of owners). On the other hand, ODR is not suitable for other disputes with high value or intricate legal relationships.

603. It is more convenient for the ODR entities to manage similar types of disputes which are large in volume and small in value. With the adoption of data analysis and artificial intelligence, the ODR service provider is able to identify the type of disputes that are commonly brought by the parties, the evidence that is required in this type of disputes, and even to predict solutions.[1316] It not only improves the efficiency of case management but also reduces the cost of ODR.

B. Availability of limited remedies

604. Another common feature is the availability of limited remedies that can be ordered by ODR providers. In Taobao Dispute Resolution, the decisions are limited to refunds and return of products, without touching upon the compensation of damages. The remedies available in the UDRP procedure are confined to the registration, transfer or modification of the domain names and do not include rulings of any monetary damages or rulings concerning the validity or the ownership of trademarks.

605. The limitation of remedies also improves the efficiency of ODR because the neutrals can choose the suitable remedy directly from the list in ODR rules without pondering which remedies to apply. As the ODR entities do not have natural jurisdictions as national courts do, they are unable to render remedies that are outside the application scope of ODR rules.

C. A set of applicable procedural rules and rules to the substance of disputes

606. The third common feature shared by the ODR rules is the development of a set of procedural and substantive rules. GZAC Online Arbitration Rules provide a set of procedural rules to handle various kinds of e-commerce disputes with more expedited proceedings and at a lower cost.[1317] Similar to *Lex Mercatoria* that was created in ancient Rome and consolidated in the Middle Ages by merchants as the transnational commercial law, *Lex Electronica* has been established by Internet users, through the interactions with public and private actors, and through the self-regulation practices.[1318] The UDRP Policy and the Rules for UDRP provide

[1316] Schmitz and Rule (n 20) 133.
[1317] The specific types of disputes include for example small claim online shopping disputes, online loan disputes and credit card disputes.
[1318] Marcelo Dias Varella, *Internationalization of law: Globalization, Internation Law and Complexity* (Springer 2014) 171-174.

solutions to the overlapping national jurisdiction issues on domain names by setting up uniformed procedural and transnational rules. Although the decisions of these ODR entities can be challenged in national courts, the majority of the decisions are accepted by the parties as they are efficient and cost-effective.[1319] Similar examples can be found in the internal complaint mechanism of third-party online platforms with a set of built-in dispute resolution rules and transaction rules that can be directly applicable.

D. Development of effective electronic communication tools

607. How information is employed and communicated in dispute resolution proceedings has a significant influence on the long-term evolution of dispute resolution.[1320] The fourth common feature of ODR procedural rules is the adoption of electronic communication tools to facilitate the proceedings. As pointed out in Section 4.1.4.2, ODR is different from face-to-face dispute resolution due to a lack of social/non-verbal cues. In addition to the communication techniques, the ODR entities have invented various electronic communication tools to improve the interactions among parties in disputes and third-party neutrals.

608. Taobao has established an internal complaint mechanism, which is facilitated by instant message software (AliWangWang) developed especially for the marketplace. The instant message software provides channels for parties to communicate with each other during the transaction and can also be preserved as evidence for future disputes.[1321] The online arbitration platform of Guangzhou Arbitration Commission provides parties channels to exchange evidence, hold hearings, and deliver arbitral awards. The online arbitration platform not only saves time for dispute resolution but also improves the security of documents.

609. The adoption of these online communication tools has increased the communication speed and interactions between parties, enhancing parties' trust in ODR. As suggested by Jelle van Veenen, while it is disputed whether the social/non-verbal cues are lacking in electronic communications, the varied online communication tools can level the playing field of the parties in dispute resolution and provide the parties with more control over presentation.[1322]

[1319] This can be proved by the large number of cases taken by ICANN, eBay, PayPal, Taobao and eBay and the relatively small number of decisions that have been challenged in courts.

[1320] Rabinovich-Einy and Katsh n (1315) 26.

[1321] Taobao invented evidential function of AliWangWang's chatting software. Parties can download chatting records on a specific date within past 75 days with an evidential number automatically created when the download command is executed. Available at: <http://web.wangwang.taobao.com/help/knowledgeDetail.htm?knowledgeId=1139893> accessed 21 June 2017.

[1322] van Veenen (n 1129) 20-21.

4.3.2.2. Co-regulation of the ODR industry to improve the quality of ODR rules

610. The governance of ODR is defined by Noam Ebner and John Zeleznikow as "creating policies, prescribing their implementation, and monitoring ODR practitioners, service providers, systems and services, all to ensure that the underlying procedures are just and that the services are delivered in a professionally satisfactory manner."[1323] The regulation of ODR consists of self-regulation by practitioners in the field of ODR and public regulation by public authorities.[1324]

611. While self-regulation seeks market efficiency and leaves it to the market to correct the breach of ODR standards, public governance seeks fairness and corrects lack of compliance through the use of public enforcement resources.[1325] While the market provides incentives for developing efficient and effective ODR services,[1326] the role of government in regulating ODR is also indispensable. The Council of Europe's Committee on Legal Affairs and Human Rights calls on its member states to develop common minimum standards that ODR providers will have to comply with, in order to ensure, that their procedures do not favor repeat-players over one-time users and to strive to establish a common system of accrediting ODR providers satisfying these standards.[1327] It is quite controversial whether the government should be involved in regulating ODR: some argue that ODR practice is by nature Internet-based and the Internet should develop its own rules without national government intervention[1328]; others insist that ODR should be controlled by governments in order to enhance public trust in using ODR.[1329] As in the ODR field, the current self-regulation is not self-sufficient enough to

[1323] Noam Ebner and John Zeleznikow, 'No Sheriff in Town: Governance for the ODR Field' (2016)32 Negotiation Journal 300.
[1324] Eva Hüpkes, 'Regulation, Self-regulation or Co-regulation?' (2009) Journal of business law 427. Rule, *Online dispute resolution for business:B2B, E-Commerce, Consumer, Employment, Insurance and other Commercial Conflicts* 272.
[1325] Pablo Cortes, 'Accredited online dispute resolution services: creating European legal standards for ensuring fair and effective processes' (2008)17 Information & Communications Technology Law 221, 223.
[1326] Rule (n 1313) 273.
[1327] Council of Europe Parliamentary Assembly, 'Access to justice and the Internet: potential and challenges', Resolution 2081 (2015).
[1328] Ebner and Zeleznikow, 'No Sheriff in Town: Governance for the ODR Field' (n 1323) 304; John Perry Barlow, 'A Declaration of the independence of Cyberspace' <https://www.eff.org/cyberspace-independence> accessed 27 June 2017; Walter B Wriston, *The twilight of sovereignty: How the information revolution is transforming our world* (Scribner 1992).
[1329] Thomas Schultz, 'Does Online Dispute Resolution Need Governmental Intervention: The Case for Architectures of Control and Trust' (2004) ; Ebner and Zeleznikow, 'No Sheriff in Town: Governance for the ODR Field' (n 1323) 309.

address procedural justice, public regulation is therefore also needed to establish a minimum quality standard for ODR entities.

A. Self-regulation in the ODR industry

612. As Cafaggia and Renda indicated, private regulation may be more effective than public regulation in the cross-border context.[1330] It has proximity to the sector to be regulated, flexibility in the absence of political constraints and greater potential to mobilize resources. In the spectrum of ODR, self-regulation participants involve traditional ADR service providers such as arbitration and mediation institutions, ODR system designers such as Youstice,[1331] ODR entities such as eJust[1332] and online platforms such as Taobao, etc. These private participants voluntarily agree to comply with industrial standards and to be accredited accordingly.

613. There are three ways to enhance the self-regulation of ODR within the ODR industry: to improve the expertise and impartiality of third-party neutrals, to incorporate an appeal or an internal review process in ODR, and to enhance the trust and security in ODR proceedings.

a. Improve the expertise and impartiality of third-party neutrals

614. One of the major problems in ODR concerns the lack of expertise and impartiality of third-party neutrals. Due to the efficiency requirement of ODR, the third-party neutrals are very often not appointed by the parties but designated directly by the ODR providers. The composition of third-party neutrals varies from arbitrators, lawyers, retired judges to the staff of merchants, buyers and sellers. Some of them do not have sufficient knowledge to understand the nature of disputes.[1333] One method to improve the expertise of the third-party neutrals is to organize training and qualifications for third-party neutrals to improve their professional knowledge of the dispute resolution. For example, Taobao has organized training for pubic jurors on its website. Moreover, Taobao has established a mechanism to rank public jurors by their performance and assign tasks to the designated public jurors in accordance with different level of difficulty.[1334] In addition, the third-party neutral who provide ODR services can be

[1330] Fabrizio Cafaggi and Andrea Renda, 'Public and private regulation: mapping the labyrinth' (2012) DQ 16, 22.
[1331] Youstice Online Dispute Resolution Rules, <https://www.youstice.com/en/rules-for-odr> accessed 21 December 2017.
[1332] eJust is a French online arbitration provider, < https://www.ejust.fr/> accessible 22 June 2017.
[1333] Such as Taobao crowd-adjudicators who are representative of both buyers and sellers.
[1334] If the decision of crowd-sourced juror has been reversed by Taobao in the appeal, there will be a deduction of the accumulated credits. See Level of Crowd-sourced juror (大众评审等级) <

incorporated into current qualification systems for ADR practitioners to ensure the expertise of the third-party neutral.[1335]

615. Others may encounter conflicts of interest in making decisions because there are economic relations between the parties.[1336] In order to cure the impartiality concern due to financial conflict of interests, the funding method of ODR in B2B disputes should be evenly distributed between the business parties. In B2C disputes, the funding of ODR entities can originate from a funding pool consisted of government support, consumer attribution and trade association membership fees in order to avoid conflict of interests. For example, in the Netherlands, the cost of the Foundation for Consumer Complaints Boards is shared by consumers, trade associations, and the government. The trade associations cover 85% of the budget and the government subsidizes the infrastructural cost.[1337] The consumer only needs to pay a small amount (between 25 EURO to 125 EURO) which is refundable if the consumer wins the case. This could largely improve the impartiality of ODR providers and third-party neutrals.

b. Incorporate an appeal or an internal review process

616. The appeal process in civil cases has the advantage of correcting wrong decisions, keeping judges up to scratch and promoting a consistent application of the law.[1338] The availability of an internal appeal process can correct errors, allow for a re-evaluate the case and supervise the decisions.[1339] Most disputes that are resolved by ODR are small claims and therefore may not be submitted to a regular court due to the high cost and long duration.[1340] ODR can not only save time and money for the parties but can also reduce the burden of national courts. By the same token, the appeal and internal review mechanism can maximize the potential of ODR and avoid referring the case to the court. In order to improve the fairness of the ODR procedure, it is recommended to have an in-built internal review or appeal mechanism in adjudicative ODR

http://pan.taobao.com/jury/help.htm?spm=a310u.3042613.0.0.lzt2Cy&type=judge_level> assessed 28 June 2017.

[1335] Melissa Conley Tyler and Jackie Bornstein, 'Accreditation of on-line dispute resolution practitioners' (2006)23 Conflict Resolution Quarterly 383, 390.

[1336] The online marketplace such as eBay and Taobao provides trading venue for both buyers and sellers and may incur conflict of interest in facilitating transactions.

[1337] EU Directorate General for Internal Policies, 'Cross-border Alternative Dispute Resolution in the European Union', IP/A/IMCO/ST/2010-15, 33.

[1338] Andrews, *Andrews on civil processes* (n 1025) 418.

[1339] Maurits Barendrecht, Korine Bolt and Machteld W De Hoon, 'Appeal procedures: Evaluation and reform' (2006).

[1340] Kaufmann-Kohler and Schultz (n 688) 128.

as an extra layer of protection for the disputed parties.[1341] As most ODR decisions are made by only one third-party neutral, the availability of the internal review or appeal process can play the role of a second opinion especially when there is a reasonable ground to suspect the impartiality of the neutral.

617. Most of the ODR rules that have been discussed in Section 4.2 do not have an internal review or an appeal process. The exception lies in Taobao's crowd-jury adjudication which is subject to a final review by Taobao staff upon the application of a party.[1342] The reluctance in using appeals or internal review processes has to do with the desire to avoid jeopardizing the advantages of fast speed and low cost.[1343] There are also concerns about the unnecessary duplication of procedures in the appeal procedure.[1344] In order to balance the fairness and efficiency requirements in ODR procedures, the ODR process can be designed with an internal review (with respect to online arbitration[1345]) or appeal procedure at the request of the parties on limited grounds. The appeal or internal review should be allowed within set time limits and only if the party can prove that the third-party neutral has a conflict of interests with the dispute, or if there are new facts or evidence that may have a substantial impact the decision, or if the submitted evidence has been forged. Moreover, the third-party neutral who hears the case in the internal appeal should be different from the neutral in the former decision. These parameters would serve a compromise between the need to have efficient ODR procedures and the requirement of an ODR decision with minimum procedural guarantees.

c. Enhance the trust, transparency and security in ODR proceedings

618. In order to improve parties' confidence in using ODR, ODR entities and neutrals should use techniques and security infrastructures to enhance trust, transparency and security in ODR proceedings. In order to reduce the gap between ODR and ADR, the neutrals should use various non-verbal communication tactics to establish interpersonal trust with the parties.[1346] The

[1341] The internal review system is only suitable for adjudicative ODR and shall not be used in consensual ODR process.
[1342] 'The announcement of adjudicator clearance and correction of decisions' <http://pan.taobao.com/jury/help.htm?spm=a310u.3036333.0.0.wIYUXT&type=adjudicator_clean> accessed 19 October 2016.
[1343] Kaufmann-Kohler and Schultz (n 688) 129. Proposals in establishing online appeal process in the UDRP have been criticized also for delays and extra expenses.
[1344] Andrews (n 1025) 422.
[1345] In offline arbitration, appeal procedures are available in arbitration upon parties' agreement, such as arbitration rules of CPR, JAMS and AAA.
[1346] See Section 4.1.4.2.

ODR entities should make their procedural standards available on their websites[1347] and provide parties with easy access to them before their involvement with any ODR services. Moreover, ODR entities should use secure infrastructures (such as an ODR platform) for parties to exchange evidence and communicate, and for neutrals to make ODR decisions. The infrastructure can be supported by using cryptography technologies such as digital certificates and blockchain.

B. Public regulation on ODR

619. The hands-off approach with regard to ODR regulation has to do with a competitive market filled with ODR entities. However, there are not enough ODR entities in the current market and there is a lack of trust in using ODR.[1348] As the ODR market is fragmented with ODR services of different quality, the current self-regulation is insufficient to offer parties with fair and effective ODR services.[1349] The best way to achieve the benefits of private regulation while assuring public accountability traditionally associated with regulation by government entities is to develop a hybrid system of regulation.[1350] The UNCTAD report reiterated that an appropriate legal framework that is supportive to the practice of e-commerce has been identified as a prerequisite for the growth of e-commerce in general and ODR in particular.[1351] The public regulation, at the current stage, should be focused on accreditation of ODR service providers, raising awareness and exerting quality control of ODR.

a. Accreditation of ODR service providers

620. The first suggestion for public regulation of ODR is to establish an accreditation system for ODR service providers. Depending on the level of strictness and control over ODR, the accreditation entity may play a role in information disclosure, evaluation or certification of ODR providers.[1352] The function of the accreditation entity can be very basic, providing only the URL addresses of the ODR providers and the type of ODR services that they provide. The accreditation entity can also play a role in assessing the quality of the services and evaluating

[1347] The fact is that the ODR entities do not fully inform parties of the procedures but rather to limit the ODR entities' liabilities. See Ebner and Zeleznikow, 'No Sheriff in Town: Governance for the ODR Field' (n 1323) 306.
[1348] Schultz (n 1329) 77.
[1349] Morek, 'The regulatory framework for online dispute resolution: A critical view' 185-186; Cortes (n 1325) 223; Ebner and Zeleznikow, 'No Sheriff in Town: Governance for the ODR Field' (n 1323) 305.
[1350] Henry H Perritt Jr, 'Towards a Hybrid Regulatory Scheme for the Internet' (2001) University of Chicago Legal Forum 215, 321.
[1351] United Nations Conference on Trade and Development, 'E-Commerce and Development Report 2003: Chapter 7: Online dispute resolution: E-commerce and beyond' <http://www.unctad.org> accessed 29 June 2017, 195.
[1352] Kaufmann-Kohler and Schultz (n 688) 123.

the ODR providers within a specific period. Furthermore, the accreditation entity can act as a certifier. The ODR providers would be labelled with a trust-mark or a seal if they have complied with the requirements and have been certified by the accredited entity.

621. The EU consumer ODR platform has adopted a combined approach between information disclosure and certification. The platform provides information regarding the ADR entities that have been certified by the accreditation authorities only and will remove such information if the ADR entities no longer comply with the standards stipulated in the Directive on Consumer ADR.[1353] The national accreditation authority will notify the platform if it finds the ADR entity fails to comply with the standards and does not correct it within three months. If all competent authorities have carried out their duty carefully to the same extent,[1354] the accreditation mechanism can be used as an effective way to supervise the quality of ODR services in the market and sustain a high-level playing field.

b. Enhance public awareness of ODR

622. One of the barriers to the development of ODR is its lack of public awareness. The Council of Europe's Committee on Legal Affairs and Human Rights calls on the Council of Europe member states to make voluntary ODR procedures available to citizens in appropriate cases and raise public awareness of the availability of such procedures and create incentives for choosing them.[1355]

623. As ODR is an effective tool to resolve small-claim cross-border e-commerce disputes, the government should impose information disclosure requirements on sellers to inform buyers of the potential ODR options that are immediately available. The EU Regulation on Consumer ODR requires traders that are established in the EU engaging in online sales or online services and online marketplaces to provide a link to the ODR platform so that consumers will have access to the available ADR providers. Consumers will have access to information about ADR providers by visiting the ODR platform.

[1353] Directive on Consumer ADR, Article 20(2).

[1354] Differences in behavior and in degrees of scrutiny between Competent Authorities mean that certified ADR providers with uneven quality can coexist across the EU. See Alexandre Biard, 'Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK' (2018) Journal of Consumer Policy 1.

[1355] Council of Europe Parliamentary Assembly, 'Access to justice and the Internet: potential and challenges', Resolution 2081 (2015).

624. The EU ODR platform is a public website which has a list of accredited ADR service providers in the EU. Similarly, the information about ODR service providers could be provided by the association of ODR service providers or public services on their website. For example, in China, Beijing Mediation Association has established a website "ADR-online.cn," which provides the public with a list of cooperating mediation institutions to resolve different types of disputes.[1356] In addition, public service authorities such as the consumer protection authority can assist consumers to find ODR services via their website.

c. Quality control over ODR rules

625. As governments are strongly incentivized to resolve disputes and maintaining a functioning society without conflicts, Thomas Schultz believes that the governmental intervention in ODR would enhance parties' trust in ODR through the exercise of quality control.[1357] Nevertheless, the government should keep in mind that such control should not jeopardize the flexibility and efficiency of ODR. The question is whether such quality control should be in the form of hard law which is directly applicable to ODR entities or soft law which are observed by ODR entities voluntarily.[1358]

626. At the international level, there is a set of non-binding legal instrument that sets out procedural rules and standards for ODR. The UNCITRAL Working Group III on ODR failed to accomplish its mission to establish a set of ODR procedural rules and standards at the international level. It demonstrates that at the current stage, cooperation between ODR practitioners and governments is required to formulate consensus in ODR rules and standards. Section 4.1 provides sources of minimum ODR procedural requirements which can be used as a reference to determine the fairness of ODR procedures in the absence of uniform standards of ODR in any international legal instrument. Apart from international legal instrument, some national or regional institutions have also proposed soft law rules for the regulation of ODR. The American Bar Association has formulated a final report on "E-commerce and Alternative Dispute Resolution" making recommendations on best practices by ODR service providers.[1359] The National Center for Technology and Dispute Resolution has proposed a set of "Ethical

[1356] ADR-online.cn, < http://www.adr101.com/> accessed 19 January 2019.
[1357] Schultz (n 1329) 90.
[1358] Linda Senden, *Soft law in European Community law* (Bloomsbury Publishing 2004) 112. The major differences between soft law and hard law is whether it has binding effects.
[1359] American Bar Association, Task Force on E-commerce and Alternative Dispute Resolution Final Report, 2002.

Principles for Online Dispute Resolution".[1360] With respect to B2B disputes, the Asian-Pacific Economic Cooperation is developing a collaborative framework on ODR of cross-border disputes involving micro, small and medium sized enterprises.[1361] The APEC Economic Committee is working on a Model ODR Procedural Rules, which can be used by ODR providers. These examples demonstrate how soft law can be used to provide a quality benchmark for ODR entities in the absence of a binding legal instrument.

627. In some jurisdictions, a hard law approach has been applied in consumer disputes. The EU Directive on Consumer ADR sets an example of how hard law rules can be imposed on consumer ADR/ODR entities. National authorities are able to examine whether these ADR/ODR entities are in compliance with the procedural principles in the Directive on Consumer ADR by establishing an accreditation system at the national level. Nevertheless, scholars cast doubts on the effectiveness of the EU Directive on Consumer ADR because traders are neither obliged to use ADR in dispute resolution nor obliged to comply with decisions of the ADR entities.[1362] It is undeniable that the EU Directive on Consumer ADR has established an eco-system for ADR services all over Europe, but further endeavors need to be made to ensure the effectiveness of ADR/ODR services. For example, some member states have adopted compulsory ADR[1363] in several industrial sectors to enhance the availability and effectiveness of ADR mechanism.[1364]

628. From the current practice in the field of ODR, it can be concluded that a hybrid approach (both hard law and soft law) has been used to control the quality of ODR. While the hard law can ensure the quality of ODR services with binding quality standards, the development of soft law in ODR is useful in reaching convergence on the ODR procedural rules and standards.

[1360] National Center for Technology and Dispute Resolution, 'Ethical Principles for Online Dispute Resolution' < http://odr.info/ethics-and-odr/> accessible 29 June 2017. See also Leah Wing, 'Ethical Principles for Online Dispute Resolution' (2016)1 International Journal of Online Dispute Resolution 12.

[1361] 24th Meeting of APEC Ministers Responsible for Trade Statement, 26 May 2018, paragraph 42, < https://www.apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Trade/2018_trade> accessed 20 January 2019.

[1362] Franziska Weber, 'Is ADR the Superior Mechanism for Consumer Contractual Disputes?—an Assessment of the Incentivizing Effects of the ADR Directive' (2015)38 Journal of Consumer Policy 265; Marte Knigge and Charlotte Pavillon, 'The legality requirement of the ADR Directive: just another paper tiger?' (2016)5 Journal of European Consumer and Market Law 155; Joasia Luzak, 'The ADR Directive: Designed to Fail? A Hole-Ridden Stairway to Consumer Justice' (2016)24 European Review of Private Law 81; Ross(n 211).

[1363] It unilaterally requires traders to participate in dispute resolution. Once the decision is made and consumer agrees with it, the decision can be directly enforced in court.

[1364] For example, the UK Financial Ombudsman Service, the Dutch Foundation Consumer Complaints Boards and the Poland Insurance Ombudsman require traders to adhere to ADR procedures. See EU Directorate General for Internal Policies, 'Cross-border Alternative Dispute Resolution in the European Union', IP/A/IMCO/ST/2010-15, 32.

Chapter 5. Enforcement of the ODR Outcomes

629. According to the Council of Europe, "enforcement" means "the putting into effect of judicial decisions, and also other judicial and non-judicial enforceable titles in compliance with the law, which compels the defendant to do, to refrain from doing, or to pay what has been adjudged."[1365] It forces the party to fulfill his/her obligation arising from judicial decisions and enforceable titles by using judicial forces authorized by laws. However, "enforcement" has a wider scope in the context of ODR, which also includes forcing the party's compliance by social sanctions through contractual arrangements. Unlike judicial forces, these social sanctions are dependent on the private control of resources or the reputation management.

630. Chapter 5 will discuss two types of ODR enforcement mechanisms in general: private enforcement and public enforcement. "Public enforcement" refers to the enforcement of the ODR outcome by the judiciary while "private enforcement" relies on private initiatives such as monetary transaction guarantees and sanctions that affect the parties' reputation. The distinction between public enforcement and private enforcement can also be found in the Note made by the Secretariat of UNCITRAL Working Group III (Online Dispute Resolution) on the overview of the private enforcement mechanism.[1366] It defines "private enforcement" as an alternative to a court-enforced arbitral award or settlement agreement (which is defined hereinafter as "public enforcement") and which can either provide for the automatic execution of the outcome of proceedings or create incentives for the parties to perform.

631. There is no enforcement mechanism that is specially designed to enforce ODR outcomes, which are characterized by low-in-value and high-in-volume. It is insufficient to rely solely on public enforcement mechanism to enforce ODR outcomes, which is usually expensive and time-consuming. The lack of an effective enforcement mechanism constitutes a major barrier to the development of ODR and reduces parties' trust in and willingness to use ODR.[1367] Therefore, the development of a suitable ODR enforcement mechanism has become one of the first priorities in developing ODR.[1368] This Chapter will give an overview of the existing

[1365] Council of Europe, Recommendation, Rec (2003)17 of the Committee of Ministers to member states on enforcement, I.a.

[1366] UNCITRAL Working Group III (Online dispute resolution): Online dispute resolution for cross-border e-commerce transactions: overview of private enforcement mechanisms, A/CN.9/WG.III/WP.124, paragraph 4. (UNCITRAL Note on Private Enforcement)

[1367] Cortés, *Online Dispute Resolutions for Consumers in the European Union* (n 17) 82-83.

[1368] Gabrielle & Schultz (n 934) 209; Rule, *Online dispute resolution for business:B2B, E-Commerce, Consumer, Employment, Insurance and other Commercial Conflicts* 106.

mechanisms (public enforcement mechanisms in Section 5.1 and private enforcement mechanisms in Section 5.2) and evaluate the benefits and drawbacks of each mechanism. Section 5.3 will discuss the appropriateness of using public enforcement mechanism to enforce ODR outcomes based on the previous discussion and propose suggestions to enhance the public and private enforcement mechanisms.

5.1. Public enforcement: judicial measures

632. Public enforcement here refers to the enforcement mechanism that relies upon the assistance or intervention of the public authorities such as national courts, administrative bodies and notary offices. Although ODR aims to provide an out-of-court redress, the intervention of public authorities may still be required to enforce the ODR outcome when one party fails to comply with it voluntarily. However, public enforcement may not be an ideal option for ODR as the traditional judicial scheme is too costly and time-consuming.[1369] The questions then arise are how the outcomes of ODR can be enforced within the existing framework and what are the limitations to the public enforcement mechanism?

633. In Section 5.1, I will discuss the public enforcement mechanisms of two common ODR outcomes,[1370] namely online arbitral awards and online mediated settlement agreements. I chose these two examples because there are existing legal frameworks to enforce the results of these ODR outcomes.[1371] I will explore the possibility to enforce ODR outcomes in current legal frameworks.

5.1.1. Enforcement of online commercial arbitral awards

634. The following section will be divided into two parts: the recognition and enforcement of online arbitral awards under a national regime on the one hand, and under the regime of the New York Convention on the other hand. The general conditions to the recognition and enforcement of an online arbitral award under a national regime will be discussed based on the UNCITRAL Model Law on International Commercial Arbitration, followed by a further study in EU and China. In the second part, I will examine to what extent online arbitral awards can be enforced

[1369] 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 1; Solovay and Reed (n 62) 8-28, 8-29.
[1370] The other types of ODR outcomes, for example, UDRP decisions and decisions made by internal complaint mechanism of the marketplace will later be discussed in Section 5.2 private enforcement mechanism.
[1371] Both in international legal instruments (New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Singapore Convention on International Settlement Agreements Resulting from Mediation) and national laws (in ADR or contract law).

under the legal framework of the New York Convention.

5.1.1.1. Recognition and enforcement of online arbitral awards under domestic legal regimes

635. The formal requirements of arbitral awards are usually set forth in the arbitration legislation of the states, which requires the awards in written form with signatures of the arbitrators and dates.[1372] In some jurisdictions, parties are also allowed to deviate from these statutory requirements and agree upon the formal requirements applicable to the award.[1373] The requirement to enforce an online arbitral award in a national court will also rely on national legislation in electronic communications (such as Electronic Signature Law and E-commerce Law) which have already been discussed in Section 3.1.2. Therefore, this section will use the knowledge gathered above to analyze the recognition and enforcement of online arbitral awards. Part A sets out the basic conditions to enforce domestic online arbitral awards in national legal regime, Part B and C respectively use the legislation of EU and China to reflect how these conditions are implemented.

A. Conditions to enforce domestic online arbitral awards

636. The following section will discuss the conditions necessary to enforce an online arbitral award in a domestic national court. The jurisdictions that will be used are the EU member states (England, Germany and the Netherlands) and China. This Section will deal, more specifically, with the typical features of an online arbitral award. Issues dealt with here are the formal requirements to which online arbitral awards must adhere, and the way in which the online arbitral awards are delivered. Other formal conditions that an arbitral award should meet, such as the requirements that awards shall be accompanied with reasoning, time, and date, are not covered here.[1374] The UNCITRAL Model Law on International Commercial Arbitration has been adopted by 75 states as the legislative model, and therefore serves as an excellent point of reference to find out how online arbitral awards fit into the national legal framework of arbitration.

a. The online arbitral award in writing and signed by the arbitrator(s)

[1372] B. Born (n 1165) 3031-3032.
[1373] In Section 52(1) of the English Arbitration Act (1996) provides that the parties are free to agree on the form of the award.
[1374] Poudret & Besson (n 301) 665.

637. The formal requirement of a written award with clear signatures of arbitrators is often stipulated either expressively or impliedly in legislation.[1375] Article 31(1) of the UNCITRAL Model Law on International Commercial Arbitration provides that an award shall be in writing and signed by the arbitrator(s). Others do not specify but imply that the award shall be in writing and bear signatures of arbitrators.[1376] As a general rule, the original or copy of the arbitral award submitted for enforcement must contain signatures of the arbitrators.[1377] It is presumed to be sufficient that an arbitral award is signed by the majority of the arbitrators and that the reason for the lack of the other signature(s) has already been stated in the award.[1378]

638. The question is whether these formal requirements are fulfilled in the context of online arbitral awards.[1379] This can be further divided into two sub-questions: firstly, whether arbitral awards issued in electronic form are in writing; secondly, whether and what type of electronic signatures of arbitrators affixed to the arbitral awards are sufficient to make the arbitral awards enforceable?

639. The writing requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.[1380] This is the functional equivalence principle established by the UNCITRAL Model Law on E-Commerce to harmonize national rules admitting data messages as in line with written formal requirements. The functional equivalence principle can be used to establish the legal effect of online arbitral awards in parallel with traditional arbitral awards.[1381] In accordance with Article 8 of the UNCITRAL Model Law on E-commerce, the originality requirement has been fulfilled if there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message.[1382] However, these general principles do not prevent national legislation from prescribing more rigid requirements to the formal

[1375] Julian DM Lew, Loukas A Mistelis and Stefan Kröll, *Comparative international commercial arbitration* (Kluwer Law International 2003) 644.
[1376] French Civil Code, Article 1473; New York Convention, Article IV.
[1377] Wolff (n 302) 175.
[1378] UNCITRAL Model Law on International Commercial Arbitration, Article 31(1); CRCICA Article 32(4); LCIA Article 26(4); Stockholm Institute Article 32(1).
[1379] Wolff (n 302) 174; Ihab Amro, 'Enforcement of cross-border online arbitral awards and online arbitration agreements in national courts' (2016)5 Slovenska Arbitražna Praksa.
[1380] UNCITRAL Model Law on E-commerce, Article 6.
[1381] Guide to UNCITRAL Model Law on E-commerce, paragraph 15.
[1382] The reliability requirement for an electronic signature is further illustrated in Article 6(3) of the UNCITRAL Model Law on Electronic Signatures.

requirements of online arbitral awards.[1383]

640. Depending on the types of electronic signatures that are used[1384] and national legislation with regard to the evidentiary value of electronic signatures, different approaches are adopted to give the legal effect to these online arbitral awards affixed with electronic signatures of the arbitrators.[1385] For example, in the U.S., an arbitrator can execute an award by any electronic signature meaning "an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.".[1386] There are no specific requirements imposed by U.S. law regarding the type of electronic signature that should be used in online arbitral awards. This demonstrates that the U.S. adopts a technology neutral approach towards electronic signatures. There are also countries which adopt a technology preference approach in the enforcement of online arbitral awards. The German law requires that arbitral awards to be affixed with a qualified electronic signature in accordance with the Electronic Signature Act if they are delivered by electronic means.[1387] While online arbitral awards with simple electronic signatures, such as scanned signature, are allowed in the U.S., such kinds of online arbitral awards may not be recognized in Germany.

b. Delivery of the online arbitral award

641. Although delivery is not itself a formal requirement to arbitral awards, it has a procedural consequence under the national arbitration legislation.[1388] National laws and institutional arbitration rules contain provisions that attach as a consequence to the notification of the award to the parties, the award's binding force or the possibility to challenge the awards.[1389] Article

[1383] For example, the German law (German Civil Code (BGB), Section 126(3), 126a) and the Dutch law (Dutch Civil Code, Article 3: 15a(1)(2)) require that the arbitral award should be delivered by a qualified electronic signature of the arbitrators in electronic context.
[1384] Types of electronic signatures are such as scanned signature, biometric signature or advanced signature based on cryptology such as digital signature. See Section 3.1.2.1. D.b. Types of electronic signature.
[1385] Same rationale in the discussion of the formal validity of arbitration agreements in Section 3.1.2.
[1386] Section 19(a) of the Uniform Arbitration Act 2000 requires the arbitral award be signed or otherwise authenticated by the concurring arbitrators. The "otherwise authenticated" are intended to conform to the Electronic Signatures in the Electronic Signatures in Global and National Commerce Act (15 U.S.C. §§ 7001, 7006(5) (2000)).
[1387] German Civil Code (BGB), Article 126a.
[1388] Born (1165) 3065, although in Switzerland, an arbitral award only becomes final upon communication to the parties.
[1389] Laws are for example: Belgian Judicial Code, Article 1713(8), English Arbitration Act, Section 55, Dutch Code of Civil Procedure, Article 1058; rules are fore example: UNCITRAL Arbitration Rules 34(6), ICC Arbitration Rules, Article 35(1), LCIA Arbitration Rules, Article 26(7), SAIC Arbitration Rules 2016, Article 32.8.

31(4) of the UNCITRAL Model Law on International Commercial Arbitration requires a copy of the arbitral award signed by the arbitrators to be delivered to each party. Other countries' legislation such as the U.S. Uniform Arbitration Act[1390] stipulates in general that the arbitrator or arbitration institution shall give notice of the award, including a copy of the award. This can be interpreted as a flexible way to accommodate electronic delivery without limiting the manner in which notice can be made.[1391] Some national laws and arbitration institutional rules explicitly set forth electronic means of delivery of arbitral awards, including by emails or other types of electronic communication methods.[1392] With the assistance of advanced technologies such as electronic signature, electronic seal, time stamp, and registered delivery services, it is possible to record the time of delivery of the awards by emails.

642. Problems may still arise when there is a technical fault within the email delivery system or when a party claims that he/she failed to receive the arbitral award. It is a matter of evidence to prove when exactly the arbitral awards have been delivered. It would be ideal if the recipient confirms that he/she has received the award via a confirmation receipt, but this is not always the case. Owing to the advanced technological innovation, there are new technologies available to prove the delivery of electronic documents.[1393] One technology is the electronic registered service, which transmits data messages between the parties by electronic means and is able to provide evidence relating to the handling of the transmitted data, including proof of sending and receiving the data messages. This protects transmitted data messages against the risk of loss, theft, damage or any unauthorized alternations.[1394] Another option is to create an electronic delivery system on the online arbitration platform where the parties can receive and send documents through the same electronic delivery system.[1395] When the email has been received by the recipient, the system will automatically send a signal to prove the receipt of the award.

[1390] Uniform Arbitration Act 2000, Section 19(a)(3).
[1391] Wolff (n 302) 177.
[1392] Belgian Judicial Code, Article 1678(1), the communication can be delivered or sent to the addressees either to his domicile, his residence or his email address; LCIA Arbitration Rules, Article 26.7, the arbitral award may be transmitted by any electronic means in addition to paper form (if so requested by any party); Euregio Arbitration Centre Rules of procedure, Article 5.6.
[1393] Jie Zheng, 'The recent development of online arbitration rules in China' (2017)26 Information & Communications Technology Law 135 , 141.
[1394] Council Regulation (EU) No 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in Internal Market and Repealing Directive 1999/93/EC [2014] OJ L 257/73 (eIDAS), Article 3(36).
[1395] GZAC, 'The Development and Improvement of Electronic Delivery in Commercial Arbitration in China' (我国商事仲裁电子送达方式的推行和完善) (2016) Zhong Cai Yan Jiu (仲裁研究) 42, 52.

B. The recognition and enforcement of online arbitral awards in the EU

643. As discussed in Section 3.1.2.2, electronic signatures have been regulated by the Regulation (EU) 910/2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market (eIDAS Regulation). The eIDAS Regulation requires a qualified electronic signature based on a qualified certificate issued in a member state to be recognized as a qualified electronic signature in another member state.[1396] Since a qualified signature has the equivalent legal effect as a handwritten signature, online arbitral awards that are authenticated with qualified electronic signatures of arbitrators shall also have the equivalent effect as arbitral awards with handwritten signatures. The online arbitral awards which are rendered outside of the EU with qualified electronic signatures shall be recognized as legally equivalent to qualified electronic signatures in the EU provided that there is an agreement concluded between the EU and the third country where the certification-service-provider who issues the foreign qualified electronic signatures is located.[1397] The legal validity of online arbitral awards which are rendered by other types of electronic signatures (non-qualified electronic signatures) is uncertain depending on the respective jurisdiction and may be subject to challenges as they do not have the same legal effect as handwritten ones. Besides electronic signatures, qualified time stamps and electronic registered delivery services that are rendered by trust services in one EU member state shall also be recognized in other member states.[1398] The adoption of time stamps and electronic registered delivery services can serve the evidentiary purpose to record whether and when the online arbitral awards have been delivered to the parties.

644. Apart from the eIDAS Regulation, the Directive on E-commerce (ECD) also requires EU member states to ensure that their national legislation shall not hamper the use of out-of-court dispute settlement schemes, including appropriate electronic means.[1399] It encourages the use of ODR in resolving disputes between the information service provider and the recipient of the service. The Consumer Directive on ADR and the Consumer Regulation on ODR have also proved the European Commission and the European Parliaments' interests in developing an ODR mechanism in B2C disputes. Although B2C online arbitration falls within the scope of these ADR legal instruments on consumer protection, there is no EU instrument regulating

[1396] eIDAS Regulation (n 498), Article 25(3).
[1397] eIDAS Regulation, Article 14(1).
[1398] eIDAS Regulation, Article 41(3)
[1399] ECD (n 475), Article 17(1).

online arbitration in the B2B context.[1400] In this regard, the formal requirements of online arbitral awards should still follow the procedural requirements prescribed by national arbitration legislation. [1401] In the following part, jurisdictions of England, Germany and the Netherlands will be used with a functional approach to examine whether the online arbitral award can be recognized and enforced under national legislation.

645. In England, the Arbitration Act 1996 allows the arbitral awards to be rendered in any form agreed by the parties.[1402] If parties have agreed that arbitral awards can be delivered in electronic form in their arbitration agreements, there is no doubt that online arbitral awards are valid in the agreed formality. In the absence of any agreement, the award shall be in writing and signed by all the arbitrators or those arbitrators assenting to the award.[1403] The English law has taken a functional approach to the admissibility of electronic signatures as evidence in English court.[1404] Any process fulfilling the function of authenticating the signatory and showing his/her affirmation of the content of the document may be a signature and can satisfy the statutory signature requirement.[1405] This also applies to the recognition and enforcement of online arbitral awards in England. It is up to the court to decide whether the online arbitral awards have met the formal requirements of Article 52 of the Arbitration Act 1996.[1406]

646. In Germany, the arbitral award shall be delivered in writing and be signed by the majority of arbitrator(s).[1407] In Germany, if the written form is prescribed by statute (which is the case in arbitration), the written form may be replaced by an electronic one with a qualified signature in accordance with the Electronic Signature Act.[1408] Similarly, in the Netherlands, it is specifically stipulated that the formal requirement of an arbitral award in writing and with the signature(s) of arbitrator(s) may be made in electronic form provided that the electronic signature of arbitrators adopts a sufficiently reliable authentication method.[1409] Such kind of

[1400] Directorate General for Internal Policies, 'Legal Instruments and Practice of Arbitration in the EU' (2014), PE 509.988, 216.
[1401] Haitham Haloush, 'The Authenticity of Online Alternative Dispute Resolution Proceedings' (2008)25 Journal of International Arbitration 355, 360. See discussions in Section 3.2.2.1.B. .
[1402] Arbitration Act 1996, Article 52(1).
[1403] Arbitration Act 1996, Article 52(2),(3).
[1404] Section 3.1.2.3 B c, see (n 527).
[1405] Hornle, 'Online Dispute Resolution–More ThanThe Emperor's New Clothes' 15; English Law Commission, E-commerce: Formal Requirements in Commercial Transactions (n 514) paragraphs 3.39-3.41.
[1406] Arbitration Act 1996, Article 52: The parties are free to agree on the form of an award. In the absence of such agreement, the award shall be in writing signed by all the arbitrators or those assenting to the award.
[1407] German Code of Civil Procedure (ZPO), Article 1054(1).
[1408] German Civil Code (BGB), Section 126(3), 126a. Act on Digital Signature (Gesetz zur digitalen Signatur).
[1409] Dutch Code of Civil Procedure, Article 1057(2), 1072b (3).

electronic signature is presumed to be met if a qualified electronic signature is used in the Dutch Civil Code.[1410]

647. From the analysis above, English law provides the most flexible legal regime when it comes to the formal requirements of online arbitral awards by giving parties autonomy on the form of arbitral awards. Countries such as Germany and the Netherlands follow a strict formal requirement to online arbitral awards which requires qualified electronic signatures of arbitrators.

C. The recognition and enforcement of online arbitral awards in China

648. According to Article 53 of the Arbitration Law of the PRC, the arbitral award shall be signed by the arbitrators and sealed by the arbitration commission. As the Arbitration Law of the PRC was promulgated in 1994 and has not been amended ever since, the formal requirements for an arbitral award are not tailored to the unique format of online arbitral awards.

649. Since the implementation of the PRC Electronic Signature Law (PESL), electronic documents and electronic signatures are also recognized in the PRC and by the people's court.[1411] It has been confirmed in the PESL that if the information contained in the data message is accessible to be used for subsequent references, such data message has met the statutory writing requirements.[1412] In accordance with the functional equivalence principle, the content recorded in the online arbitral awards is no different from the arbitral award in paper form. Moreover, the use of reliable electronic signature in online arbitral awards, which has the same legal effect as a handwritten signature, secures the authenticity of arbitral awards.[1413] Therefore the Arbitration Law of the PRC should also embrace the information technology and recognize the legal status of online arbitral awards as a general trend. At the current stage, it is possible for the parties to agree on the electronic form of online arbitral awards and the use of electronic signature in online arbitration by agreement.[1414]

650. The Arbitration Law of the PRC has not been amended since its promulgation in 1994. The

[1410] Dutch Civil Code, Article 3: 15a(1)(2).
[1411] Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts, Interpretation No. 16 [2018] of the Supreme People's Court, Article 11.
[1412] PESL, Article 4.
[1413] PESL, Article 14; Li Hu (n 1197) 206.
[1414] Pursuant to Article 3 of the PESL, the legal effect of any document using electronic signature and data messages as stipulated by the parties shall not be denied.

latest online arbitration rules issued by Chinese arbitration institutions[1415] and the attitude of people's courts in accepting online arbitral awards[1416] can be used as an indicator to show the legal compatibility of online arbitration in China.[1417] For instance, GZAC Online Arbitration Rules[1418] state that the online arbitral awards shall be made by the arbitral tribunal affixed with the electronic signatures of the arbitrators and the electronic seal of GZAC.[1419] The arbitral awards shall be deemed to be delivered to the designated email address or mobile number of the parties.[1420] Meanwhile, the parties may still receive arbitral awards in paper form upon a request to GZAC. In addition, Article 10 of GZAC Online Arbitration Rules further elaborates on the electronic delivery rules. In case of any inconsistency between the delivery time of GZAC's system and the recipient's system, the delivery time of the recipient's system prevails on the condition that sufficient evidence has been provided by the recipient.[1421] The GZAC Online Arbitration Rules have made revolutionary progress in modernizing their institutional rules by accepting online arbitral awards and providing rules on the electronic delivery of the awards.[1422]

5.1.1.2. Cross-border recognition and enforcement of online arbitral awards under the New York Convention

651. The New York Convention has established an international legal framework for national courts to recognize and enforce foreign arbitral awards.[1423] Article III of the New York Convention has set up the obligations of member states to recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied

[1415] Song Lianbin and others, 'Annual Review on Commercial Arbitration in China', Commercial Dispute Resolution in: China: An Annual Review and Preview (Wolters Kluwer Law & Business 2016) 5–6.
[1416] According to Article 14(2) of the Provisions of the Supreme People's Court on Several Issues concerning the Enforcement of Cases of Arbitral Awards by the People's Court (Fa Shi [2018] No. 5): the arbitral tribunal may deliver the arbitral awards in accordance with the Arbitration Law of the PRC, arbitration institutional rules or party's agreement.
[1417] Besides CIETAC and GZAC, other Chinese arbitration institutions such as Shenzhen Arbitration Commission also published their online arbitration rules in 2016. These online arbitral awards have already been successfully enforced in people's courts. See (n 1149) on the number of online arbitration cases settled by GZAC in 2017.
[1418] See Section 4.2.1. Online arbitration.
[1419] GZAC Online Arbitration Rules (n 1148), Article 27(1).
[1420] GZAC Online Arbitration Rules (n 1148), Article 27(2). At the meantime, GZAC will send a text message to the recipient's mobile communication number as a reminder.
[1421] GZAC Online Arbitration Rules (n 1148), Article 10(1).
[1422] The arbitration online platform (https://www.gzyijian.com/site/index) allows parties to submit evidence and receive notifications from the arbitral tribunal.
[1423] It is controversial whether B2C arbitral awards are commercial and can be enforced under the New York Convention in the member states who have made commercial reservation. See Gaillard & Savage (n 298) 38.

upon.[1424] It also requires member states to presumptively recognize awards made in other countries with no more onerous conditions than those for domestic awards. This section will study whether and to what extent foreign online arbitral awards can be recognized and enforced in foreign states pursuant to the rules of the New York Convention.

652. In what follows, I will first define the notion of "international" and "non-domestic" of online arbitral awards which are stipulated in Article I of the New York Convention. Second, I will analyze the role of "commercial reservation" in confining the enforcement scope of the arbitral awards. Third, I will explore the possible challenges for the recognition and enforcement of an online arbitral award. Last, I will discuss the requirement of a "duly authenticated" original or "a duly certified copy" (Article IV(1) of the New York Convention) in the context of online arbitral awards.

A. "Online arbitral awards: "international" or "non-domestic"?

653. The precondition to apply the New York Convention is to have an arbitral award recognized and enforced in a state other than the one where the arbitral award is made, or if such an arbitral award is not considered as a domestic award.[1425] The following question would be whether the online arbitral award is "international" or "non-domestic".

654. As discussed in Section 4.2.1.4, the determination of the seat of online arbitration is a legal fiction, which can be fixed according to a set of rules irrespective of the virtual nature of online arbitration. According to Article 20(1) and 31(3) of the UNCITRAL Model Law on International Commercial Arbitration, the arbitral awards are deemed to be made at the seat of arbitration regardless of where the hearings were held or where the award was signed. Based on the principle of party autonomy, the seat in an online arbitration can be determined by the parties in their arbitration agreement.[1426] In the absence of any stipulations in the arbitration agreement, it is usually for the arbitral tribunal or the arbitration institution (where the parties have agreed to arbitrate in accordance with a set of institutional arbitration rules) to designate the seat of arbitration.[1427] Lastly, if there is no indication of where the award was made, it is normally for the enforcing court to determine whether the awards were made within or outside

Andreas Börner, 'Article III' in Kronke (n 1182) 115-142.
[1425] New York Convention, Article I(1).
[1426] Belohlavek (n 1193)33.
[1427] B. Born (n 1165) 2054.

its jurisdiction.[1428]

B. Commercial reservation to the scope of New York Convention

655. The New York Convention provides for a commercial reservation that allows signatory states to refuse to enforce arbitral awards that are not considered "commercial".[1429] If the forum state has made the commercial reservation, whether the subject matter of the dispute is "commercial" may affect the enforcement of a foreign arbitral award. This reservation has been adopted by approximately one-third of the states and jurisdictions.[1430] However, in the absence of a definition in the New York Convention, the definition and scope of "commercial" can be interpreted differently under the national law of enforcing states. In the U.S., for example, "commercial relationship" has a wide scope including employment, consumer transactions and shareholder disputes.[1431] It is controversial whether B2C arbitration should receive the blessing of the New York Convention. Some scholars held the view that there does not seem to be any examples of any national court excluding B2C arbitral awards from enforcement under the New York Convention.[1432] The UNCITRAL Model Law on International Commercial Arbitration also gives a wide interpretation of "commercial" to cover matters arising from all relationships of a commercial nature, and it offers a non-exclusive list of transactions.[1433] The scope of "commercial" in the UNCITRAL Model Law should have a wide scope to effectuate pro-arbitration objectives, subject to any non-arbitrability rules in particular states.[1434] Despite that there is a trend of a liberal and expansive definition of the term "commercial",[1435] other scholar held the view that B2C arbitration does not fall within the scope of "commercial" worrying that the protection of national courts for consumers are

[1428] 'Chapter 26 Recognition and Enforcement of Foreign Arbitral Awards' in Lew, Mistelis, et al., (n 296) *Comparative International Commercial Arbitration*, 699; New York Convention, Article I(1).
[1429] New York Convention, Article I(3).
[1430] See UNCITRAL, Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>.
[1431] Title 9 U.S.C. §1,see, e.g., Bautista v. Star Cruises, 396 F.3d 1289 (11th Cir. 2005); Francisco v. Stolt Achievement MT, 293 F.3d 270, 274 (5th Cir. 2002) ("an employment contract is 'commercial'"); Physiotherapy Assoc. v. Schexneider, 1998 WL 34076415 (W.D. Ky.); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (U.S. S.Ct. 2006) (consumer transaction subject to domestic FAA); Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265 (U.S. S.Ct. 1995);
[1432] Llewellyn Joseph Gibbons, 'Creating a market for justice; A market incentive solution to regulating the playing field: Judicial deference, judicial review, due process, and fair play in online consumer arbitration' (2002)23 Northwestern Journal of International Law & Business 1, 55.
[1433] The UNCITRAL Model Law on International Commercial Arbitration, footnote 2 related to the definition of "commercial" of Article I (1).
[1434] B. Born(n 1165) 309.
[1435] A number of jurisdictions do not provide for "commercial" relationship requirement in their national law, this is the case in England, Germany, and Italy.

therefore lost.[1436]

C. Grounds for refusing to recognize online arbitral awards

656. Although national courts have the obligation to recognize arbitral awards in general, Article V of the New York Convention provides legal grounds for the courts to refuse recognition. Among these grounds, the following grounds are especially relevant in the recognition and enforcement of online arbitral awards:

(i) Article V(1)(a) invalidity of arbitration agreements;

(ii) Article V(1)(b) parties' right of notification and right to be heard are violated;

(iii) Article V(1)(e) non-binding arbitral award or annulled arbitral award.

657. The first possible ground to challenge the online arbitral award is the validity of electronic arbitration agreements under the law to which the parties have subjected to, or under the law of the country where the award was made in the absence of any agreement. As discussed in Chapter 3, electronic arbitration agreements are recognized in national states by meeting both the formal validity requirement and substantive validity requirement.

658. The second possible ground for national courts refusing to recognize an online arbitral award is the challenge of due process in the online arbitration proceedings.[1437] The assessment of the procedural justice of online arbitration proceedings in Section 4.2.1 has touched upon this issue. While online arbitration has reduced the time and cost for dispute settlement, institutional online arbitration rules should be designed to meet the minimum procedural guarantees to ensure procedural justice in online arbitration.

659. The third possible ground for national courts refusing to recognize an online arbitral award is the lack of binding status of the awards or annulment of the award under the law of the arbitration seat.[1438] As discussed in Section 5.1.1.1 A, the formal requirements of arbitral awards are stated in national legislation either in an expressive or implied way. Some national legislation allows party autonomy in deciding the formal requirements of the arbitral awards.[1439] In the absence of parties' agreement, it is the national law of the seat of arbitration

[1436] Stewart and Matthews (n 170)1136.
[1437] New York Convention, Article V(1)(b).
[1438] New York Convention, Article V(1)(e).
[1439] English Arbitration Act, 1996, Section 52; Swiss Code on Private International Law, Article 189(1).

that determines the formal validity of arbitral awards. In some jurisdictions, [1440] the lack of formal requirement of the arbitral awards may constitute a ground to invalidate the award in the annulment proceeding. [1441] However, states have virtually never relied upon non-compliance with formal requirements as grounds to deny recognition of foreign arbitral awards.[1442] In other jurisdictions, the arbitration legislation does not provide for annulment based on formal defects in the award.[1443] With the implementation of national legislation on electronic communications and considering the New York Convention's openness to technology advancement,[1444] the general trend for national courts is to embrace online arbitral awards.[1445]

D. Submission requirements

660. As the formal requirement of arbitration agreements has been discussed in Section 3.1.1. A, the section here will focus on the requirements to be met by a valid and enforceable arbitral award. Article IV of the New York Convention furnishes the formality requirements to be observed when applying for the enforcement of an arbitral award. It requires the party applying for the recognition and enforcement of the arbitral award to produce evidence of the arbitral award in a duly authenticated origin or a duly certified copy. The "authentication of the original award" means that the signatures of the arbitrators on the award are attested to be genuine. [1446] The "certification of the copy of the award" is the formality by which the copy is to be attested as a true copy of the whole original.[1447] The New York Convention is silent as to which law applies to the authentication and certification criteria. From the drafting records of the Convention, the delegates intended to allow enforcing states the option to permit authentication and certification either under the law of the country where an award was rendered (*lex arbitri*), or under the law of the enforcing court (*lex fori*).[1448] The aim of Article VI of the New York

[1440] English Arbitration Act, 1996, Section 68(2)(h); Belgian Judicial Code, Article 1717(3); Dutch Code of Civil Procedure, Article 1065(1)(d).
[1441] B. Born (n 1165) 3037.
[1442] *Ibid*.
[1443] French Code of Civil Procedure, Article 1502; Arbitration Law of the PRC, Article 70; Japanese Arbitration Law, Article 44; Korean Arbitration Act, Article 36(2), Australian International Arbitration Act, 2011, Schedule 2, Article 34(2).
[1444] UNCITRAL Recommendation Regarding the Interpretation of Article II (n 315).
[1445] Wolff (n 302) 179.
[1446] Marike R. P. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 143.
[1447] *Ibid*.
[1448] Dirk Otto, Article IV in Herbert Kronke, Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 179; Paulsson (n 1446) 143; United Nations Economic and Social Council, Report of the Committee on the Enforcement of International Arbitral Awards, E/AC.42/4/Rev.1, paragraph 55.

Convention was to simplify the request for recognition and enforcement of arbitral awards. Therefore, only *prima facie* evidence is sufficient so long as it can prove that arbitral awards are authentic.[1449]

661. Article VII(1) of the New York Convention creates a right for the party to rely on the more favorable regime to recognize and enforce a foreign arbitral award. The more-favorable-right provision may be used by the enforcing party when the arbitration forum offers a more flexible formal requirement than that of Article IV of the New York Convention. However, the more-favorable-right provision shall be rarely used not only because national courts generally accept online arbitral awards, but also because invoking such a provision would disallow parties to enforce foreign arbitral awards relying on the New York Convention.[1450]

662. Online arbitral awards are often saved as electronic data and exchanged via electronic communications such as emails and electronic registered services. The New York Convention neither defines the requirement nor provides applicable laws regarding the authentication or certification of arbitral awards.[1451] In the absence of uniform rules on the applicable law to the authentication or certification requirement set forth in Article IV of the New York Convention, the authentication or certification of an arbitral award shall be determined under the law of the country where the award was rendered, or under the law where the recognition and enforcement were sought.[1452] Some countries may require more rigid formal requirements to prove that the arbitral awards are in writing and signed by arbitrators.[1453] Other countries such as the U.S., provide more flexibility to the formal requirements of the arbitral awards including online arbitral awards.[1454] In practice, the potential hurdle to the enforcement of online arbitral awards can be avoided by rendering the awards also in paper form with manual signatures.[1455]

[1449] Paulsson (n 1446) 138.

[1450] Dirk Otto, Article VII in Herbert Kronke, Patricia Nacimiento, et al. (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 451.

[1451] The Committee thought it was preferable to allow a greater latitude with regard to this question to the tribunal of the country in which the recognition or enforcement was being requested. Travaux préparatoires, United Nations Conference on International Commercial Arbitration, Report of the Committee on the Enforcement of International Arbitral Awards, E/2704, E/AC.42/4/Rev.1, 14.

[1452] Michael Bühler and Michael Cartier, 'Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 194 [Foreign arbitral awards]', in Manuel Arroyo (ed), Arbitration in Switzerland: The Practitioner's Guide (Kluwer Law International 2013)307; Otto (n 1448) 178; Fouchard & Goldman (n 278) 970.

[1453] Legislations of Germany and the Netherlands require a qualified electronic signature of arbitrators to be affixed with online arbitral award.

[1454] Article 19(a)(1) of the Uniform Arbitration Act incorporates the Electronic Signature Act to include electronic signature as an effective way for arbitrators to authenticate the arbitral awards.

[1455] Haitham A. Haloush, 'The Authenticity of Online Alternative Dispute Resolution Proceedings' (2008) 25 Journal of International Arbitration 3, 362.

Moreover, with the advanced technology, it is possible to identify the originality and authenticity of an online arbitral award by using an arbitration online platform based on various authentication technologies such as the blockchain technology.[1456]

5.1.2. Enforcement of online mediated settlement agreements

663. Online mediated settlement agreements (MSAs) are the outcomes of online mediation which resolve some or all of the issues in dispute. Although it is said that settlement reached in mediation has a higher rate of compliance than court decisions,[1457] there is a growing need for a legally protected right for the parties to enforce MSAs if one party fails to comply with the agreement and especially in the commercial context.[1458] The diversity of the enforcement mechanisms of MSA has been seen as one of the obstacles to the development of international mediation.[1459] Section 5.1.2.1 will include four possible enforcement mechanisms of the MSA: enforcement as a contract, via court ratification, in arbitral awards, and via international instruments. Section 5.1.2.2 and 5.1.2.3 will deal with how online MSA are enforced in the current legal frameworks of the EU and China respectively.

5.1.2.1. Possible enforcement mechanisms of the MSA under the current legal framework

664. As the enforcement of online MSA also follows the same enforcement mechanism of offline MSA, a study on current enforcement mechanism of the MSA will be conducted. In August 2014 and February 2015, the Secretariat of UNCITRAL circulated questionnaires investigating the legislative framework of the states in respect of the enforcement of settlement agreement resulting from international commercial conciliation/mediation (the MSA).[1460] There are four main approaches used to enforce the MSA in the jurisdictions which have been reached by the

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[1456] Mauricio Duarte, 'Could Blockchain Help the Recognition of International Arbitration Awards?' < http://arbitrationblog.kluwerarbitration.com/2018/04/20/blockchain-help-recognition-international-arbitration-awards/> accessed 17 October 2018.

[1457] Sussman, E., 'Final Step: Issues in Enforcing the Mediated settlement agreement', in Rovine, A.W. (ed.), Contemporary Issues in International Arbitration and Mediation. The Fordham Papers 2008, M. Nijhoff, Leiden, 2009, 343-344.

[1458] SI Strong, 'Beyond International Commercial Arbitration-The Promise of International Commercial Mediation' (2014)45 Wash UJL & Pol'y 10, 35.

[1459] Nadja Alexander, 'Nudging Users Towards Cross-Border Mediation: Is it Really About Harmonised Enforcement Regulation?' (2014), 409; Chang-Fa Lo, 'Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements' (2014)7 Contemporary Asia Arbitration Journal 119.

[1460] Note by the Secretariat, Settlement of commercial disputes-International commercial conciliation: enforceability of settlement agreements, A/CN.9/WGII/WP.190, paragraphs 14.

questionnaires of the UNCITRAL: namely to enforce the MSAs as contracts (Part A), via court ratification (Part B), and via arbitral awards (Part C).[1461] In addition, the UNCITRAL has worked out to establish an international legal framework for the cross-border enforcement of MSA arising from commercial disputes in 2018.[1462] It provides a fourth option for the parties to enforce international commercial MSAs under the international convention (Part D). The following Section will discuss these four enforcement mechanisms and explore the legal framework in which they are established.

A. Enforcement of the MSA as contracts

665. According to the *travaux préparatoires* of the UNCITRAL Model Law on Conciliation, Article 14 of the Model Law was meant to create a contractual obligation between the parties, which was susceptible to enforcement by courts.[1463] An MSA is a contract in nature and therefore it should also meet all the contractual requirements. According to the questionnaires received by the Secretariat of UNCITRAL, due to an absence of specific statutory rules on the enforcement of MSA, the MSAs are therefore enforced as contracts in a large number of states.[1464] In the absence of specific legislation on the enforcement of the MSA, contract laws of these states may fill the missing gap although it may not be sufficiently efficient. The national contract law scrutinizes consent in contracts, arising from misrepresentation, mistake, unconscionability, undue influence and duress.[1465] The online MSAs are also recognized by national courts in accordance with the functional equivalence principle and the respective national legislation of electronic communications as specified in Section 3.1.2. However, this dissertation will not go into the details of national contract laws in finding out enforceability conditions in this regard but rather focus on other alternatives in enforcing MSA.

B. Enforcement of the MSA via judicial ratification

666. Other than enforcing the MSA as contracts, some jurisdictions have devised national statutory mechanisms (homologation of the settlement) to allow expedited enforcement of the MSA.[1466]

[1461] Note by the Secretariat, Settlement of commercial disputes: enforceability of settlement agreements resulting from international commercial conciliation/mediation, A/CN.9/WG.II/WP.187, paragraphs 22-25.
[1462] Report of the United Nations Commission on International Trade Law (fifty-first session), A/73/17, Annex I.
[1463] Report of the UNCITRAL on its thirty-fifth session, Supplement No. 17 (A/57/15) paragraph 124.
[1464] For example, Canada, Ecuador, Germany and Hungary. See Settlement of commercial disputes: Enforcement of settlement agreements resulting from international commercial conciliation/mediation, Compilation of comments by Governments, A/CN.9/846.
[1465] McKendrick, *Contract law: text, cases, and materials* 519-743.
[1466] Carlos Esplugues Mota, José Luis Iglesias and Guillermo Palao Moreno, *Civil and commercial mediation in Europe: Cross-border Mediation*, vol II (Intersentia 2014) 719.

In some jurisdictions such as Greece and Slovakia, an enforceability request can be made by one of the parties to the competent courts without explicit consent from the others.[1467] In other jurisdictions, such as France and China, it is a requirement that both parties of an MSA need apply to the court to ratify the settlement before the MSA can be enforceable.[1468] In this particular case, there are risks that one party may refuse to make the application in court. Although the other party may still be able to seek to enforce the MSA as a contract, the procedure is then no longer subject to the expedited enforcement regime.

667. The statutory expedited enforcement procedure of an MSA saves parties the trouble of initiating cases in court which may undermine both confidentiality and finality of the MSA.[1469] The expedited enforcement procedure also saves time for the parties as a result of the limited scope of judicial review. With the establishment of the online court, it is possible to have an MSA ratified via online court proceedings.[1470] This can further reduce the cost and time for parties that will normally be spent on the enforcement proceedings.

668. The judicial ratification of the MSA based on expedited enforcement mechanism has a narrower scope than the judicial review of the MSA based on contract law.[1471] The scope of judicial ratification is typically limited to factors such as *the bona fides* character of the agreement, the informed consent of the parties, clarity in relation to the interpretation of the agreement, the ability of the agreement to be performed, the legality of the terms of the agreement and whether it injures third party rights.[1472] The judge's control over the content of the MSA is rather limited to preserve the parties' efforts during mediation.[1473] Moreover, the

[1467] Giuseppe De Palo and others, 'Rebooting'the mediation directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU' (2014) Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, Brussels, 37 , 110. (Rebooting the Mediation Directive) Report from the Commission on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM(2016)542 final,9.

[1468] French Code of Civil Procedure, Article 1534; People's Mediation Law, Article 33: both parties to the MSA may apply to the people's court jointly for judicial ratification within thirty days from the day of the conclusion of the MSA.

[1469] Dorcas Quek Anderson, 'Litigating over mediation-how should the courts enforce mediated settlement agreements?' (2015) Singapore Journal of Legal Studies, 132.

[1470] The online mediation platform of the people's court of China（人民法院调解平台）<http://tiaojie.court.gov.cn/> allows parties to apply for online judicial ratification of the MSAs that are rendered by mediation institutions of the platform. See Section 5.1.2.3.B. b.

[1471] Nadja Marie Alexander, *International and comparative mediation: legal perspectives*, vol 4 (Kluwer law international 2009) 308.

[1472] 'Chapter 7: Post-Mediation Issues' in Nadja Alexander, International and Comparative Mediation, Global Trends in Disputes Resolution, Volume 4 (Kluwer Law International 2009) 308.

[1473] Nancy H Rogers, Sarah R Cole and Craig A McEwen, *Mediation: Law, policy, practice*, vol 1 (Clark Boardman Callaghan 2016) 267-268.

statutory enforcement mechanism functions only domestically and does not extend to MSAs that are rendered in foreign jurisdictions. Due to a variety of legislative regimes regarding the ratification of MSAs and in the absence of a uniform regime for recognizing foreign orders on the ratification of MSAs, it is unpredictable whether a national court would recognize an MSA ratified by a foreign court (homologation).[1474]

C. Enforcement of the MSA via arbitral awards

669. The third approach is to have an MSA recognized and enforced as an arbitral award in a foreign state by applying the New York Convention.[1475] Where arbitration proceedings have commenced but are suspended in order to mediate the dispute, the parties can request that the arbitration proceedings be reactivated in order to incorporate the result of the mediation into the arbitral award.[1476] In such conditions, the MSA can be enforced as an arbitral award (consent awards) in accordance with Article 30 of the UNCITRAL Model Law on International Commercial Arbitration.[1477] However, this mediation-arbitration procedure falls outside the scope of our discussion under the MSA as it is treated as an arbitration proceeding (which has been discussed in Section 5.1.1 above).

D. Enforcement of the MSA via international instruments

670. UNCITRAL developed two instruments[1478] with the aim to harmonize commercial conciliation/mediation: the Conciliation Rules of 1980 and the Model Law on International Commercial Conciliation of 2002, which formed the international legal framework of conciliation.[1479] The notion of "conciliation" used in two UNCITRAL instruments covers the

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[1474] Brette L Steele, 'Enforcing international commercial mediation agreements as arbitral awards under the New York Convention' (2006)54 UCLA Law Review 1385, 1391.

[1475] Note by the Secretariat, Settlement of commercial disputes-International commercial conciliation: enforceability of settlement agreements, A/CN.9/WGII/WP.190, paragraph 18.

[1476] Ronan Feehily, 'The Legal Status and Enforceability of Mediated Settlement Agreements' (2013)12 Hibernian LJ 1, 19; Born (n 1165) 3025-3027; 'Chapter 6: Consent Awards', in Giacomo Marchisio, The Notion of Award in *International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law*, Volume 44 (Kluwer Law International 2017) 109 - 140. See for example, English Arbitration Act, 1996, §51(2); Belgian Judicial Code, Art. 1712(1); Chinese Arbitration Law, Art. 49; Japanese Arbitration Law, Art. 38(1); Costa Rican Arbitration Law, 2011, Art. 30; Peruvian Arbitration Law, Art. 50(1). See also institutional rules such as 2012 ICC Rules, Art. 32; ICDR Rules, Art. 29(1); LCIA Rules, Art. 26(8).

[1477] National laws which support consent awards are for example: Singapore Arbitration Law, Article 18; German Code of Civil Procedure (ZPO), sections 1053, 1054; Arbitration Law of the PRC, Article 51, 52.

[1478] B2C disputes are excluded from the scope of UNCITRAL instruments on commercial conciliation/mediation. See Guide to enactment and use of the UNCITRAL Model Law on International Commercial Conciliation (2002), paragraph 29; Note by the Secretariat, Settlement of commercial disputes-International commercial conciliation: enforceability of settlement agreements, A/CN.9/WG.II/WP.195, paragraph 16.

[1479] The Model Law on International Commercial Conciliation has been amended by the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (Report

proceedings in which the parties are assisted by a third person to settle a dispute including conciliation, mediation, neutral evaluation, mini-trial or similar terms.[1480] Since the adoption of these two instruments, the legislation on conciliation has been enacted in a growing number of jurisdictions, and conciliation (mediation) institutions have also proliferated.[1481] Although Article 14 of the UNCITRAL Model Law on Conciliation 2002 explicitly deals with the enforcement of settlement agreements by granting its binding and enforceable effect, the specific enforcement method is left to the states to regulate when implementing the provision. However, allowing the states to adopt their individual national enforcement procedures for the MSA is likely to result in a lack of consistency and certainty in relation to enforcement procedures.[1482]

671. In order to promote the development of international commercial mediation and facilitate cross-border enforcement of the MSA, the UNCITRAL Working Group II on Arbitration and Conciliation (UNCITRAL Working Group II) has worked on an expedited enforcement mechanism of the MSA since 2014. An enforcement mechanism for the MSA would increase the certainty of using mediation if a party fails to comply with the agreement and promote the use of mediation in cross-border dispute resolution.[1483] In 2018, the UNCITRAL Working Group II on Arbitration has produced two legal instruments: namely the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (hereinafter "the Amendment to UNCITRAL Model Law on International Commercial Conciliation") and the Convention on International Settlement Agreements Resulting from Mediation (hereinafter "Singapore Convention"). [1484] The Amendment to the UNCITRAL Model Law on International Commercial Conciliation[1485] has

of the United Nations Commission on International Trade Law, Fifty-first session, 25 June-13 July 2018, Annex II).

[1480] Guide to Enactment and use of the UNCITRAL Model Law on International Commercial Conciliation (2002), paragraph 7.

[1481] Policy Research Working Paper, Arbitrating and Mediating Disputes, Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related of Foreign Direct Investment, The World Bank, Financial and Private sector Development Network, Global Indicators and Analysis Department, October 2013, 9.

[1482] Hopt & Steffek, *Mediation, Principles and Regulation in Comparative Perspective* (n 357) 190.

[1483] Proposal by the Government of United States of America: future work for Working Group II, 3, A/CN.9/822. These doubts include for example: whether the formalizing enforcement of MSA would diminish the value of mediation as resulting in contractual agreements or whether the New York Convention was the appropriate model for work in relation to the MSA.

[1484] UNCITRAL Working Group II Sixty-eighth session: Settlement of commercial disputes (International commercial mediation: preparation of instrument on enforcement of international commercial settlement agreements resulting from mediation) Note by the Secretariat, A/CN.9/WG.II/WP.205/Add.1,2.

[1485] International commercial mediation: draft amendment to the Model Law on International Commercial Mediation and International Settlements Resulting from Mediation (amending the UNCITRAL Model Law on International Commercial Conciliation, A/CN.9/943.

filled in the contents of the enforcement of international mediated settlement agreements as indicated in Article 14 of the UNCITRAL Model Law on Conciliation of 2002.[1486] The Singapore Convention has been adopted as an international legal instrument for parties to seek cross-border enforcement of international commercial mediated settlement agreements.[1487] The following part will illustrate the application scope of the Singapore Convention and the Amendment to UNCITRAL Model Law on International Commercial Conciliation, and the formal requirements of the MSA.

a. Scope of "international settlement agreements" resulting from commercial mediation

672. In Article 16 of the Amendment to the UNCITRAL Model Law on International Commercial Conciliation (UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreement Resulting from Mediation) and Article 1 of the Singapore Convention, it is stipulated that the international agreements resulting from mediation shall be concluded in writing by parties to resolve a commercial dispute. The MSA is "commercial" in the sense that it excludes settlements concluded by one of the parties (a consumer) to resolve a dispute for personal, family or household purposes, or relating to family, inheritance or employment law.[1488] The MSA is "international" to a broad sense in that either the places of business of the parties to the settlement agreement, or a substantial part of the obligations or the subject matter of the MSA is located in different states. The Amendment to the UNCITRAL Model Law on International Commercial Conciliation and the Singapore Convention also exclude settlement agreements between parties, court-ratified settlement agreements or settlement agreements that have been recorded and enforceable as an arbitral award.[1489]

b. Formal requirements of the MSA

673. The formal requirements of the MSA indicated in Article 4 of the Singapore Convention and

[1486] The enacting state may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement.
[1487] United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), Report of the United Nations Commission on International Trade Law (fifty-first session), A/73/17, Annex I. The Singapore Convention is open for signature by all states on 1 August 2019.
[1488] United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention, Article 2; UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreement Resulting from Mediation, Article 16(2).
[1489] United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention, Article 4, paragraph 1; the Amendment to the UNCITRAL Model Law on International Commercial Conciliation (UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreement Resulting from Mediation), Article 18, paragraph 1.

Article 18 of the Amendment to the UNCITRAL Model Law on International Commercial Conciliation include the following three conditions.

(i) The settlement agreement is in writing;

674. It was generally held by the UNCITRAL Working Group II that the formal requirement of the MSA should not be prescriptive and should be set in a brief manner in order to preserve the flexibility of the conciliation process.[1490] On the other hand, the UNCITRAL Working Group II on the instrument of the enforcement of the MSA agreed that the MSAs should meet the certain formal requirement in order to distinguish itself from other types of agreements (for example, agreements that come out of negotiation)[1491] and to prove the contents of the settlement. The distinction between MSAs and other type of settlement agreement is useful in determining the applicable scope of the Convention or the Model Law. It was also confirmed in the UNCITRAL Working Group II's report that the principle of functional equivalence embodied in the UNCITRAL Model Law on E-commerce should also be applied in the Singapore Convention and the amendment to UNCTIRAL Model Law on Conciliation to include MSAs in electronic form.[1492] Therefore, Article 2(2) of the Singapore Convention and Article 16(6) of the Amendment to UNCITRAL Model Law on Conciliation embrace the possibility of concluding an MSA by using electronic communications:

"The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference."

(ii) The settlement agreement is signed by the parties or, where applicable, the mediator;

675. It is suggested by the UNCITRAL Working Group II that an MSA shall not only be in writing, but also include an indication that the parties are to be bound by the terms of the settlement (for example by requiring the parties' signatures).[1493] Moreover, Article 4(2) of the Singapore Convention and Article 18(2) of the Amendment to UNCITRAL Model Law on Conciliation have granted electronically signed MSAs the same legal effect as MSAs signed in paper form,

[1490] Note by the Secretariat, Settlement of commercial disputes-International commercial conciliation: enforceability of settlement agreements, A/CN.9/WG.II/WP.195, Paragraph 40.
[1491] Report on Working Group II (Arbitration and Conciliation) on the work of its sixty-third session, A/CN.9/861, paragraph 51.
[1492] Report on Working Group II (Arbitration and Conciliation) on the work of its sixty-fourth session, A/CN.9/867, paragraph 133.
[1493] Report on Working Group II (Arbitration and Conciliation) on the work of its sixty-third session, A/CN.9/861, paragraph 67.

if a method is used to identify the parties or the mediator and to indicate the parties' or the mediator's intention with respect to the information contained in the electronic communication.

(iii) The settlement agreement is resulted from mediation.

676. The Singapore Convention and the Amendment to UNCITRAL Model Law on International Commercial Conciliation are applicable to mediated settlement agreements. Both instruments provide a non-exhaustive list of the evidence to prove mediation, such as the mediator's signature, a document signed by the mediator indicating the mediation has been carried out, or an attestation by the institution that administered the mediation. In the context of online mediation, parties may prove the MSA by any electronic communications between them and the mediation institutions or simply by an online MSA with an electronic signature of the mediator.

677. The implementation of the Singapore Convention and the Amendment to UNCITRAL Model Law on International Commercial Conciliation may provide parties the possibility to enforce the commercial MSA in a cross-border manner. Nevertheless, the effectiveness of the Singapore Convention and the Amendment to UNCITRAL Model Law on International Commercial Conciliation will depend on the total number of nations who adopt these legal instruments.

5.1.2.2. Enforcement of mediated settlement agreements in the EU

A. Enforcement of the MSA arising from cross-border disputes in the EU

678. In the EU, there is a legal requirement provided in the EU Mediation Directive that an MSA in civil and commercial disputes which has been made enforceable in a member state should be recognized and declared enforceable in other member states.[1494] This requires member states to ensure that parties can request either individually or jointly upon the explicit consent of the other parties, the content of a written agreement resulting from mediation be made enforceable.[1495] Such a request will normally be granted except when the content of the MSA is contrary to the law of the member states where the request is made or when the law of that member state does not provide the enforceability of the content of the specific agreement.[1496] This could be the case if the obligation specified in the MSA was by its nature not

[1494] EU Mediation Directive, Recital 20.
[1495] EU Mediation Directive, Article 6(1).
[1496] EU Mediation Directive, Article 6(2).

enforceable.[1497]

679. When there are EU legal instruments which directly provide for the enforcement of settlement agreements in a specific legal matter, the enforcement can be sought directly by the parties in a foreign member state without reference to national laws. This is the case for example in settlement agreements of disputes in parental responsibility, uncontested claims and succession.[1498] There is no direct cross-border enforcement mechanism established in the EU to recognize a foreign MSA in e-commerce disputes, but it is possible to recognize an MSA either as an authentic instrument or as a judgment.[1499]

680. The first way is to enforce the MSA as an authentic instrument. The "authentic instrument" refers to a document which has been drawn up or registered as an authentic instrument in the member state of origin. [1500] The MSA can be enforced across the EU as an authentic instrument on three conditions:[1501]

(i) The authenticity of such documents shall be established by a public authority or other authority empowered for that purpose;

(ii) the authenticity must relate to the signature and the content of the instrument; and

(iii) the authentic instrument must be enforceable in the state in which it originates.

The authentic instrument formally drawn up or registered by a public authority in a member state can be enforced in another member states without any declaration of enforceability being required.[1502] Therefore, the MSA can be issued in the form of an authentic instrument when it has been authenticated by a notary or entered into before a state-accredited mediator.[1503] The only exception for the enforcement of the authentic instrument in the member state addressed is when the enforcement is contrary to the public policy of the member state.

[1497] EU Mediation Directive, Recital 19.

[1498] De Palo and others (n 1467) Rebooting the Mediation Directive, 135. Council Regulation (EC) No 2201/2003, Article 55(e); Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims; Regulation 650/2012 on succession and on the creation of a European Certificate of Succession.

[1499] EU Mediation Directive, Article 6(2).

[1500] Brussels I Regulation Recast, Article 1(2)(c).

[1501] Article 58 of the Brussels I Regulation Recast and Article 57 of Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention), OJL 339.

[1502] Brussels I Regulation Recast, Article 58. Examples of authentic instruments recognized under the Brussels I Regulation Recast include: MSA entered into before a state-accredited mediation authority (German Code of Civil Procedure, Section 794, paragraph 1, no. 1) or by a notarial public (German Code of Civil Procedure, Section 794, paragraph 1, no. 5).

[1503] Kaufmann-Kohler (n 14)212.

681. The second way is to enforce the MSA as a court judgment. Depending on whether the mediation is conducted during court proceedings or out-of-court, there are two types of court judgments: the judicial MSA and the MSA ratified by the court in a judgment. Both types of MSAs shall also be enforced as "court settlement" or "authentic instruments" in accordance with Article 58 of the Brussels I Regulation Recast and Article 57 of the Lugano Convention instead of "judgments". The wording of "judgments" given in the provisions[1504] for the cross-border enforcement mechanism refers solely to judicial decisions actually given by a court or tribunal deciding on its own authority on the issues between the parties. The MSAs are contractual in nature and therefore should not be treated as "judgments" under Brussels I Regulation Recast and Lugano Convention.[1505]

682. The Mediation Directive is silent on the validity of online MSAs reached by online mediation. The ECD requires its member states to ensure that their legal system allows contracts to be concluded electronically and shall not be deprived of legal effectiveness and validity on account of its electronic means.[1506] Therefore, MSAs in electronic form shall be recognized with legal effects in so far as parties have given their consent by electronic signatures and the agreements are kept in a durable medium.[1507] However, in order to have online MSAs recognized and enforced in another member state, such online MSAs are subject to different national rules of based on where the request is made in respect of the formal requirement of MSAs. Some member states may require the MSA to be in writing bearing signatures of the parties and the mediators.[1508] The eIDAS Regulation has established the cross-border recognition of a qualified electronic signature. The MSA based on a qualified certificate in one member state shall be recognized in another member state.[1509] Other member states may further require the MSA to be mediated by an accredited mediator.[1510] Problems arise when the mediator selected for online mediation in one member state is not accredited in the member state where the MSA is enforced.[1511]

[1504] Article 36 of the Brussels I Regulation Recast and Article 33 of Lugano Convention.
[1505] Case C-414/92, *Solo Kleimotoren GmbH v Emilio Boch*, paragraphs 15, 17; Mota, Iglesias and Moreno (n 1466) 337.
[1506] ECD (n 475), Article 9(1).
[1507] F.F. Wang, *Online Arbitration* (Informa Law from Routledge 2018) 47.
[1508] For example, Mediation Act 202/2012 of Czech Republic, Section 7.
[1509] eIDAS Regulation (n 498), Article 25(3).
[1510] For example, Belgian Judicial Code (Code Judiciarie), Article 1733.
[1511] Carlos Esplugues and José Luis Iglesias, 'Mediation and private international law: improving free circulation of mediation agreements across the EU' in *In-depth analysis on the implementation of the Mediation Directive* (2016) 74.

B. Domestic enforcement of the MSA in selective EU member states

683. Almost all member states have extended the scope of their national legislation beyond cross-border cases to domestic cases when transposing the EU Mediation Directive.[1512] All member states provide for an enforcement mechanism of the MSA as prescribed by Article 6 of the EU Mediation Directive.[1513] The direct enforceability of the MSA reached by the parties is usually made dependent on its homologation by a public authority, generally notary offices or courts.[1514] France, Belgium, Germany and Portugal will be used to reflect the varieties of procedural requirements of the different EU member states for the enforcement of the MSA. These jurisdictions are selected as each of them represents a distinctive feature in the enforcement of the MSA.

684. In France, one party with the consent of the other parties or all the parties to the MSA can apply to the court for a ruling to confirm the MSA which can be directly enforceable.[1515] Before the implementation of the EU Mediation Directive, the enforcement of the MSA in France differentiates between judicial mediation and conventional (voluntary) mediation. While the MSA reached through judicial mediation can be submitted to the court for homologation by all the parties, the MSA reached through conventional (voluntary) mediation was qualified as a '*transaction*' which has the *res judicata* effect as a final judgment. After the implementation of the EU Mediation Directive, both the judicial MSA and the contractual MSA can be recognized and enforced in France after declared enforceable by a court or by a public authority of another EU member state.[1516] The French law has unified the approach of homologation procedure in judicial mediation and voluntary mediation.

685. In Belgium, the law makes a distinction between MSA made by a non-accredited mediator and an accredited one.[1517] It is stipulated in the *Code Judiciaire* that the parties or one of the parties can ask the court to homologate the MSA on the condition that there is an MSA made under

[1512] Report from the commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM(2016) 542 final, 5 (Report on the Application of Mediation Directive); Mota, Iglesias and Moreno (n 1505) 530. Only three member states (Austria, England and Wales, Scotland and the Netherlands) have chosen to transpose the Directive to cross-border cases only and a distinction has been made between domestic mediation and cross-border mediation in these member states.
[1513] Report on the Application of Mediation Directive, *ibid*, 9.
[1514] Mota, Iglesias and Moreno (n 1466) 762.
[1515] French Code of Civil Procedure, Article 1534.
[1516] Palo and Trevor (n 371) 119. French Code of Civil Procedure (Décret n °2012-66 du 20 janvier 2012 relatif à la résolution amiable des différends) Article 1534.
[1517] Mota, Iglesias and Moreno (n 1466) 49.

proper assistance and supervision of an accredited mediator. This reflects the attitude of the legislature, who does not trust the voluntary MSA made without the assistance of professionals.[1518] The MSA shall be made in writing and to be signed by the parties and the mediator.[1519] The court has only two limited grounds to refuse the homologation of the MSA: either when the agreement is contrary to the public policy or, in family matters when the agreement is deemed contrary to the interests of minor children.[1520] Such an MSA with judicial homologation will then become enforceable.[1521] For the MSA made by a non-accredited mediator, the enforcement can only be made via a notarial deed.[1522]

686. In Germany, an MSA is not directly enforceable but is treated as any other contractual agreement where its enforcement is concerned.[1523] In case that an MSA is concluded between parties who are both represented by their lawyers, either party may register the settlement agreement with a lower court (*Amtsgericht*) and seek a declaration that the settlement is enforceable.[1524] Otherwise, German law requires the MSA to be notarized before it can be directly enforced in court.[1525] However, these two options are only available when at least one of the parties has its habitual residence or domicile in Germany.[1526] Therefore, it creates difficulties for parties to enforce the MSA in a cross-border context. The last option is to have the MSA converted into an arbitral award if the parties decide to reach a settlement during arbitration proceedings.[1527]

687. In Portugal, the content of the MSA shall be made in writing, signed by the parties and the mediator.[1528] There are several ways to enforce an MSA: by enforceable title, [1529] by court ratification, by notarial deed or automatic enforcement without judicial homologation. The

[1518] Palo and Trevor (n 371) 25.
[1519] Belgian Judicial Code (Code Judiciaire), Article 1732.
[1520] Belgian Judicial Code (Code Judiciaire), Article 1724.
[1521] Belgian Judicial Code (Code Judiciaire), Article 1733; Piet Taelman and Stefaan Voet, 'Mediation in Belgium: A Long and Winding Road' in *New Developments in Civil and Commercial Mediation* (Springer 2015) 103-104.
[1522] The settlement agreement can be treated as a judicial transaction in accordance with Article 733 of Belgian Judicial Code.
[1523] Mota, Iglesias and Moreno (n 1466) 175.
[1524] *Ibid*, 176; German Code of Civil Procedures (ZPO), Section 794 paragraph 1 No. 4(a), No. 5, Section 796(a).
[1525] German Code of Civil Procedures (ZPO), Section 796(c).
[1526] It is required that the local court (Amtsgericht) is in the district of which one of the parties had its residence at the time the agreement was reached. See also Nadja Alexander, Sabine Walsh and Martin Svatoš, *EU Mediation Law Handbook* (Kluwer Law International 2017) 377.
[1527] German Code of Civil Procedures (ZPO), Section 1053(1)(2).
[1528] Portuguese Law No. 29/2003 of 19th April Establishing the general principles applicable to mediation carried out in Portugal, as well as the legal framework for civil and commercial mediation, for mediators and for public mediation, Article 20. (Portuguese Mediation Law)
[1529] Portuguese Civil Code Procedure (Lei n. 41/2013 de 26 de Junho), Article 703.

reform of Portuguese legislation on mediation has provided an automatic mechanism for the MSA reached domestically or abroad to be directly enforced in Portugal without a homologation procedure. The MSA can be automatically enforced in Portugal under five conditions: (i) the dispute is subject to mediation without any need of judicial homologation;[1530] (ii) the parties have the capacity to agree on the MSA; (iii) the MSA is reached through mediation which was carried out in accordance with the defined legal parameters;[1531] (iv) the mediator is registered on the certified mediator list; and (v) the content of the MSA does not violate public policy.[1532] Article 9(4) allows an MSA reached in another EU member state to be enforceable in Portugal under three conditions: (i) the MSA is also enforceable in the country of origin; (ii) the dispute must be subject to mediation and not subject to judicial ratification; and (iii) no violation of public policy may occur. Although an automatic enforcement mechanism is available in Portugal, the MSAs with automatic enforcement mechanism may be challenged by courts with wider grounds than the MSAs with judicial ratification.[1533]

688. From the selected EU member states, it can be observed that the enforcement procedure of the MSA in each member state is carried out by different public authorities (notary office, court, qualified ADR entities, etc.) in different authentic instruments (notary act, court report, court minutes, court order, court judgment, etc.). In France, there is no distinction made between judicial mediation and voluntary mediation in the homologation procedure by courts. In Belgium, the homologation procedure is only applicable to the MSA made by an accredited mediator while the MSA made by the non-accredited mediator may be enforced when it has been notarized. In Germany, the MSA made by lawyers can also be homologated in court but with a restriction on the domicile of one of the parties. In Portugal, the MSA can be recognized by courts without a homologation procedure on limited grounds. According to Article 6(2) of the Mediation Directive, the content of the MSA may be made enforceable by a court or competent authority in accordance with the law of the member state where the request is made. In the absence of a uniform enforcement mechanism of the MSA, the cross-border enforcement

[1530] The automatic enforcement mechanism does not apply to public mediation scheme (in respect of family mediation, labour mediation and criminal mediation).
[1531] Portuguese Mediation Law, Article 16-22.
[1532] Portuguese Mediation Law, Article 9(1).
[1533] Sabine Walsh and Miguel Cancella d'Abreu, 'Chapter 25: Portugal', in Nadja Alexander, Sabine Walsh, et al. (eds), EU Mediation Law Handbook, Global Trends in Dispute Resolution, Volume 7(Kluwer Law International 2017) 634. The MSA with judicial ratification can be challenged under restrictive terms set out in Article 729 of the Civil Procedure Code of Portugal.

requirement of the MSA can be varied depending on the respective national legislation of each member state, which may constitute a barrier to the circulation of the MSA in the EU.[1534]

5.1.2.3. Enforcement of a mediated settlement agreement in China

A. Legal forms of MSAs in China

689. In China, there are also two major types of mediation: judicial mediation and voluntary mediation (out-of-court mediation). There are mainly three types of MSA: the MSA concluded during civil procedures, in arbitration procedures and the MSA concluded in out-of-court procedures.

690. The first type of mediation is judicial mediation. The people's court encourages the use of mediation to resolve disputes in civil proceedings. Judicial mediation is mediation presided over by judges and is characterized by the intervention and supervision of judicial power.[1535] The MSA that is concluded in judicial mediation should be agreed by the parties of their own will and without compulsion. The content of such an MSA shall not be contrary to the law. Once an MSA is reached, the people's court shall draw up a mediation statement, setting forth the claims, the facts of the case and the result of mediation.[1536] Such a mediation statement shall be signed by the judges and the court clerk, sealed by the people's court and delivered to both parties. The mediation statement becomes effective and enforceable when it has been signed by both parties. If no agreement is reached through mediation or if either party withdraws consent before the mediation statement is delivered, the court must render a judgment without delay.[1537]

691. The second type of mediation refers to mediation in arbitration proceedings. It is stipulated in Article 51 of the PRC Arbitration Law that the arbitral tribunal may carry out mediation prior to rendering an arbitral award. The arbitral tribunal shall conduct mediation if both parties seek mediation. If the mediation leads to a settlement agreement, the arbitral tribunal shall make a written mediation statement or make an arbitral award in accordance with the settlement agreement. A written mediation statement shall specify the claim of the dispute and settlement

[1534] De Palo and others (n 1467) Rebooting the Mediation Directive, 74.
[1535] Xiao Yang, 'Give full play to the positive role of judicial mediation in the construction of a harmonious society' (2006) 19 QiuShi. (肖扬：充分发挥司法调解在构建社会主义和谐社会中的积极作用，《求是》2006 年第 19 期)
[1536] Civil Procedure Law of the PRC, Article 96.
[1537] Civil Procedure Law of the PRC, Article 99.

result between the parties.[1538] The written mediation statement shall be signed by the arbitrators, sealed by the arbitration commission and then deliver to both parties. Such a mediation statement shall become effective after both parties have acknowledged it by a signed receipt. A written mediation statement shall have the same legal effect and enforceability as an arbitral award. If the parties have not reached a settlement or if one of the parties withdraws the agreement, the arbitral tribunal shall make an arbitral award promptly.[1539]

692. The third type of mediation out-of-court mediation refers to the mediation conducted voluntarily by the parties outside the civil procedures and arbitration procedures. There are various forms of out-of-court mediation in China. Depending on the subject matter of disputes and the entities that handle disputes, the out-of-court mediation in China can be divided into people's mediation (for civil disputes),[1540] industrial mediation (for disputes between members of the trade association or between members and non-members), institutional mediation (for commercial disputes), administrative mediation (for consumer disputes, traffic accident disputes, land disputes, medical malpractice disputes, etc.) and mediation for labor disputes.[1541] In the realm of e-commerce disputes, people's mediation, industrial mediation and institutional mediation play a major role. Therefore, I will discuss follow-on the formal requirement of MSAs in these types of mediation in China.

a. Formal requirement of MSAs by the People's Mediation Law

693. As discussed in Section 2.3.3.2.A, people's mediation is a major type of mediation used to settle civil disputes of the general public, which includes disputes among citizens and disputes between citizens and other entities. The industrial mediation (sector mediation) has been integrated into the people's mediation system.[1542] According to Article 8 and Article 34 of People's Mediation Law of the PRC, it is possible for social groups or other entities to establish people's mediation committees[1543] to mediate specific types of disputes among people. It has

[1538] Arbitration Law of the PRC, Article 52.
[1539] Arbitration Law of the PRC, Article 51(1) and 52(3).
[1540] See Section 2.3.3.2Current ADR mechanism in China.
[1541] Jiaqi Liang, 'The Enforcement of Mediation Settlement Agreements in China' (2008)19 American Review of International Arbitration 489, 494-495. See also Section 2.3.3.2.A. .
[1542] See Hong Dong Ying, 'The New Tendency of People's Mediation-The Rise of Trade Association Mediation' Fa Xue Yan Jiu, Vol. 11, 2015, p. 260 (洪冬英：论人民调解的新趋势：行业协会调解的兴起，《法学研究》2015 年第 11 期).
[1543] People's Mediation Committee is local level mediation committees that function under village committees or residents' committees and mediate private disputes under the supervision of local justice department. The term of People's Mediation Committee is three years and can be renewed. See also Halegua; Hongwei Zhang, 'Revisiting people's mediation in China: practice, performance and challenges' (2013)1 Restorative Justice 244.

been confirmed in the *Opinions of the Ministry of Justice on Strengthening the Building of Industry-based or Profession-based People's Mediation Committee*[1544] that industry-based mediation or professional-based mediation is part of the people's mediation system. Industrial mediation refers to mediation conducted by trade associations such as consumers' association, bank sector association, insurance sector association, securities sector association, medical services sector association, transportation sector association, Internet sector association, e-commerce sector association or construction sector association.[1545] The mediators of the industry-based mediation have the necessary expertise to handle relevant disputes. The incorporation of industrial mediation into people's mediation enlarges the scope of disputes that people's mediation can handle.

694. The MSA can be reached by the parties and formulated by the people's mediation committee.[1546] When the parties deem it unnecessary to produce a written MSA, the people's mediator shall record the content of such an agreement. The MSA may specify the basic information of the parties, main facts, arguments and responsibilities of the parties, as well as the content of the settlement agreement, performance and time limit.[1547] The MSA shall be signed by the parties and the people's mediator(s) together with the seal of the people's mediation committee. The MSA that has been mediated by the people's mediation committee are contracts which have binding effects on the parties.[1548]

b. Formal requirements of MSAs by institutional mediation rules

695. As institutional mediation is not regulated within the current legal framework in China, the parties shall follow the mediation rules of the respective mediation institution. For example, it is stipulated in the Mediation Rules of the CCPIT/CCOIC that the MSA shall be concluded by bearing the signatures of both parties and mediator(s) and seal of the mediation institution.[1549] The Mediation Rules of SCMC also require a written MSA to be drafted by the mediator based on the settlement agreement between the parties with the signatures of the parties and mediator(s) and the seal of SCMC.[1550] The MSAs are contracts in nature and shall therefore

[1544] Opinions of the Ministry of Justice on Strengthening the Building of Industry-based and Profession-based People's Mediation Committees [2011] Si Fa Tong No. 93; Opinions of the Ministry of Justice on Strengthening the Building of Industry-based or Profession-based People's Mediation Committee [2014] Si Fa Tong No. 109.
[1545] See 'Zhong Guo Shang Shi Tiao Jie Nian Du Guan Cha' [2013 China Commercial Mediation Annual Observation], p. 33 (中国商事调解年度观察 2013).
[1546] PML, Article 28.
[1547] PML, Article 29.
[1548] PML, Article 31.
[1549] Mediation Rules of the CCPIT/CCOIC 2012, Article 24.
[1550] The Mediation Rules of SCMC 2012, Article 27.

be executed by the parties.

696. In accordance with Article 3 of the Electronic Signature Law of the PRC, the electronic document shall not be denied legal effect simply because it uses electronic signatures or takes the form of a data message. Moreover, according to Article 4 of the Electronic Signature Law of the PRC, the writing requirements of MSAs can also be met in the form of online MSAs provided that information contained in the data message can show the content of the agreement and can be accessible so as to be usable for subsequent references.[1551] The reliable electronic signatures are recognized with the same legal effect as handwritten signatures in China.[1552] Online MSAs can also be recognized with the legal effect so long as it has been proved with evidentiary value. There are various authentication means[1553] to record the parties' voluntariness to approve the MSA and to prove the authenticity of online MSAs.

B. Current enforcement mechanism of MSAs in out-of-court mediation in China

a. Judicial ratification/homologation of MSAs

697. The MSAs that are concluded in out-of-court mediation requires a homologation process (either issued by the court or by other public authorities) to ensure the legality and voluntariness of the MSA. All the parties or one party upon the consent of the other parties can apply to the competent people's court for a judicial ratification of the people's mediation agreement within 30 days upon the conclusion of the MSA mediated by the people's mediation committee.[1554] The types of MSAs which can be directly enforced in court after homologation by public authorities include, not only the MSAs mediated by the people's mediation committee, but also MSAs mediated by mediation institutions, industrial mediation organizations.[1555] Both parties shall submit a written statement undertaking that the MSA is reached by them upon mutual consent without any malicious conspiracy or evasion of laws, and the parties shall also undertake any responsibilities if such an MSA cause any damages to the third-parties.[1556] The people's court shall review the content of the MSA and confirm its legal effect via a court order. Once the people's court has ratified the MSA, the MSA becomes enforceable when the judicial

[1551] See Section 3.1.2.4.
[1552] Electronic Signature Law of the PRC (n 377), Article 14.
[1553] For example, China Yun Qian (https://www.yunsign.com) proves to be a third-party authentication service provider who can synchronize electronic contracts of the parties and have the electronic contracts notarized whenever the parties require it.
[1554] PML, Article 33.
[1555] ADR Opinion (n 376), Article 20.
[1556] ADR Opinion (n 376), Article 22.

ratification order has been delivered to both parties.[1557]

b. Online judicial ratification of MSAs

698. Online mediation has started off in China owing to the "Internet plus" national strategy and the construction of a diversified dispute resolution mechanism (combination of judicial and extra-judicial dispute resolution).[1558] The Supreme People's Court has launched a pilot project of establishing an online mediation platform in certain people's courts in China.[1559] The online mediation platform establishes the link between people's courts and various mediation institutions such as people's mediation committee, institutional mediation and industrial mediation entities.[1560] Before the cases are accepted by the people's courts, parties can choose a specific mediation institution to mediate their disputes via the online mediation platform. If the parties are able to reach an MSA during online mediation, they can directly apply to the people's court for online judicial ratification.[1561] During the online judicial ratification procedure, the judge can hold an online hearing with the virtual presence of the mediator and the parties. The judge is able to make an online judicial ratification of the MSA directly affixed with the electronic signatures of the parties.

5.1.3. Sub-conclusion

699. The reason that a party may seek public enforcement of ODR outcomes in court is to seek legal protections in case one party fails to comply with the agreement. Section 5.1.1 and 5.1.2 have explored the possibility of enforcing ODR outcomes under the existing legal framework. Public enforcement provides parties with judicial measures to enforce certain types of ODR outcomes, namely the arbitral awards and MSAs. As it requires judicial support for the enforcement, the ODR outcomes are subject to judicial control base on national legislation.[1562] In the cross-

[1557] ADR Opinion (n 376), Article 25.

[1558] Yan Yang and Hua Zhang, 'Annual Review on Commercial Mediation in China (2016)' in *Commercial Dispute Resolution in China: An Annual Review and Preview* (Kluwer Law International 2016) 53, 69.

[1559] Notice of several people's courts in constructing pilot online mediation platforms (关于在部分法院开展在线调解平台建设试点工作的通知) <http://rmfyb.chinacourt.org/paper/html/2017-02/18/content_121875.htm?div=-1> accessed 9 September 2017.

[1560] The online mediation platform of the people's court （人民法院调解平台） <http://tiaojie.court.gov.cn/> connects people's courts with various mediation institutions. There are 1,656 people's courts and 5,392 mediation institutions have joined the platform and 103,510 cases have been settled through the platform.

[1561] China's Trial, 'Shenzhen Futian People's Court: Establish Efficient and Convenient Smart Modern Court', 5 September 2017, <http://www.chinatrial.net.cn/magazineinfo978.html> accessed 12 June 2018. The people's courts that have granted the access to online mediation platform can have online judicial ratification of online MSA upon the parties' application.

[1562] New York Convention, Article V; Singapore Convention, Article V.

border context, the public enforcement relies on international instruments such as the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards and Singapore Convention on International Settlement Agreements Resulting from Mediation. From the study above, it has been found that the legislation on the enforcement of arbitral awards and MSAs in an offline context is applicable to ODR outcomes either by interpretation or by legislative amendments. The New York Convention can be applied to enforce online arbitral awards in national courts through a broad interpretation of its formal requirements.[1563] The Singapore Convention has also recognized the validity of online MSAs by the application of the electronic equivalence principle.[1564]

700. In the EU, the eIDAS Regulation has provided venues for a qualified electronic signature based on a qualified certificate in a member state to be recognized in another member state. Online arbitral award with qualified electronic signatures of the parties and the arbitrator rendered in a member state should not meet technical barrier in cross-border recognition and enforcement in the EU. This does not prevent member states from setting out their own formal requirements for online arbitral awards. While England takes a flexible approach in accepting various forms of ODR results, Germany and the Netherlands insist on a qualified electronic signature requirement. In China, online arbitral awards are also accepted in practice followed by online arbitration procedures of several arbitration institutions.[1565]

701. Article 6(1) of the EU Mediation Directive has facilitated the cross-border recognition of MSAs in civil and commercial disputes by setting out a general principle. Nevertheless, as observed from the previous discussion, national laws have various procedural requirements before an MSA can be directly enforced in court. Most countries require a homologation procedure either by national courts or by public authorities.[1566] In China, the MSA follows a judicial ratification procedure upon both parties' consent to have it enforced. Some people's court has also established an online judicial ratification procedure by using the online court platforms.

702. Despite the fact that public enforcement mechanism is supported by public authorities and can be enforced in court, it has certain limitations in its applicability and therefore may not be a perfect match for the enforcement of ODR outcomes arising out of e-commerce disputes for at

[1563] Wolff (n 302)178-179.
[1564] Singapore Convention, Article 4(2)
[1565] See Section 5.1.1.1 C. GZAC Online Arbitration Rules.
[1566] Mota, Iglesias and Moreno (n 1466) 719.

least three reasons.

Firstly, as a majority of ODR disputes are relevant to B2C e-commerce. The public enforcement mechanism may not be suitable for B2C disputes due to its limited scope of application. For example, Article I paragraph 3 of the New York Convention offers contracting states a commercial reservation on the applicability of the Convention which means the application of the Convention can be limited to commercial matters only.[1567] It is controversial whether the New York Convention is applicable to enforce B2C arbitral awards as consumer disputes are considered non-commercial in some countries[1568] and take into account the special consumer protection regimes in various jurisdictions.[1569] The commercial reservation represents the biggest hurdle to the use of online arbitration in cross-border B2C disputes.[1570] In the Singapore Convention, it is also stipulated that the scope of application should be restricted to commercial matters, excluding consumer disputes.[1571] Therefore, public enforcement may not be suitable for ODR outcomes arising from B2C disputes.

Secondly, it is inefficient to enforce an ODR outcome by using traditional public enforcement. The benefit of ODR includes saving cost and time for dispute resolution. The time-consuming public enforcement mechanism could make ODR less attractive by incurring an extra cost for the enforcement stage in addition to the ODR service fee. Nevertheless, the time and cost concerns in public enforcement may also be mitigated by updating the public enforcement mechanism with information technology. The availability of online court order for ratifying the MSA in Chinese People's Court is a good example of how this can be implemented.

Last but not least, there are hurdles to the enforcement mechanism of certain ODR outcomes,

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[1567] Countries such as United States of America, Poland, Malaysia, India, Argentina and China have made such reservation to commercial disputes only. See the status of New York Convention, < http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 9 August 2017.

[1568] Hanriot (n 1369) 11-12; Mohammad A Aladaseen, 'The Arbitrability of International Online Comsumer Disputes' (Bangor University Law 2015) 72-73.

[1569] Born (n 1165) 1012-1025. In U.S., the law recognizes the B2C arbitration both before disputes and after disputes arise, subject to restrictions based on the principles of unconscionability and due notice. In the E.U., statutory protections either forbid or regulate the use of B2C arbitration clause in pre-dispute consumer contracts. UNCITRAL Working Group II (Arbitration and Conciliation), International commercial conciliation: enforceability of settlement agreements, Note by the Secretariat, A/CN.9/WG.II/WP.195, 7: at the sixty-third session of the Working Group, there was general agreement that settlement agreements involving consumers should be excluded from the scope of the instrument.

[1570] Stewart and Matthews (n 170)1135.

[1571] Singapore Convention, Article 2. The scope of the Convention excludes settlements concluded to resolve a dispute arising from transactions engaged in by consumer, for personal, family or household purposes and relating to family, inheritance and employment law.

especially with regard to online MSA. In some countries,[1572] it is still a requirement that all the parties agree to apply for judicial ratification of the MSA. It would be difficult to apply for judicial ratification if one party refuses to comply with the MSA and rejects to cooperate in making the application in court. Although the Singapore Convention and the Amendment to UNCITRAL Model Law on Conciliation may improve the cross-border enforcement of commercial MSAs without requiring a homologation procedure, it is uncertain how many countries will join the Convention or adopt the Model Law.

703. Public enforcement may be suitable for a small number of e-commerce disputes between businesses which are high in value. However, it is not likely to be a wise choice for ODR decisions arising from small-claim e-commerce disputes between businesses and consumers. In those cases, a less costly and more efficient enforcement mechanism should be further explored. The UNCITRAL Working Group III on ODR proposed to establish a private enforcement mechanism in this regard to tackle the enforcement barrier of ODR outcomes.[1573]

5.2. Private enforcement: extra-judicial measures

704. Different from the public enforcement mechanism, which is supported by public authorities, private enforcement mechanism uses social resources or incentives to oblige parties to execute decisions. The UNCITRAL Working Group III on ODR, at its twenty-eighth session, has worked out a Note on an overview of private enforcement mechanisms.[1574] In this Note, "private enforcement" was defined as an alternative to a court-enforced arbitral award or settlement agreement, which either (i) provides for the automatic execution of the outcome of the proceedings (Section 5.2.1.) or (ii) creates incentives for the parties to perform (Section 5.2.2.). The following sections will explore these possibilities to enforce ODR outcomes outside the judicial system.

5.2.1. Automatic execution of ODR decisions

705. The automatic execution of ODR decisions relies on the control of social resources in disputes such as the control of payment or domain names. Although the automatic execution mechanism

[1572] For example, in France, Ireland, Malta and China.
[1573] Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session, A/CN.9/716, paragraph 98.
[1574] UNCITRAL Note on Private Enforcement (n 1366) paragraph 4.

does not lead to a final and binding outcome, not all parties are likely to bring such disputes to the court due to time and cost concerns.[1575]

706. In order to execute ODR decisions, the ODR service providers have basically two options. The first option is for the ODR service provider to cooperate with the third-party who takes control of resources to enforce the decision (such as the UDRP enforcement mechanism where the dispute resolution provider works with the registrant). [1576] The second option is to incorporate an internal enforcement mechanism (such as establishing an escrow account or guarantee system within marketplaces). [1577] Such an enforcement scheme can provide a "one-stop shop" for parties seeking to resolve a dispute through ODR.[1578]

707. In what follows, I will discuss three types of automatic execution methods: the monetary enforcement mechanism, the UDRP enforcement mechanism and the enforcement based on block-chain technology. The first two enforcement mechanisms are currently in use, and the third enforcement mechanism has not been completely put in place but shows a tendency of future development in the ODR field.

5.2.1.1. Monetary enforcement mechanism in e-commerce marketplace

A. Platform economy and the role of "online trading platform"

708. Monetary enforcement mechanism is widely used by the online trading platform[1579] to keep transaction orders over the platform. The online trading platform offers a virtual trading venue for sellers and buyers to meet and make transactions over products or services.[1580] A platform operator is a special third-party intermediary who facilitates transactions between sellers and buyers. The legislature in the EU and China both hold the view that the online trading platform should also provide internal dispute resolution mechanism for trading parties to resolve their

[1575] *Ibid*, paragraph 33.
[1576] The UDRP dispute resolution body can instruct the domain name Registrar to transfer domain name to another party or cancel domain names.
[1577] Marketplaces such as Alibaba owns Alipay and eBay owns PayPal, two payment intermediaries via which buyers make payments to sellers. While the platform operators act as an adjudicator for the disputes, they can instruct the payment intermediary to execute the decision.
[1578] UNCITRAL Note on Private Enforcement, (n 1366) paragraph 10.
[1579] "E-commerce marketplace" will be used interchangeably with "platform operator" and "online trading platform".
[1580] Christiane Wendehorst, 'Platform Intermediary Services and Duties under the E-Commerce Directive and the Consumer Rights Directive' (2016)5 Journal of European Consumer and Market Law 30.

disputes arising from the platform.[1581]

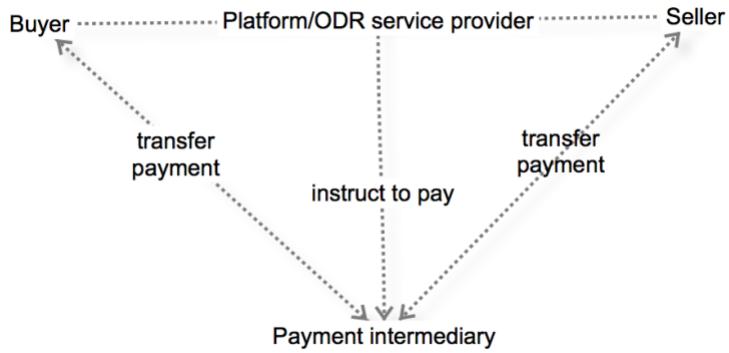
709. In the EU, there is not yet any specific EU regulation addressing the legal issues raised by the online trading platform.[1582] The EU has taken into consideration both the innovation opportunities and the regulatory challenges presented by online platforms and has set out its approach to support their further development.[1583] It was proposed by Busch and other scholars to establish an EU Online Platform Directive stipulating the relationship among platform operator, supplier and customer.[1584] The European Commission has made one proposal for a Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services. The EU legislators have recently agreed to implement this new Regulation to improve the fairness of online platform's trading practices and protect the interests of traders.[1585] According to Article 9 of the new Regulation, online trading platforms shall provide for an internal system for handling the complaints of their business users.[1586]

710. In China, with the emergence of online retailing platforms such as Taobao, several administrative guidelines have been issued to advise platform operators and regulate the platform markets. For example, the State Administration for Industry and Commerce issued Guidelines for the Performance of Social Responsibilities by Online Transaction Platform Operators in 2014.[1587] It requires the platform operator to establish a system for dispute settlement and consumer protection, to mediate between disputed parties and to provide assistance for the parties in the event of complaints, litigation, arbitration or other dispute resolution process.[1588] The Ministry of Commerce has promulgated "Service Standards for Third-party E-commerce Trading Platforms".[1589] It encouraged the third-party trading platform operators to provide consumers with a "seller's guarantee" service in order to

[1581] The European Commission's Proposal for a Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (n 85) Article 9; E-commerce Law of the PRC (n 48) Article 63.
[1582] Communication on Online Platforms and the Digital Single Market, COM(2016) 288 final, 5.
[1583] *Ibid*, Staff Working Document and Synopsis Report on the results of the public consultation.
[1584] Christoph Busch and others, 'The Rise of the Platform Economy: A New Challenge for EU Consumer Law?' (2016)5 Journal of European Consumer and Market Law 3.
[1585] European Commission, 'Digital Single Market: EU negotiators agree to set up new European rules to improve fairness of online platform's trading practices', press release, 14 February 2019.
[1586] Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services (n 85).
[1587] State Administration for Industry and Commerce, Guidelines for the Performance of Social Responsibilities by Online Transaction Platform Operators, Gong Shang Shi Zi [2014] No. 106.
[1588] *Ibid*, Article 19.
[1589] Announcement [2011] No. 18 of the Ministry of Commerce, Promulgation of the "Service Standards for Third-party E-commerce Trading Platforms" (第三方电子商务交易平台服务规范).

indemnify consumers in transaction disputes.[1590] Finally, in the recently promulgated E-commerce Law of the PRC, the online trading platforms are also encouraged to establish an ODR mechanism to resolve disputes between users arising from the platform.[1591]

711. Private enforcement mechanisms have been devised by these online trading platforms to ensure decisions made by the internal complaint mechanisms can be enforced efficiently and effectively even if the parties do not follow them voluntarily. Although these private enforcement mechanisms are applicable to the internal complaint mechanism of the marketplace, they can also be a useful reference for the enforcement of ODR outcomes. By working with the payment intermediary, the ODR service provider can instruct the payment intermediary to execute the ODR outcomes by using the currently available private enforcement mechanisms.



B. Type of monetary enforcement mechanism

712. There are currently at least three types of monetary enforcement mechanism (chargeback scheme, transaction guarantee scheme and escrow account scheme) used by the marketplace to ensure electronic transactions can be settled within the marketplace without seeking judicial redresses.

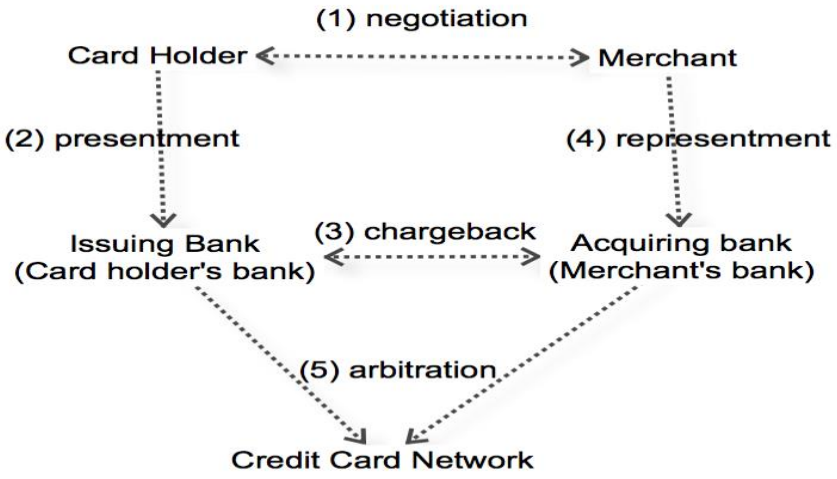
a. Chargeback scheme

713. The chargeback scheme refers to a process in which a buyer disputes a charge and consequently requests a reimbursement from a payment intermediary, with that intermediary (where it has already transferred the purchased funds to the merchant) in turn attempting reimbursement

[1590] *Ibid*, Article 6.5.
[1591] E-commerce Law of the PRC (n 48) Article 63.

from the merchant.[1592] It was proposed by Columbia and the U.S. at the Thirty-first Session of the UNCITRAL Working Group III on ODR to consider the payment chargebacks as part of the private enforcement instruments to enforce ODR outcomes from low-value cross-border e-commerce consumer disputes.[1593] The chargeback scheme is perceived as having a great potential to be used in making ODR decisions enforceable when disputed parties have transferred funds to a third-party payment intermediary.

714. The chargeback scheme is often used in credit card payment disputes. A study on the credit card chargeback scheme will show us how the chargeback scheme works and what role it may play in enforcing ODR outcomes. The credit card chargeback is the refunding process which enables a cardholder who paid for goods or services (with a payment card) to dispute certain or all aspects of the transaction through the payment card issuer.[1594] The issuing bank (acting for the card holder) will work with the acquiring bank (acting for the merchant) to settle the payment disputes either by a chargeback to the card holder's account or a representment to the merchant's account. The credit card network,[1595] acting as a third-party neutral, will make a final decision on the payment disputes between the card holder and the merchant in accordance with the international credit card processing rules. [1596] The decision made by the credit card network must be executed by the issuing bank and the acquiring bank.



[1592] UNCITRAL Note on Private Enforcement, (n 1366) 8-9.
[1593] UNCITRAL WGIII, 'Online dispute resolution for cross-border e-commerce transactions: Proposal by the Governments of Columbia and the United States of America', Thirty-first Session, A/CN.9/WG/III/WP. 134.
[1594] Working document 'Payment card chargeback when paying over Internet', MARKT/173/2000 < http://ec.europa.eu/internal_market/e-commerce/docs/chargeback_en.pdf> accessed 14 October 2016.
[1595] The credit card network (such as Mastercard or Visa) controls where credit cards can be accepted and to facilitate transactions between merchants and credit card issuers.
[1596] See MasterCard Chargeback Guide and Visa Chargeback Guidelines for Visa Merchants.

715. The major problems with the credit card chargeback system are the complexity, length and cost. First, there are too many parties involved in the chargeback system (cardholder, issuer, merchant, and acquirer). Although the dispute is only between the cardholder and the merchant, two banks who issue the card (issuing bank and the acquiring bank) are also involved in the handling of disputes. Secondly, it takes a rather long time to complete the whole chargeback process. Depending on the process, a chargeback process lasts from 6 weeks to 6 months. [1597] Moreover, the chargeback is expensive for the merchants. Each time a consumer files a chargeback or a reversal is made, the merchant is charged with a fee. [1598] Likewise, if a chargeback turns out to be invalid, the cardholder will also be charged with an additional fee. If a merchant gets too many chargebacks, usually more than one or two percent of total sales, their merchant account will be terminated by the acquiring bank and the merchant will be added to the black list which prevents the merchant from accepting credit cards. [1599]

716. The credit card chargeback mechanism is a self-executable dispute resolution mechanism which combines dispute resolution with a built-in enforcement mechanism. The chargeback scheme can also be used by a third-party payment intermediary (instead of credit card companies) who receives payment from the buyer on behalf of the seller. Therefore, the chargeback scheme can also be applied to execute ODR outcomes when the third-party payment intermediary cooperates with the ODR service provider.

b. Transaction guarantee scheme

717. In recent years, e-commerce market players (such as marketplaces or payment intermediaries) have adopted a transaction guarantee scheme which provides parties with immediate monetary remedies in specified cases. [1600] Once the specific conditions are met, the transaction guarantee scheme will allocate the payment as instructed.

718. In this part, I will use PayPal transaction guarantee mechanism (Buyer Protection Scheme and Seller Protection Scheme) as an example to demonstrate how it works in practice. The PayPal

[1597] 'Understanding Chargebacks: A Guide to Chargebacks for Online Merchants', DALPAY < https://www.dalpay.com/en/support/chargebacks.html> accessed 14 October 2016.
[1598] The chargeback fee ranges from $50 to $1000 per chargeback. See Visa/MasterCard Fraud & Chargeback Program Thresholds Guidelines. < https://www.moneris.com/~/media/Files/Fraud%20and%20Chargeback%20Risk%20Program%20Thresholds.pdf > accessed 12 January, 2017.
[1599] See Visa/MasterCard Fraud & Chargeback Program Thresholds Guidelines.
[1600] See eBay Moneyback Guarantee, Amazon AtoZ Guarantee, and PayPal Buyer/Seller Protection. These conditions include such as: when the product has not been received, the product does not match the description, or the refund has not been received.

Buyer Protection protects the buyer if an item purchased has not been shipped or if a shipped item is significantly not as described by the seller. Payments received in the recipient's PayPal account may be reversed at a later time if such a payment is subject to a claim.[1601] PayPal Buyer Protection enables PayPal to make a final decision at its full and sole discretion with regard to the payment chargeback. The final decision may result in PayPal reimbursing the buyer for the amount of payment he/she made through PayPal and the payment recipient (Seller) bearing liability to PayPal for that reimbursement.[1602]

719. Similarly, there is a PayPal Seller Protection policy for claims brought by its buyers including unauthorized payment or non-delivery of a product.[1603] PayPal may reimburse the seller provided that there is proof that the item was posted in accordance with requirements. Unlike PayPal Buyer Protection policy, the Seller Protection policy does not cover the buyer's claim that the product was not as described. In other words, the seller cannot get reimbursed if the buyer claims that the product was not as described even if the seller can prove the product has been delivered.

720. The transaction guarantee mechanism is an effective enforcement mechanism in resolving disputes arising from transactions in the online marketplaces. However, there are also defects in the transaction guarantee mechanism. Firstly, there is a limited scope of disputes that are covered by the transaction guarantee scheme. The buyer protection mechanism is applied in only two types of disputes (non-delivery and inconformity with description) to limit the complexity and the scope of claims, while the seller protection mechanism is limited to disputes of "unauthorized payment" and "non-delivery".[1604] Other transaction disputes such as quality issues and after-sales services are not covered by the transaction guarantee scheme. However, the limitation on the scope of application is not black and white. In fact, the transaction guarantee mechanism can be used as a filter to differentiate simple disputes and more complicated disputes.[1605] For those simple disputes, the adoption of the transaction guarantee mechanism can save time and cost for the parties. Secondly, the transaction guarantee mechanism can be manipulated by buyers and against sellers.[1606] It has been reported that

[1601] User Agreement for PayPal Service, recital: risk of payment reversals.
[1602] User Agreement for PayPal Service, Article 13.1.
[1603] User Agreement for PayPal Service, Article 11.6.
[1604] Del Duca, Rule and Cressman 269.
[1605] The claims that are outside the scope of eBay Moneyback Guarantee are for example: punitive claims, lost profits, travel expenses or restocking costs. Del Duca, Rule and Rimpfel (n 916)215.
[1606] Sellers that have used eBay complained that they have been scammed by buyers through the Money Back Guarantee even if the products they sell are real and have been delivered to the buyers. See 'Ebay's money back

some fraudulent buyers have exploited the transaction guarantee scheme by returning a fake product to the buyer while asking eBay to refund them as they claim the received products are not in accordance with the description.[1607] That is why an ODR service provider which is independent of the payment intermediary can be useful in handling disputes between sellers and buyers. The ODR service provider can work with payment intermediaries such as PayPal to execute their decisions.

c. Escrow account scheme

721. In the absence of a chargeback system in certain countries such as China,[1608] the payment intermediary has used the escrow account system to ensure the security of transactions on the marketplaces. For example, Alipay, one Chinese third-party intermediary, acts as a trusted agent in the transaction between the seller and the buyer. When a transaction has been concluded between the buyer and the seller, the payment will be paid from the buyer to Alipay. When the payment is received, Alipay will notify the seller to ship the products. When the buyer has received the products and informs Alipay of the acceptance of the delivery, Alipay will then release the payment to the seller.

722. When a dispute occurs between the buyer and the seller, Alipay may act as the third-party neutral and make a decision based on the documents submitted by the parties and in accordance with the applicable rules (General Terms of Alipay Transaction, Alipay Dispute Resolution Rules and Alipay Service Agreements).[1609] The parties are also free to negotiate between themselves or choose other types of dispute resolution. When a dispute is pending, the payment will be temporarily held by Alipay until a decision has been made by the Alipay dispute resolution center, or when a judgment has been rendered by the people's court or when a

guarantee has given a buyer carte blanche to nick m goods' by Anna Tims < https://www.theguardian.com/money/2015/nov/17/ebay-money-back-guarantee> and 'My eBay buyer protection nightmare' by Sophie Christie < http://www.telegraph.co.uk/finance/personalfinance/money-saving-tips/11127669/My-eBay-buyer-protection-nightmare.html> accessed 19 January 2017.

[1607] "It's seller beware as eBay's buyer guarantee is exploited by scammers", see example of Robert Barr of Hedon and Raman Singh, <https://www.theguardian.com/money/2016/apr/25/ebay-seller-beware-buyer-guarantee-exploited-scammers > accessed 4 December 2016.

[1608] Ying Yu and Mingnan Shen, 'Consumer Protection as the'Open Sesame'that Allows Alibaba to Crush the Forty Thieves (Gaining Market Power by Protecting Consumers: A Private Company Blows China's Banks Away)' (2015) Journal of Antitrust Enforcement.

[1609] General Terms of Alipay Transaction < https://render.alipay.com/p/f/fd-iztoo5r8/index.html >;Alipay Dispute Resolution Rule <https://cshall.alipay.com/lab/help_detail.htm?help_id=212378&keyword=%D4%F5%C3%B4%CD%B6%CB%DF%D6%A7%B8%B6%B1%A6%D5%CB%BB%A7&sToken=s-b5eb417049694bffbf59927abacb1eff&from=search&flag=0>; Alipay Service Agreements <https://render.alipay.com/p/f/fd-iztow1fi/index.html > accessed 27 October 2018.

settlement agreement has been reached between the parties if the parties employed a different type of dispute resolution.

723. In ODR, the ODR provider can coordinate with a third-party escrow agent[1610] to enforce a decision. Although the escrow account system provides direct enforcement for ODR decisions, it is not flawless. The main concerns for the development of an escrow account system are the security of and the management of the funds. Alipay's control of the payment can last for a long period starting from the transfer of funds until the buyer has confirmed the receipt of merchandise or when a dispute has been settled. In 2015, according to the statistical report by the Payment & Clearing Association of China, the total amount of the third-party online payment has reached to 49.48 trillion Yuan (approximately 6.68 trillion EURO).[1611]

724. Although the concept of an "escrow account" is borrowed from abroad,[1612] there is no legislation directly regulating the operation of escrow agents in China.[1613] Despite the fact that third-party payment intermediaries, such as Alipay, render some financial services (deposit and payment) that are similar to banks, they are non-bank institutions that are outside the scope of financial institutions under the government's supervision. Until recently, China has promulgated the *Administrative Measures for the Online Payment Business of Non-bank Payment Institutions* which provides regulatory guidelines for online payment intermediaries such as Alipay. It requires the payment intermediary to be equipped with an Internet payment business license to record the balance of prepaid funds, to initiate payment instructions by clients and to reflect details of the payment transaction.[1614] More importantly, the public funds that are withheld by Alipay are now regulated by *Measure for Depository of Customer Excessive Reserves by Payment Institutions*.[1615] The Measure requires the payment institution

[1610] A third-party escrow agent is for example escrow.com.
[1611] Payment and Settlement Department of the People's Bank of China: 2015 Overall Performance of Payment System, <http://www.pbc.gov.cn/zhifujiesuansi/128525/128545/128643/3044097/index.html> accessed 8 December 2016.
[1612] The concept of "escrow account" has been used in Common Law countries in real estate transactions and loans. A third party withholds an asset or funds on behalf of two other parties that are in the process of completing a transaction. The asset or funds are held by the escrow agent until it receives the instructions or until predetermined contractual obligations have been fulfilled. See John Mann, 'Escrows-Their Use and Value' (1949) University of Illinois Law Forum 398, 398-400; Robert A Kendall, 'Independent Escrow Agent: The Law and the License' (1964)38 Southern California Law Review 289, 292-307.
[1613] Ying Yu, 'The nature of third-party payment intermediary: discussion on legal relationship of escrow' （第三方支付之定性——试论托付法律关系）6 (2012) Journal of Law Application (法律适用), 53-54.
[1614] Administrative Measure for the Online Payment Business of Non-bank Payment Institutions, Article 3.
[1615] Measures for Depository of Customer Excessive Reserves by Payment Institutions, Announcement [2013] No. 6 of the People's Bank of China.

to deposit all the customers' excessive reserves in a special deposit account in banks.[1616] Also, the payment intermediaries are required to accrue risk reserves at a certain percentage of the total interest accrued on all its excess reserves bank accounts on a quarterly basis to prevent losses of customer excess reverses.[1617] However, current measures have not stipulated the ownership of interests arising from the reserves of public funds. Although legally speaking, the ownership of interests should belong to users, in practice, it is owned by the third-party payment intermediary.[1618] Moreover, it is also difficult to distinguish the reserve fund interest accrued for each individual user.[1619] ODR service providers may also enforce decisions by working with an escrow agent provided that the security of funds and legitimacy of the escrow account can be ensured.

C. Evaluation of monetary enforcement mechanism for ODR outcomes in e-commerce marketplace

725. The combination of payment method and internal complaint mechanism of the marketplace is necessary to produce an effective enforcement mechanism and increase consumers' trust in using marketplaces.[1620] The chargeback scheme, transaction guarantee scheme and escrow account scheme are three monetary enforcement mechanisms used in e-commerce marketplace when disputes arise. In order to enhance the effectiveness of ODR outcomes, the ODR service providers that operate outside the e-commerce marketplaces may also work with third-party payment intermediaries who provide for these monetary enforcement mechanisms. In what follows, I will evaluate the monetary enforcement mechanism based on the legal nature, the security of the transaction and cost-and-efficiency analysis.

a. Legal nature of the monetary enforcement mechanism

726. As private entities are not inherently granted the power to control parties' funds, they need to obtain authorization from the parties (usually via a user's agreement) to be able to allocate the funds. For the credit card chargeback mechanism, the card issuing bank has signed a user's

[1616] *Ibid*, Article 3.
[1617] *Ibid*, Article 29.
[1618] It is stipulated in Article 9 of the Service Agreement of Alipay (2017 version) that any interests arising from the reserves of public fund belongs to Alipay.
[1619] Chunyan Zhang, 'A preliminary study on the ownership of reserve fund and interests arising from reserve funds of third-party payment platform', 29 Hebei Law Science 3, 2011, 82. (张春燕：《第三方支付平台沉淀资金及利息之法律权属初探》，河北法学 2011 年第 29 卷第 3 期)
[1620] For example, successful marketplaces (such as eBay, Amazon and Taobao) have worked with payment intermediaries (credit card companies, PayPal, Alipay, ect.) in executing internal disputes.

agreement with the cardholder and the acquirer has signed a merchant service agreement with the merchant.[1621] When the payment has been made by the cardholder to the merchant via a credit card, the acquirer is responsible for receiving the card transaction payment from the card issuing bank. If a cardholder files a chargeback request, the card issuing bank is authorized to chargeback the disputed amount from the acquiring bank via the card scheme. When the merchant fights back and provides sufficient evidence, the acquiring bank is then authorized to represent the amount from the issuing bank.[1622] Both the card issuers and acquirers shall abide by the final decision made by the credit card network if no agreements can be reached between them.[1623] In the transaction guarantee scheme, the payment intermediaries obtained their powers to reimburse the winning parties via the User's Agreement.[1624] In an escrow account scheme, the third-party payment intermediary derives the right to act as an escrow agent from the user's payment service agreement,[1625] permitting it to withhold the payment on behalf of the buyer and release the payment until the buyer has received the merchandise and confirmed with a receipt. By entering into a user's agreement with the platform or payment intermediaries, the parties have authorized the payment intermediaries to arrange the payment in accordance with the decisions made by the third-party neutral. The discussion of electronic consent in standard form contract in Section 3.2.1. will also be applied to assess the validity of the user's agreement.

b. Security of payment for the transaction

727. In the chargeback scheme and transaction guarantee scheme, the seller will receive the payment immediately when the transaction has been concluded by contracts. The payment intermediaries in these two types of enforcement schemes do not have the ownership of the amount paid. In the escrow account scheme, the payment is withheld by the escrow agent/third-party payment intermediary until the buyer has received the merchandise and confirmed it with a receipt. There is a greater risk on the security of funds in an escrow account scheme as the

[1621] See for example: ING VISA Card General Conditions (Version 25 May 2018) < https://www.ing.be/static/legacy/SiteCollectionDocuments/ReglementIngVisaNewEN.pdf>,Rules of Card Acquiring Merchant Agreement < https://www.nets.eu/globalassets/documents/finland/rules-of-card-acquiring-merchant_fi-engpdf> accessed 27 October 2018.
[1622] "Chargeback representment" is a special term used in credit card chargeback scheme when the merchant disputes the chargeback and enters into the process of chargeback reversal.
[1623] MasterCard Chargeback Guide and Visa Chargeback Guidelines for Visa Merchants.
[1624] See for example, User Agreement for PayPal Service < https://www.paypal.com/au/webapps/mpp/ua/useragreement-full> and eBay User's Agreement < https://www.ebay.co.uk/pages/help/policies/user-agreement.html#ebp> accessed 27 October 2018.
[1625] See Alipay Service Agreement (n 1609) Article 3(4).

parties have no possession of the funds. Therefore, the escrow agent/third-party payment intermediary should be regulated strictly by laws.[1626] While the escrow agent facilitates transactions by enhancing trust between the parties, it raises concerns with regard to the legality and security of such an escrow account scheme.

c. Cost and efficiency

728. Compared with the transaction guarantee scheme and the escrow account scheme which can be executed directly, the credit card chargeback mechanism is more time-consuming because of payment reversals between parties by chargebacks and representments before a final decision is made. When a payment dispute arises, the buyer can request a chargeback of the disputed amount from the seller's account. If the seller disagrees with the chargeback, he/she can also demand a representment to reverse the chargeback from the buyer's account. [1627] Nevertheless, a significant penalty will be imposed on the merchants if the representment proves to be wrong. Therefore, the merchants' operational risk increases when they receive too many chargebacks.[1628] The cost of the credit card chargeback mechanism is much higher for businesses than the other two types of enforcement mechanisms as there is no extra charge for the other two mechanisms in the current framework.

5.2.1.2. UDRP domain name transfer

A. Enforcement by domain name Registrars

729. Aside from the enforcement mechanism that relies on the control of monetary resources, ODR decisions can be enforced by relying on technical control of other valuable social resources.[1629] The success of UDRP is owed largely to its effective enforcement mechanism. According to Article 4(i) of the UDRP Policy, the remedies available to execute decisions made in the UDRP processes are the cancellation of domain names and the transfer of domain name registration to the complainant (who is the trademark or service mark owner).[1630]

[1626] Yu (n 1613) 39; Zhang (n 1619.
[1627] UNCITRAL Note on Private Enforcement, (n 1366) paragraph 36: the disputed amount may be passed back and forth between the parties until one party decides no longer to pursue the reimbursement.
[1628] See (n 1599) VISA chargeback monitoring program which set fraud thresholds for chargeback ratios.
[1629] The technical control of social resources refers to digital assets: for example, the ownership of intellectual property rights.
[1630] UDRP Policy (n 1262).

730. During the process of domain name dispute resolution under UDRP, the Registrar locks[1631] the domain name of the registrant once it has been notified by the dispute resolution service provider that a dispute was initiated. When a decision has been made in favor of the complainant, the panel has 3 business days to inform the Registrar of its decision. The Registrar is then bound to implement such a decision in accordance with the Registration Accreditation Agreement entered into between ICANN and the Registrar.[1632] Before implementation, the Registrar is required to wait 10 business days in order to give the adversely affected registrant the opportunity to file a complaint in court.[1633] In order to stay the implementation proceeding, the registrant should provide official documentation to prove that a lawsuit has been lodged against the complainant in a jurisdiction to which the complainant has previously specified for the event that the complainant prevails and the registrant wishes to take the disputes to court. The Registrar will not implement decisions or take further actions before it receives confirmative evidence that the lawsuit has been dismissed or withdrawn or a resolution has been made between the parties.

B. Evaluation of the UDRP enforcement mechanism

731. UDRP turns out to be an effective enforcement mechanism for cyber-squatting as in one-third to one-half of all UDRP cases, domain name registrants do not even file a response, and in nearly all such instances complainants have prevailed.[1634]

732. However, the UDRP enforcement mechanism is not a panacea for all types of ODR outcomes due to its inherent limitations. First, the remedies of UDRP are limited to cancellation or transfer of domain names, suggesting that UDRP is only applicable to cyber-squatting disputes. For domain name disputes that do not concern allegation of abuse, the UDRP requires the parties to use other redresses.[1635] Second, the UDRP decision is not final and can be reversed by national court decisions. The UDRP allows parties to initiate parallel legal proceedings and the decision is not to be implemented if either party files a lawsuit challenging the decision.[1636] National courts do not give much value to UDRP due to the procedural concerns with regard

[1631] Locks means measures to prevent any modification by the respondent to the information of registrant and registrar.
[1632] The Registration Accreditation Agreement required the Registrar to execute decisions made by the dispute resolution provider authorized by ICANN.
[1633] UDRP Policy, Article 4(k).
[1634] White (n 1283) 236-237.
[1635] UDRP Policy, Article 5.
[1636] UDRP Policy, Article 4(f).

to UDRP decision as the courts are believed in a better position than UDRP to weigh evidence and assess credibility.[1637] The UDRP decision is based on written submissions without any testimony, cross-examination, briefing, or arguments. Therefore, the UDRP decisions are not final and when disputed in court, the national courts do not necessarily give judicial deference to UDRP decisions.[1638]

5.2.1.3. Automatic enforcement based on blockchain technology

A. Enforcement based on blockchain technology

733. Blockchain is a distributed database that maintains a continuously-growing list of data records composed of data structure blocks.[1639] Each block holds an individual transaction and contains a timestamp and information linking to a previous block. When transactions occur, records of ownership are recorded in ledgers. This mechanism results in a decentralized database of distributed public ledgers with a growing record of transactions.[1640] Although the blockchain technology was designed for cryptocurrencies, this technology can be applied for other purposes. The following two examples (bitcoin and smart contract) demonstrate the possibility of using blockchain technology to implement ODR decisions in the future.

734. The first most successful application of the blockchain technology is the Bitcoin virtual currency designed by Satoshi Nakamoto in 2008.[1641] While the traditional currency is managed by central banks, virtual currency is managed by a distributed ledger which is publicly shared and cannot be altered. There is no centralized monetary authority to issue bitcoins; instead, bitcoins are instead generated by users. In order to participate in bitcoin transactions, the users need to install a bitcoin wallet on their devices. It generates a bitcoin account number and allows the users to transact with others by transferring value between different addresses. The objective of bitcoin is to overcome the inherent weakness of centralized models of digital

[1637] Froomkin (n1293) 100.
[1638] *Retail Servs. Inc.v. Freebies Publ'g*, 247 F. Supp. 2d 822, 827-28 (E.D. Va. 2003), affd,364 F.3d 535 (4th Cir. 2004) (The U.S. court stated: "Decisions made by arbitration panels under the UDRP are not afforded deference by the district court."); LG Köln, Urteil vom 16.06.2009, Az. 33 O 45/08 (*XM Satellite Radio Inc. v. Michael Bakker*, NAF Claim Number FA0612000861120), the German regional court held that "whether the requirements stipulated by Paragraph 4(a) of UDRP (on which the panel made its decisions) are satisfied or not is considered irrelevant."
[1639] Technology Guide to Blockchain Technology, < https://www.gitbook.com/book/yeasy/blockchain_guide/details>
[1640] OECD, Directorate for Financial and Enterprise Affairs Corporate Governance Committee, 'Blockchain Technology and Corporate Governance', 7, DAF/CA/CG/RD(2018)1/REV1.
[1641] Arvind Narayanan and others, *Bitcoin and cryptocurrency technologies* (Princeton University Pres 2016) 176.

currencies and enable online transactions without the participation of the third-party payment intermediary.[1642] In the field of ODR, Pietro Ortolani proposed the use of a bitcoin escrow mechanism to enforce ODR decisions.[1643] By creating a multi-signature bitcoin address,[1644] the buyer can deposit the payment on this virtual bitcoin address. The bitcoin address can be unlocked with two-out-of-three keys, which are respectively held by the two disputed parties and the ODR service provider. If no disputes arise, the buyer and seller can agree and release the payment to the control of the seller. If a dispute arises, the ODR service provider can review the case and make a decision. Once a decision is made by the ODR service provider, the party who wins the case will have the key to release the payment. This is a quasi-escrow account scheme which is not controlled by a third-party intermediary but jointly controlled by the disputed parties and the ODR service provider. The ODR service provider is unable to take funds in any way without the permission of either the buyer or the seller. This quasi-escrow account scheme secures the disputed amount without having to place the disputed funds within the control of ODR service providers.

735. Another application of the blockchain technology is the smart contract. A smart contract is a contract between the parties that is stored or digitally executed on the blockchain using programmed codes.[1645] Currently, the most powerful blockchain that enables smart contracting is Ethereum.[1646] The terms of the original contract have been translated into computer codes. Using Ethereum, the user can create a smart contract that will hold a contributor's money until a given condition is fulfilled. Kleros is an ODR service provider for crowd-sourced arbitration based on a smart contract.[1647] First, the parties enter into a smart contract and choose Kleros as its adjudication protocol. When disputes arise between the parties, the relevant information will be sent to Kleros and decisions will be made by public jurors of Kleros. The smart contract will then execute decisions based on decisions made by Kleros. A smart contract based on blockchain technology has gradually been used in certain

[1642] Anna Riikka Koulu, 'Blockchains and online dispute resolution: Smart contracts as an alternative to enforcement' (2016) SCRIPTed-A Journal of Law, Technology & Society, 49.
[1643] Pietro Ortolani, 'Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin' (2015) Oxford Journal of Legal Studies, 15.
[1644] Bitrated (www.bitrated.com) is a trust platform which allows parties to make reversible e-commerce transactions using multi-signatures including a trust agent.
[1645] Stefan Thomas & Evan Schwartz, Smart Oracles: A Simple, Powerful Approach to Smart Contracts, CODIUS (July 17, 2014), < https://perma.cc/4BPK-5C4V > accessed 14 September 2017.
[1646] Ethereum is a decentralized platform that runs smart contracts: applications that run exactly as programmed without any possibility of downtime, censorship, fraud or third-party interference. See < https://www.ethereum.org/> accessed 31 January 2018.
[1647] Kleros < https://kleros.io/ > accessed 29 October 2018.

industries such as insurance and energy as smart contracts can be automatically executed without involving a third-party neutral.[1648] The smart contract does not rely on national courts for enforcement but can be automatically enforced through programmed coding.

B. Evaluation of the enforcement based on blockchain technology

736. The main advantage of the application of blockchain technology to the enforcement mechanism is that there is no third-party payment intermediary in electronic transactions and the payment will be automatically transferred according to codes. Therefore, in blockchain transactions, it is less of a concern with regard to the security of the funds from a third-party payment intermediary. Also, the parties can avoid any additional cost for double transactions (the funds transferred from the buyer to the third-party payment intermediary and from the third-party intermediary to the seller). The third advantage of the blockchain technology is owing to its dispute prevention function. Because of the automated execution, contractual breach and damages are less likely to happen in smart contracts.[1649]

737. Although smart contracts provide parties with an automatic enforcement mechanism, they also create new problems for the parties. First, the content of the smart contract is encrypted with codes. Once a smart contract has been coded, it cannot be altered. [1650] Also, when a smart contract has been executed, it becomes irreversible. Second, as the blockchain technology is based on encryption technology, it is also subject to systematic risks. An example of such technical risks is the hacking of DAO (Decentralized Autonomous Organization), a crowd-funding system, based on blockchain technology, which is designed to allow companies to raise funds for their proposals if the proposal reached a 20% quorum.[1651] The hacker took advantage of a bug in DAO's code to siphon off over $60 million USD worth of Ether.[1652] Last but not least, there is also a lack of judicial review over the decision-making process due to the decentralized feature of the blockchain technology.[1653] When the block-chain based dispute

[1648] Alan Cohn, Travis West and Chelsea Parker, 'Smart After All-Blockchain, Smart Contracts, Parametric Insurance, and Smart Energy Grids' (2017)1 Georgetown Law Technology Review, 280-281.
[1649] Wolf A. Kaal and Craig Calcaterra, 'Crypto Transaction Dispute Resolution' (2018) The Business Lawyer, 40.
[1650] Max Raskin, 'The Law and Legality of Smart Contracts' (2017)1 The Georgetown Law Technology Review, 326-327.
[1651] Nathaniel Popper, 'A Hacking of More Than $50 Million Dashes Hopes in the World of Virtual Currency' (New York Times, June 17, 2016) < https://www.nytimes.com/2016/06/18/business/dealbook/hacker-may-have-removed-more-than-50-million-from-experimental-cybercurrency-project.html> accessed 19 September 2017.
[1652] Ether is another virtual currency similar to bitcoin used on the Ethereum network, a blockchain based platform offering smart contracts applications.
[1653] Kaal and Calcaterra (n 1649) 41; Rikka Koulu, *Dispute resolution and technology: revisiting the justification of conflict management* (Comi 2016) 307-308.

resolution is challenged by the parties, the national courts are unable to intervene in smart contracts by writing or changing codes. In the absence of available judicial redress, the blockchain-based dispute resolution mechanism may fall out of the judicial control by the national legal system.

5.2.2. Incentive-driven enforcement mechanism

738. In incentive-driven enforcement mechanisms, parties voluntarily abide by the decisions of the dispute resolution mechanism in order to preserve their reputation or credit which is crucial in market competition. There are several incentive-driven mechanisms that are currently being used in practice, namely the online trustmark certificate, the rating system, punitive measures, and the blacklist mechanism. These mechanisms are soft measures which are not directly enforceable. Instead, the incentive-driven enforcement mechanism relies on the voluntary execution by the parties.

5.2.2.1. Trustmark scheme

739. A trustmark is an electronic label or visual representation indicating that an e-commerce merchant has demonstrated its conformity to certain standards regarding security, privacy, and sound business practices including abiding by the redress mechanism in place.[1654] Trustmark is a form of branding and their use is particularly important for SMEs[1655], who are the key players in e-commerce. The trustmark provides consumers with the opportunity to recognize the quality and standards of the products or services offered by an e-commerce merchant. The trustmark scheme in the EU will be examined to study the potential use of the trustmark scheme in promoting the enforcement of ODR decisions.

A. Trustmark scheme in the EU

740. In the EU, the trustmark scheme is used to assure consumers that a particular site or online seller has been validated by a trustmark provider and that the products or services that the businesses provide are safe. The trustmark scheme is designed to enhance consumers' trust in

[1654] The concept of trustmark is taken from the Trust Marks Report 2013 ("Can I trust the trust mark?") 7, issued by European Consumer Center < http://magyarefk.hu/pdf/trust_mark_report_2013.pdf> and the proposal by the American Bar Association Task Force on E-Commerce and ADR 2002 ('Addressing Disputes in E-commerce') 19, <https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/FinalReport102802.authcheckdam.pdf> accessed 21 September 2017.

[1655] Trust Marks Report 2013 ("Can I trust the trust mark?") 14.

the webshop that carries the trustmark. In 2012, the European Commission has published a study "EU Online Trustmarks Building Digital Confidence in Europe" (2012 study) that analyzed existing e-commerce trustmarks, the relevant European legal framework and the main policy options for introducing such a trustmark.[1656] There is currently no regulatory framework in trustmarks, but it was suggested by the stakeholders that a minimum set of harmonized trustmarks trust-building features should be established to reduce the heterogeneity in the trustmark field.[1657] Most trustmarks providers offer two types of services: (i) certification (checks whether webshops comply with applicable standards or codes of conduct) and (ii) dispute resolution.[1658] Trustmark providers either provide internal ADR or work with external ADR providers to settle disputes between webshops and consumers.[1659] However, these trustmark service providers only request merchants to participate in the internal dispute resolution process of the trustmark service provider or external ADR/ODR services, but do not compel merchants to comply with recommendations or decisions rendered in the ADR/ODR process.

741. At the EU level, three collaborative networks of trustmarks (Euro-label, EMOTA and Ecommerce Europe) exist that operate across borders. For example, the European Trustmark Association (EMOTA) committee grants a license to national trustmark providers in a member state[1660] and allows these providers to distribute the EMOTA trustmarks to the merchants. The trustmark providers undertake to certify and evaluate their business members. These pan-European trustmarks can also be used to in accrediting the quality of ODR services.[1661] This requires merchants who have been awarded the trustmarks to provide information to consumers on ADR/ODR services to resolve consumer complaints in accordance with the EU Regulation on Consumer ODR. However, merchants are neither forced to use ADR/ODR nor obliged to implement the decisions out of ADR/ODR within existing rules.[1662]

[1656] Directorate-General for the Information Society and Media (European Commission) 'EU Online Trustmarks Building Digital Confidence in Europe' <https://publications.europa.eu/en/publication-detail/-/publication/84352f85-5cab-4fe6-a4a4-dd03745a8ed1/language-en> accessed 30 October 2018. (2012 study)

[1657] EU Online Trustmarks Building Digital Confidence in Europe (2012 study), 6.

[1658] EU Online Trustmarks Building Digital Confidence in Europe (2012 study), 27-28.

[1659] Trust Marks Report 2013 ("Can I trust the trust mark?"), 40-42.

[1660] The list of EMOTA trustmark providers in EU member states, < https://europeantrustmark.eu/en/consumers/complaints/> accessed 30 October 2018.

[1661] This opinion was stressed by Ecommerce Europe in a meeting with the European Commission. < https://www.ecommerce-europe.eu/news-item/trust mark-dialogue-with-european-commission/> accessed 3 January, 2017.

[1662] It is proposed by the Trust Marks Report 2013 that trust mark members should participate in the ADR process and follow their decisions or recommendations. Trust Marks Report 2013 ("Can I trust the trust mark?") 55.

742. When businesses are committed to using ODR services by joining a trustmark scheme, to the extent that the consumers decide to make transactions they would not have otherwise taken because of this trustmark, the businesses' failure to participate in ODR may constitute a violation of Article 6(2)(b) of the Unfair Commercial Practices Directive.[1663] This allows consumers to bring legal actions in court or complaints to administrative authorities against the unfair commercial practices of businesses under Article 11.

B. Evaluation of trustmark scheme in ODR

743. Turstmark is widely used as a quality guarantee for products or services. It is suggested that the trustmark scheme can also be used as an incentive for traders to participate in ODR and to comply with ODR decisions. Although a trustmark scheme seems to be a promising private enforcement mechanism for ODR, there are no uniform standards in regulating the conditions to grant trustmark and in ensuring the neutrality of trustmark service providers. Three critical questions need to be answered for the establishment of trustmark scheme in ODR.

a. Who is eligible to issue a trustmark to whom?

744. The trustmarks can either be issued to online merchants by trustmark service providers or to ADR/ODR service providers by a third-party accreditor.[1664] The first type of trustmark is used to inform consumers of the availability of ADR/ODR services and ensures that the merchant undertakes to settle disputes with their customers by using specific ADR/ODR services. The second type of trustmark is used to evaluate the quality of ADR/ODR service providers. There is no existing example of the second option of a third-party accreditor who grants trustmarks to ADR/ODR service providers, but the EU ODR platform turns out to be an ideal entity to issue trustmarks.[1665] The EU Regulation on Consumer ODR establishes a third-party accreditor system that enlists ADR entities conforming to the quality standards stipulated by the EU Directive on Consumer ADR.[1666] Therefore, the ODR platform plays the role of an accreditor by providing qualified ADR entities to the parties in the EU.

b. What are the ODR related criteria to issue a trustmark certification to merchants?

[1663] Directive 2005/29/EC of the EU and of the Council of 11 May 2005 concerning unfair commercial practices in the internal market (Unfair Commercial Practices Directive), OJ L149/22.
[1664] UNCITRAL Note on Private Enforcement (n 1366) paragraph 20.
[1665] Pablo Cortés, 'A new regulatory framework for extra‐judicial consumer redress: where we are and how to move forward' (2015)35 Legal Studies 114, 134; Amy Scultz, 'Building on oarb attributes in pursuit of justice' in Piers and Aschauer (n 19) 203.
[1666] EU Regulation on Consumer ODR, Article 14(4); EU Directive on Consumer ADR, Article 20(4).

745. Trustmarks are believed to promote the development of ODR as it ensures that online merchants will adhere to quality standards, participate in an ODR procedure, and comply with the outcomes.[1667] However, there are no uniform standards on to what extent merchants should adhere to ADR/ODR. For example, the trustmark accreditation criteria of EMOTA only stipulate that traders should provide information about ADR/ODR to resolve consumer complaints.[1668] It does not oblige traders to participate in the ADR/ODR process or follow decisions or recommendations made by the ADR/ODR entities.

746. In my opinion, the trustmark scheme should provide added value to the ODR enforcement rather than merely imposing an information disclosure obligation (which is the current stance of EMOTA). The online merchants have the obligation to indicate first what type of ADR/ODR service they have committed to and second whether they are bound by the decisions or recommendations rendered by these ADR/ODR services. The merchants should then cooperate with the ODR process by providing necessary documents and reply to questions from the ADR/ODR service provider in a timely manner. After a decision has been rendered or an agreement has been reached by the parties (depending on the nature of the ODR) the merchants should execute the decisions by the ADR/ODR or the agreement without delay. The merchants should be allowed to display a trustmark when they have a high rate of resolved complaints. In case of a delay or failure to enforce the ODR decisions or execute the agreement, sanctions such as a revocation of trustmarks or financial penalties should be imposed.[1669]

c. How to ensure the neutrality of the trustmark service provider?

747. One of the major concerns with the trustmark scheme is the neutrality of the trustmark service provider. Doubts about the neutrality of the trustmark providers exist given the fact that these trustmark providers are funded by the merchants. [1670] The lack of neutrality can be found, for instance, in Better Business Bureau (BBB), one of the well-known trustmark providers, who makes credit accreditation of companies. Although BBB claimed to be a non-profit organization, it granted those merchants who have paid annual fees with "A ratings" while

[1667] Cortés, *Online Dispute Resolutions for Consumers in the European Union* (n 17) 62.
[1668] EMOTA European Trustmark Accreditation Criteria for national trustmark providers, < https://docs.wixstatic.com/ugd/b18286_873c2ee1761a48a8a6e3ecdb8e0564ac.pdf> accessed 21 September, 2017.
[1669] EU Online Trustmarks Building Digital Confidence in Europe (2012 study), 28; Pablo Cortes and Arno R. Lodder, 'Consumer Dispute Resolution Goes Online: Reflections on the Evolution of European Law for Out-of-Court Redress' (2014)21 Maastricht J Eur & Comp L 14, 30.
[1670] Merchants are required to pay a membership fee in order to be able to label the trust mark on their websites.

giving those who failed to pay subpar grades even though they may not receive so many complaints from the customers.[1671]

748. The trustmark providers should also be supervised to ensure that their own accreditation services are trustworthy. Lessons can be learnt from the Netherlands and Japan, where two trustmarks ("Thuiswinkel Waarborg" and "Online Shopping Trust") are accredited by a third party.[1672] I propose that a similar supervisory mechanism can be established to control the quality of trustmark services and enhance the reputation of trustmark scheme so that merchants may wish to join the trustmark scheme and comply with ODR decisions voluntarily.

5.2.2.2. Rating system

749. Professor Akerlof has shown in his famous "lemon market" theory that the market failure and a race to the bottom may take place in a market with asymmetrical information.[1673] Being unable to distinguish between high-quality and low-quality products, parties will only want to offer prices that reflect average quality. The seller who offers good-quality products will be driven out of the market, and low-quality products will dominate the market. A rating system is a useful tool to enhance trust and minimize information asymmetry in e-commerce as parties are unable to meet in person in electronic transactions. Studies have found that parties show generalized trust and trustworthiness after even relatively brief exposure to reputation systems.[1674]

A. Rating system of the marketplaces

750. The owners of the websites, usually big marketplace operators such as eBay, Amazon, Taobao and Alibaba, allow their users to log into the system and leave their reviews or feedbacks for products or services providers they have encountered. The marketplace operators then reorganize the contents of these reviews and aggregate them into a rolled-up metric like a

[1671] Time, 'Why the Better Business Bureau should give itself a bad grade'< http://business.time.com/2013/03/19/why-the-better-business-bureau-should-give-itself-a-bad-grade/> accessed 4 January 2017.
[1672] EU Online Trustmarks Building Digital Confidence in Europe (2012 study), 31; Pablo Cortés, *The Law of Consumer Redress in an Evolving Digital Market: Upgrading from Alternative to Online Dispute Resolution* (Cambridge University Press 2017) 260-261.
[1673] George Akerlof, 'The market for "lemons": Quality uncertainty and the market mechanism' in *Essential Readings in Economics* (Springer 1995).
[1674] Ko Kuwabara, 'Do Reputation Systems Undermine Trust? Divergent Effects of Enforcement Type on Generalized Trust and Trustworthiness1' (2015)120 American Journal of Sociology 1390, 1414.

feedback score or a number of stars.[1675] When customers search products or services on the marketplace, they can easily find the aggregated ratings and relevant comments of such products or services. Moreover, the search system can also arrange products or services in accordance with their ratings, [1676] which connects the reputation system with businesses' market behaviors. The rating score is displayed in the profile of the sellers on the website. The reputation system turned e-commerce purchases from a one-time transaction into a repeated game, thereby removing incentives for sellers' misbehavior and enhancing consumer confidence in online marketplaces.[1677]

751. In the eBay feedback system, a detailed seller rating system enables buyers to rate their sellers in several different categories (e.g. shipping, timeliness, responsiveness).[1678] An effective way to promote the use and enforcement of ODR decisions is to include the compliance of ODR decisions into the rating categories. If the merchants are responsive and cooperative in ODR procedures and execute the ODR decisions voluntarily, a high rating on dispute resolution category will be rendered by customers. This rating system can encourage merchants to participate in ODR voluntarily. Customers are then able to choose merchants with high rating scores in ODR to ensure their future disputes will be settled by ODR.

B. Evaluation of the rating system

752. Rating system has proved effective in improving the trust between parties as it can ensure the quality of businesses' contractual performance and substitute for enforcement.[1679] Paul Resnick and Richard Zackhauser found in their empirical study of eBay's rating system that there is a correlation between a feedback score and the likelihood that an auction will be concluded successfully.[1680] However, the effectiveness of the rating system also depends on the accuracy of the ratings.[1681] It can for instance be manipulated by fraudsters especially when

[1675] Colin Rule & Harpreet Singh, 'ODR and Online Reputation System: Maintaining Trust and Accuracy Through Effective Redress' in Wahab MSA, Katsh E and Rainey D, *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing 2011) 176.
[1676] Del Duca, Rule and Cressman (n 1604) 273-276.
[1677] *Ibid*, 187.
[1678] eBay Detailed Seller Ratings, <http://pages.ebay.com/help/feedback/detailed-seller-ratings.html> accessed 6 January 2017.
[1679] Lewis A Kornhauser, 'Reliance, reputation, and breach of contract' (1983)26 The Journal of Law and Economics 691, 692-693.
[1680] Paul Resnick and Richard Zeckhauser, 'Trust among strangers in Internet transactions: Empirical analysis of eBay's reputation system' in *The Economics of the Internet and E-commerce* (Emerald Group Publishing Limited 2002).
[1681] Bob Rietjens, 'Trust and reputation on eBay: Towards a legal framework for feedback intermediaries' (2006)15 Information & Communications Technology Law 55, 63.

there is no supervision or quality control over these ratings.[1682] Some customers leave fraudulent reviews in order to obtain lower prices from merchants. Other online merchants even hire "professional bad reviewers" to leave negative reviews of their competitors.[1683] A recent report by the UK Competition & Market Authority also found evidence of fake reviews, negative reviews not being published and businesses paying for endorsements without this being made clear to consumers.[1684] Such abusive behaviors may endanger the trustworthy of the rating system as a whole and undermine other customers' trust in reviews.

753. The marketplace operators or third-party reputation management entities are responsible to ensure that these reviews are reliable. For example, Alibaba imposed penalties on parties who make multiple and apparently false reviews on the same party. [1685] Amazon also takes actions (such as suspending a user's Amazon account, forfeiting or withholding remittance and payment, or legal actions) against manipulated reviews.[1686] Government authorities also have the power to supervise the marketplace operators or reputation management entities such as rating websites.[1687]

5.2.2.3. Blacklisting system

754. The blacklisting system, as its name indicates, means that a list of parties who are labelled as untrustworthy with regard to conducting businesses. The UNCITRAL Working Group III on ODR has proposed an alternative enforcement mechanism called the "merchant blacklist", which marks the web browsers of a merchant with a red label if the merchant fails to comply

[1682] Chrysanthos Dellarocas and Charles A Wood, 'The sound of silence in online feedback: Estimating trading risks in the presence of reporting bias' (2008)54 Management Science 460; Dina Mayzlin, Yaniv Dover and Judith Chevalier, 'Promotional reviews: An empirical investigation of online review manipulation' (2014)104 The American Economic Review 2421.
[1683] Global Times, 'Beware of Taobao bullies' <http://www.globaltimes.cn/content/749547.shtml> accessed 6 January 2016.
[1684] Competition & Markets Authority (CMA), Online reviews and endorsements- report on the CMA's call for information, 39-40, 19 June 2015 < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/436238/Online_reviews_and_endorsements.pdf> accessed 3 October, 2017.
[1685] See Annex 2: Alibaba's Standard of Penalty Points Incurred for Non-compliance of Transactions.
[1686] Amazon, 'Anti-Manipulation Policy for Customer Reviews' < https://www.amazon.com/gp/help/customer/display.html?nodeId=201749630> accessed 13 January 2017.
[1687] In 2011, the ACCC (Australian Competition and Consumer Commission) took action against removal business Citymove for misleading online reviews and imposed an infringe notice of $6600. < https://www.accc.gov.au/media-release/accc-removalist-admits-publishing-false-testimonials> accessed 21 September 2017.

with ODR decisions or recommendations.[1688] There are quite a few blacklisting systems[1689] that are designed to display the commercial reputation and credibility of enterprises. I will use blacklisting systems in China to examine existing blacklisting systems both in the public sector and in the private sector.

A. Types of blacklisting systems

a. Public blacklisting systems

755. The State Administration for Industry and Commerce (SAIC) of the PRC has established a blacklisting system for enterprises that have committed seriously illegal and dishonest acts.[1690] It applies to all the enterprises that are registered within the PRC. If an enterprise commits bribery, fails to comply with judgments, or conducts any other dishonest actions, the SAIC will mark the enterprise as a dishonest enterprise in the publicly accessible Enterprise Credit Information System, which can be shared by other government authorities.[1691] In my proposal, a merchant's failure to comply with ODR decisions could also become dishonest acts to be sanctioned by SAIC in the Enterprise Credit Information System. As a result, merchants, for the sake of their reputations, would have incentives to comply with ODR decisions.

b. Private blacklisting system

756. Besides the government authorities, private entities can also blacklist merchants that fail to enforce ODR decisions. In order to facilitate dispute settlement, trade associations in China have set up relevant industrial mediation committees to handle ever-increasing disputes.[1692] Meanwhile, most trade associations in China have established blacklisting systems to self-regulate the industry and reduce transaction risks between industrial members.[1693] As the

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[1688] UNCITRAL Note on Private Enforcement (n 1366) paragraph 27. For example, Google Chrome uses security symbols in the web address to show their users whether a website is safe to visit. It is proposed by the working group that similar symbols can be made on the web browsers of the merchants to label merchants in blacklist.

[1689] Blacklisting systems are for example: Notorious Markets List, < https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/january/2017-notorious-markets-list>, Supplier Blacklist <supplierblacklist.com>, B2B Supplier/Buyer Blacklist https://www.foreign-trade.com/blacklist/a accessed 20 November 2018.

[1690] State Administration for Industry and Commerce, Interim Measures for the Administration of List of Enterprises with Serious Illegal and Dishonest Acts, (2015) Order No. 83 of the State Administration for Industry and Commerce.

[1691] Information of Enterprises of serious illegal or dishonest acts can be found on Credit China's website <https://www.creditchina.gov.cn/xinyongfuwu/shixinheimingdan/index.html?keyword=> accessed 30 October 2018. （企业失信黑名单）

[1692] Industrial mediation refers to the mediation established by relevant trade association such as in banking, insurance, securities, medical services, transportation, Internet or construction sectors, see (n 249).

[1693] The State Council of the PRC has promulgated a plan for the construction of social credit system from 2014 to 2020 (Guo Fa (2014) No. 21), which encourages trade associations to establish credit systems.

members of the trade association are encouraged to use industrial mediation, the trade association could consider integrating dispute resolution as a criterion in the blacklisting system. Other private blacklisting systems are, for example, managed by marketplace operators (such as Alibaba who publishes a blacklist of suppliers who do not meet trust and security standards and are banned from the marketplace), or by other third-party websites[1694] with blacklisting information provided by the users.

B. Evaluation of blacklisting systems

757. The blacklisting system (or "naming and shaming") can be used in creating incentives for merchants to participate in ADR/ODR process and to comply with decisions made accordingly. For example, the Swedish Consumer Complaints Board publish twice a year in their consumer magazine the names of merchants that do not comply with recommendations.[1695] Another example is the Civil Aviation Authority's proposal of using "naming and shaming" for airlines that do not participate in ADR.[1696] The above examples have demonstrated how "blacklisting scheme" can be implemented to force parties' compliance in ADR/ODR. However, the use of blacklisting systems may also result in civil liability for defamation. Therefore, some countries such as the Netherlands, require that the blacklist to be registered with Dutch Data Protection Authority (Autoriteit Persoonsgegevens), who will then publish registered blacklists[1697] with all the approved blacklists of businesses in various sectors to ensure the objectiveness of the blacklists.

5.2.2.4. Punitive measures

758. Online marketplaces such as Alibaba have specified a set of penalty rules to punish online merchants for their non-compliance with Alibaba transaction rules. Each type of non-compliant behavior leads to certain penalty points.[1698] For example, failure to settle serious disputes[1699] with the other party may result in the membership termination. Different punitive measures will be taken by Alibaba depending on the number of accumulated penalty points of the

[1694] Notorious Markets List<, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/january/2017-notorious-markets-list>, Supplier Blacklist <supplierblacklist.com>, B2B Supplier/Buyer Blacklist <https://www.foreign-trade.com/blacklist/a>.
[1695] See Råd & Rön < https://www.radron.se/svarta-listan/> accessed 30 October 2018.
[1696] Civil Aviation Authority, 'Consumer complaints handling and ADR: CAA policy statement and notice of approval criteria for applicant ADR bodies' (CAP 1286) paragraph 63.
[1697] Autoriteit Persoonsgegevens, <https://autoriteitpersoonsgegevens.nl/nl/zelf-doen/register-zwarte-lijsten> accessed 30 October 2018.
[1698] See Annex 2 Alibaba's Standard of Penalty Points Incurred for Non-compliance of Transactions.
[1699] Serious disputes refer to fundamental breach of contract, such as non-delivery, non-payment or serious quality problems.

merchants. Once the total of penalty points is accumulated to 48, the online merchant's membership will be terminated, and the merchant will be no longer able to conduct business on Alibaba.com. Such a penalty mechanism can also be applied to encourage parties to execute ODR decisions voluntarily.

A. Alibaba punitive measures

759. Alibaba has established a Standard of Penalty Points for Non-compliance of Transactions Rules[1700] as shown in the following table. If the traders breach certain Alibaba transaction rules, they will be punished in accordance with penalty point charts displayed below. In addition, there are enforcement actions that are triggered based on the number of penalty points received.

<table>
<tr><th>Penalty points cumulatively incurred</th><th>Enforcement actions</th><th>Notification</th></tr>
<tr><td>6 points</td><td>Issuance of severe warning</td><td>Email notice</td></tr>
<tr><td>12 points</td><td>Blocking of search results and mini-site for 7 days[1701]</td><td rowspan="3">Email notice and automatic enforcement of penalty by system</td></tr>
<tr><td>24 points</td><td>Blocking of search results and mini-site for 14 days</td></tr>
<tr><td>36 points</td><td>Blocking of search results and mini-site for 21 days</td></tr>
<tr><td>48 points</td><td>Termination of membership</td><td>Not applicable</td></tr>
<tr><td colspan="3">Note:
a) In case of extremely serious non-compliance, Alibaba.com has the right to immediately terminate the user's agreement unilaterally and close the account without refunding service fees for the remaining period, and also has the right to announce the same on Alibaba.com and/or other media, impose associated penalties and/or permanently refuse to cooperate, and other enforcement actions.
b) Where the cumulative penalty points of a user reach 24 points or above, Alibaba.com has the right to refuse or restrict such user's participation in various promotions and marketing activities on Alibaba.com or to use the products/services.</td></tr>
</table>

[1700] Rules for Enforcement Actions Against Non-Compliance of Transactions on Alibaba.com <https://rule.alibaba.com/rule/detail/3310.htm> accessed 5 January 2017.

[1701] The traders will be prevented to appear in the search results and be banned to use their mini-sites. The mini-site is a platform offered by Alibaba for suppliers to display their products and company information to buyers.

c) Points are cumulatively calculated on a yearly basis, which means that all penalty points are on record for a 365-day period, except where enforcement action of closing the account has been imposed.

760. According to the Announcement of Penalized List of Alibaba Gold Supplier published by Alibaba in 2016, trade disputes constitute 20% of the membership termination of Alibaba's merchants.[1702] According to Alibaba's penalty rules, if the disputes have not been resolved by the merchants, certain penalty points will be exerted by Alibaba. For general unsolved disputes such as minor quality problems or aftersales disputes, a penalty of 3 to 6 points will be exerted; for unsolved severe disputes such as fake products or material quality problems, a penalty of 48 points will be exerted.[1703] The penalty system of Alibaba creates incentives for merchants to settle disputes with their customers by using the internal complaint mechanism of the platform and comply with decisions voluntarily. Otherwise, the merchants may be punished by having limited access to their business activities in Alibaba's online marketplace or even by being drive out of the marketplace.[1704]

B. Evaluation of punitive measures

761. The punitive measures imposed by online marketplaces may encourage merchants to settle disputes with their customers as there is a major difference between the penalty points of "serious disputes resolved" (a penalty of 6 points) and "serious disputes unresolved" (a penalty of 48 points).[1705] If the merchants are unable to resolve serious disputes with their customers, their membership would face termination and they would no longer be able to conduct any business activities on Alibaba's website. However, the punitive measures may have a limited scope of application as merchants are restricted only in a certain marketplace. Nevertheless, similar punitive measures (fine or loss of membership) may be established by trade associations to a much wider scope to penalize the merchant members for their failure to participate in ODR or non-compliance with ODR decisions.

[1702] Announcement of Penalized List of Alibaba Gold Supplier (2016), <https://rule.alibaba.com/rule/detail/3975.htm> accessed 5 January 2017.
[1703] See Annex 2 for Alibaba's Standard of Penalty Points Incurred for Non-compliance of Transactions.
[1704] Xiaochen Gan, 'The Study of Self-regulation of Internet Enterprises: From the Perspective of AliPay (Law and Social Science) 2010, Volume 6, 47. （甘晓晨：《互联网企业自治规则研究——以支付宝规则为例》，《法律和社会科学》2010 年第 6 卷）
[1705] See Annex 2 Alibaba's Standard of Penalty Points Incurred for Non-compliance of Transactions.

5.2.3. Sub-conclusion

762. In Section 5.2, two types of private enforcement mechanisms are explored: the automatic execution of ODR decisions and the incentive-driven enforcement mechanism. The first type of enforcement mechanism relies on private parties who control social resources such as monetary or technological control over valuable assets. Once ODR decisions are made, they will be executed by those private parties based on the prior users' agreement between the private parties and parties in dispute. For the second type of enforcement mechanism, reputation and punitive measures create incentives for parties to execute ODR decisions voluntarily.[1706] While automatic execution mechanism relies on the control of social resources, incentive-driven mechanism depends on the parties' own will to execute ODR decisions so as to maintain a good reputation in the market for future businesses.

763. In automatic execution mechanism, ODR decisions are automatically executed by a third-party instead of being executed by the parties on their own. Based on the user's agreement, the automatic execution mechanism authorizes the third-party to make decisions and enforce these decisions directly without the involvement of national courts. However, the automatic execution mechanism has also raised legitimacy concerns. First, it has been challenged whether third-parties have the legal rights in taking control of social resources. For example, the escrow account system that has been used by Alibaba raises concerns regarding the security of escrow funds and the rightful ownership of interests arising from escrow funds.[1707] A regulatory mechanism (in escrow account or blockchain transactions) which is specially designed for new type of electronic transactions and payment methods is not yet in place. Second, there is a lack of judicial review of ODR decisions when they can directly be enforced by private parties.[1708] Although parties can refer to courts if they are discontent with ODR decisions, chances are low that they will seek redress after ODR decisions are made due to time and cost factors.[1709]

764. The incentive-driven mechanism depends on party's voluntary execution of decisions either because they want to retain a good reputation in the market or because they do not want to be penalized by losing the opportunities to compete in the marketplaces. There are also flaws with

[1706] The incentive-driven enforcement mechanism is different from scenario when parties voluntary execute decisions, as there exists a coercion, in the absence of which, parties would otherwise not do so.
[1707] Ying Yu, 'Preliminary Discussion on the Establishment of Escrow Account System in E-commerce of the PRC' (我国设立电子商务 Escrow 法律制度初探), 3 (2009) Journal of Law Application (法律适用), 38.
[1708] Koulu (n 1653) 140-142.
[1709] Del Duca, Rule and Loebl (n 1208)62; EU Directorate General for Internal Policies, 'Cross-border Alternative Dispute Resolution in the European Union', IP/A/IMCO/ST/2010-15, 12.

the incentive-driven mechanism partly due to a lack of uniform standards and the possibility for merchants to manipulate the reputation management system. Due to a lack of uniform standards in the rating system, merchants can do forum shopping to choose those rating systems with lower standards. The UNCITRAL Working Group III on ODR observed that the ratings and trustmarks might be compromised by fraudulent actors, who can mask their identities and provide false ratings or create fake trustmarks.[1710] The incentive-driven mechanism involves a third-party accreditor, who conducts accreditation, assigns rating or imposes penalties. These third-parties are usually of private nature and funded by the merchants, who are simultaneously also users of their services.[1711] Therefore, the third-party rating entities play the roles of both a referee and a service provider, which may impair the neutrality of the third-party accreditors. The best solution is to establish a trustmark or rating system funded and supervised by the government.

5.3. Preliminary Conclusion

765. ODR outcomes, compared to judicial decisions, are better known for their low-cost and efficiency. Therefore, the enforcement mechanism of ODR outcome should be designed to accommodate these features. In what follows, I will compare public and private enforcement (a brief comparative table below) and offer proposals to make these mechanisms more effective and justified.

Table of comparison between public enforcement and private enforcement

Comparison		**Public enforcement**	**Private enforcement**
Enforcement body		Public authority	Private entities/parties in dispute
Types of ODR decisions		Online arbitral awards; online MSAs	ODR decisions made by a third-party
Nature of ODR decisions		Binding and final	Non-binding and can be challenged in court
Type of disputes		Mainly B2B disputes	Mainly B2C disputes
Legal base of enforcement		Judicial support	Contract or reputation incentives

[1710] UNCITRAL Note on Private Enforcement (n 1366) 5.
[1711] Merchants usually pay a fee to join the trust mark scheme, or a membership fee to join the marketplace.

Criteria for the enforcement		Due process requirement stipulated by arbitration and mediation laws	Transaction rules of the platform/accreditation standards
Speed		Slow	Fast
Cost		Expensive	Cheap

766. The public enforcement provides judicial control over the legality and fairness of ODR outcomes using a set of legal rules stipulated in the international convention and national laws.[1712] Compared to private enforcement, the due process control of ODR decisions are much stricter and more clarified in public enforcement.[1713] However, it takes more time and money for the parties to seek public enforcement than private enforcement. Moreover, B2C disputes, which account for a large number of cases in ODR, fall outside the scope of public enforcement mechanism in most jurisdictions because of mandatory national laws in consumer protection.[1714]

767. The private enforcement mechanism is considered to be a better match for the enforcement of ODR outcomes because of its efficiency and cost-effectiveness. Compared to public enforcement mechanism, private enforcement mechanism is characterized by greater flexibility and convenience. The private enforcement mechanism either relies on the automatic enforcement by third-parties who take control of certain resources or relies on the reputation management system which urge parties to execute ODR outcomes voluntarily. The automatic execution scheme has similar features as public enforcement mechanism as both require certain forms of control over social resources. While public enforcement is based on judicial powers, automatic execution is dependent on private parties who take control of social resources. The public enforcement involves judicial reviews, whereas automatic execution may bypass such a procedural protection. The criteria to enforce an ODR outcome is usually determined by transaction rules or accreditation standards set out by the private entities. Unlike public enforcement, there is a lack of judicial control over the quality of ODR decisions. Furthermore, in incentive-driven enforcement mechanism, the third-party accreditation service providers or

[1712] International conventions are for example: New York Convention and Singapore Convention; national laws are for example: arbitration law and mediation law.
[1713] Koulu (n 1653) 182; Thornburg (n 1034) 212-213.
[1714] See Section 5.1.3 for a detailed discussion on the limited scope of public enforcement mechanism.

rating service providers are usually funded by merchants. This generates legality concerns for the private enforcement mechanism.

768. In order to use both the public enforcement mechanism and the private enforcement mechanism to better serve the execution of ODR outcomes, the following suggestions should be considered for the design of ODR enforcement mechanism: (i) to improve the efficiency of public enforcement mechanism and (ii) to enhance the quality control of private enforcement mechanism.

769. In the sphere of public enforcement, a specialized enforcement mechanism for B2C arbitration decisions can be established to ensure that consumers can enjoy expedited judicial enforcement as a majority of e-commerce disputes are B2C related. For example, the decisions of Consumer Arbitration Centers in Portugal are enforceable in national courts.[1715] Consumer Arbitration Centers in Portugal are private entities, co-financed by their associate bodies and the Ministry of Justice. At the international level, an international legal framework could be established to recognize and enforce B2C arbitration decisions in a cross-border context. This framework could be established based on the International Consumer Protection and Enforcement Network (ICPEN).[1716] The current ICPEN network shares information regarding transnational activities that are likely to harm consumers and encourage global cooperation among consumer protection authorities over 60 countries. It is suggested that ICPEN could also be served as a platform to provide information about certified B2C arbitration providers in different countries. The member states undertake that decisions made by certified B2C arbitration providers in one country are also enforceable by national consumer protection authorities in another country. This requires international cooperation among consumer protection authorities in various jurisdictions. Another means to improve the efficiency and reduce the cost of the public enforcement mechanism is by using online courts to have online arbitral awards and online MSAs recognized and enforced.[1717] The online mediation platform established by the Supreme People's Court of China provides a fast channel for parties to apply for judicial ratification of their MSAs online.[1718]

770. The government should also provide support and quality control over the private enforcement

[1715] Pablo Cortés, *The New Regulatory Framework for Consumer Dispute Resolution* (Oxford University Press 2016) 263.
[1716] International Consumer Protection and Enforcement Network, <https://www.icpen.org/> accessed 30 October 2018.
[1717] See Section 5.1.2.3 B. b. Online judicial ratification of MSA.
[1718] These MSAs should be mediated by mediation institutions that are registered on the online mediation platform.

mechanism. First, the government should provide legitimacy to new types of electronic transactions (such as escrow account and smart contracts) by laws. This could tackle the legality concerns towards the private parties who take control of social resources based on agreements. Second, the government should provide financial support to increase the neutrality of third-party accreditation services or rating services. Third, in an incentive-driven enforcement mechanism, the third-parties responsible for accreditation, rating and imposing penalties should be meet minimum quality standards set out by the government so that the merchants are no longer able to do forum shopping to select a third-party accreditation or rating service to their advantage.

Chapter 6. Conclusion

771. While it may sound natural to use ODR to resolve e-commerce disputes, the path to attain this objective is not self-evident. In order for ODR to thrive, ODR professionals and national governments need to work together to overcome bias in ODR, improve parties' trust in ODR, and increase its popularity. In order to do so, a number of hurdles need to be cleared.

772. In Chapter 3 to 5, I have come to the conclusion that there are three major issues that must be addressed. First of all, it is important to establish the validity requirements of an e-ADR agreement. This is crucial given that the ADR agreement opens the gate to dispute resolution. Secondly, I focused on the procedure of ODR itself. The questions I examined relate to the minimal procedural standards that should be adhered to during the proceedings. Thirdly, I dealt with the enforcement, be it voluntarily or not, of the outcome of the ODR procedure.

773. In this conclusion, I will present you with the most relevant findings of my research on the three questions set out above. First, I will present the three challenges to the development of ODR. Second, based on these challenges, I will make recommendations for the design of future ODR mechanism. Last, I will envisage the future development of ODR.

6.1. Challenges to the future ODR development

774. Although there are a variety of ODR services provided online, only a small number of them have survived and evolved. The three major barriers to the future development of ODR are cross-border recognition of e-ADR agreements, lack of procedural fairness in ODR, and the lack of enforceability mechanism for ODR outcomes.

6.1.1. Cross-border recognition of e-ADR agreements

775. The first challenge to the ODR development is the deviations in cross-border recognition of e-ADR agreements. These challenges lie in both the formal validity and substantive validity requirements of various national laws.

776. Firstly, the analysis of formal requirements of e-ADR agreements has been assessed based on the two most common ADR mechanisms, namely arbitration and mediation. There is a clear writing requirement of the arbitration agreements both in the New York Convention and national legislation. The UNCITRAL Recommendation Regarding the Interpretation of Article

II paragraph 2 and Article VII paragraph 1 of the New York Convention provides two alternatives that allow a broad interpretation of the writing requirement when an arbitration agreement has been concluded in the context of electronic communications. With regard to mediation agreements, although writing is not a mandatory formal requirement, it serves as an evidentiary function. Moreover, the legislation in electronic commerce law[1719] and electronic signatures[1720] has provided guidance for national courts to assess the validity and evidentiary value of electronic contracts via the functional equivalence principle. Nevertheless, due to disparate technical standards that are applied in electronic communications and the varieties of electronic authentication means, the assessment of formal validity of e-ADR agreements is subject to uncertainty. Both the EU and China take a two-tiered approach in regulating the electronic signature by recognizing electronic signatures in general and giving preference to a certain type of electronic signature ("qualified electronic signatures" in EU and "reliable electronic signatures" in China) the equivalent legal effect as handwritten signatures. In Common Law jurisdictions such as in England, a functional approach has been used to assess the formal validity of the electronic contract by requiring the indication of the signatory's intention to be bound by the content of the electronic contract.

777. Secondly, the assessment of the substantive validity of e-ADR agreements is focused on the protection of weaker parties and thus deals with the conflicts between party autonomy and public policy. While the EU uses the fundamental principle of effective judicial protection and consumer protection rules[1721] to regulate e-ADR agreements that have deprived the consumer's right to access to the court, China adopts standard form contract rules[1722] to limit the legal effect of terms that have substantial impact on consumer's interests and that are not presented in a conspicuous manner. Due to various levels of legislative control over B2C e-ADR agreements, there is uncertainty with the validity assessment of e-ADR agreements as e-ADR agreements that are allowed in one jurisdiction may not be legal in another jurisdiction. For example, the B2C arbitration clauses that are incorporated into the terms and conditions of a website are treated unfairly in the EU legal framework while it may be recognized in China if they are displayed in a conspicuous manner. In the absence of a consumer arbitration regime,

[1719] UNCITRAL Model Law on E-commerce, Article 6 to 8; ECD, Article 9-11.
[1720] UNCITRAL Model Law on Electronic Signatures, Article 6; eIDAS Regulation, recital 63 and Article 46; PESL, Article 4, 5, 8.
[1721] Unfair Terms in Consumer Contracts Directive, EU Directive on Consumer ADR, EU Regulation on Consumer ODR, Consumer Rights Directive.
[1722] PRC Contract Law, Article 39 & 40; PRC Consumer Protection Law, Article 26.

the EU legal framework is more favorable to secure consumer dispute resolution rights in cross-border e-commerce disputes.

6.1.2. Lack of procedural fairness in ODR

778. The second challenge to the ODR development is the lack of procedural fairness in ODR. As ODR is a private dispute resolution mechanism using information technology, it raises concerns with regard to the procedural fairness of ODR procedures. On the international level, the UNCITRAL Working Group III on ODR has drafted the non-binding Technical Notes on ODR for B2B and B2C e-commerce disputes small in value but large in volume.[1723] The UNCITRAL Working Group III on ODR intended to improve the quality of ODR rules by prescribing a set of standards for ODR procedures. However, the flexibility of ODR procedures and the variety of ODR constitute difficulties for legislators to regulate a set of binding procedural rules in the Technical Notes on ODR. The case study of current ODR rules reveals that current procedural rules are not in full compliance with the procedural standards prescribed in Section 4.1. GZAC Online Arbitration Rules are most similar to judicial proceedings by giving parties procedural autonomy in selecting arbitrators and choosing applicable laws. In the UDRP rules, third-party neutrals are selected by the UDRP service provider taking into account the parties' preferences. The internal complaint mechanism of Taobao marketplace is less in compliance with the procedural fairness standard concerning the selection and expertise of the third-party neutrals. While GZAC online arbitral awards are binding on the parties with finality, both the UDRP decisions and Taobao decisions can be overruled by national courts. While ODR rules are drafted to accommodate the requirement of a fast and cost-effective dispute resolution mechanism in resolving e-commerce dispute, there are challenges to the legitimacy of ODR procedures on whether time limits and electronic communications are sufficient to ensure party's right to be heard and right to be notified. The procedural fairness in improving the quality and legitimacy of ODR procedural rules shall be reconciled with procedural efficiency in simplifying the procedure and facilitating e-commerce transactions.

6.1.3. Lack of enforceability mechanism for ODR outcomes

779. The third challenge to the development of ODR is the lack of enforceability mechanism for ODR outcomes. There are two types of enforceability mechanisms for ODR outcomes: the public enforcement mechanism that requires judicial support and the private enforcement

[1723] Technical Notes on ODR, see (n 997).

mechanism that depends on the control of social resources and the reputation management. Depending on the legal effects with the ODR outcomes and the type of e-commerce transactions, ODR outcomes can be divided into binding, unilaterally binding and non-binding, commercial and non-commercial, B2B and B2C.

780. In the context of the public enforcement mechanism, online arbitral awards and online MSAs can be enforced under the international conventions such as New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards and Singapore Convention on International Settlement Agreements Resulting from Mediation. However, the public enforcement mechanism is suitable for a small number of disputes which are usually between business parties and with a high value. Due to its limited applicability, the public enforcement mechanism is therefore not suitable for a majority number of ODR outcomes that arise out of small claims.

781. In the context of the private enforcement mechanism, there are the automatic execution mechanism and the incentive-driven enforcement mechanism based on reputation. The automatic execution mechanism is based on the prior authorization from the user's agreement between private parties who take control of social resources and the parties in dispute. Nevertheless, there are legitimacy concerns with regard to the automatic execution mechanism as it is usually based on new types of electronic transactions which are not yet regulated by law, such as escrow transactions and blockchain transactions. The incentive-driven enforcement mechanism depends on the party's voluntary execution of decisions either because of reputation or because they do not want to lose the opportunity to compete in the marketplace because of penalties. There are also concerns that merchants may do forum shopping to choose the most favorable third-party accreditors. Moreover, the impartiality of the third-party accreditors is also challenged because they are most of the time funded by the merchants.

6.2. Recommendations for the future ODR system design

782. This section will wrap up the dissertation by proposing recommendations to improve the design and operation of ODR systems. First of all, ODR mechanisms have been developed to tackle e-commerce disputes with an increasing number. ODR includes various forms of dispute resolution such as adjudicative ODR and consensual ODR, external ODR and internal ODR, binding ODR and non-binding ODR, technology-assisted ODR and technology-based ODR.

In order to design the future ODR system, it is important to keep in mind the broadening scope of ODR and the varieties in the forms of ODR.

783. Secondly, the development of ODR requires that common grounds on the validity of e-ADR agreements be established, quality control of ODR services be improved, and the enforcement mechanism for the ODR outcomes be enhanced. However, these recommendations shall not jeopardize the development of ODR and keep the flexibility of ODR intact.

6.2.1. Establish common grounds in recognizing the validity of e-ADR agreements

784. Regarding the formal validity assessment, it is found that e-ADR agreements are more often authenticated by electronic signatures as it not only identifies the parties of the agreement but also attributes parties to the contents of the agreement. From the current legislation on electronic signatures in various jurisdictions, the lesson can be drawn that the legislator needs to balance between technological neutrality and legal certainty. While giving preference to a specific technology may increase the legal certainty, it risks deteriorating the environment for technological advancement. Moreover, the legislator should facilitate cross-border transactions by promoting the cross-border recognition of various electronic signatures. The UNCITRAL Model Laws on E-commerce and E-signatures have achieved a certain level of harmonization among the states with implementation. However, as these Model Laws have no binding effect, divergence still exists between different national legislation.[1724] It is therefore proposed to establish a trust list of certification-service-providers that issue qualified certificates to the electronic signatures that are used in cross-border transactions. In addition, as authentication means are not limited to electronic signature, a mere law on electronic signature may be insufficient for electronic contracts that are authenticated by other types of authentication means (such as electronic timestamp, website authentication, or electronic registered delivery services). In order to facilitate the cross-border recognition of e-ADR agreements, some common grounds need to be established. It is proposed that a functional approach can be used to determine the formal validity of electronic contracts. The validity of the electronic contract can be confirmed if the parties can be identified, the integrity of the content can be ensured, and the time of contract formation can be recorded by using certain authentication means.

785. In view of the assessment of its substantive validity, the e-ADR agreements are examined for contract rules of consent, unfair terms in consumer contracts and standard form contract rules.

[1724] Such as the minimalist approach and two-tiered approach in the legislation of electronic signature.

It has been discovered that B2C e-ADR agreements are scrutinized with stricter validity requirements than B2B e-ADR agreements as consumers are oftentimes involved in contracts pre-formulated by traders and thus may be deprived of their access to the court without having willingly and knowingly consented to the agreements. In the absence of uniform rules, some common denominators can be used to regulate the substantive validity of e-ADR agreements: conspicuous presentation of terms prior to transactions, clear and obvious consent of the parties in an affirmative matter and fairness of the agreements in substance.

6.2.2. Improve procedural fairness in ODR

786. In order to explore the great potential use of ODR, it is first of all important to strike a balance between procedural efficiency and procedural fairness. On the one hand, the success of existing ODR rules shows that the identification of types of disputes, availability of limited remedies, a set of applicable procedural rules and rules to the substance of disputes, and effective electronic communication tools are key to improve the procedural efficiency of ODR. On the other hand, a hybrid approach (self-regulation and public regulation) should be applied to control the quality of ODR services.

787. In self-regulation, the ODR service providers (such as traditional dispute resolution providers, ODR service providers or third-party online platforms) should voluntarily agree to comply with principles and industrial standards in order to improve the reputation of ODR and attract parties to use their services. It is also necessary to improve the expertise and impartiality of third-party neutrals by training and qualification. Last but not least, an additional internal appeal or review procedure embedded in the ODR procedure could be useful to increase the soundness and fairness of ODR decisions.

788. Governments should also play a role in supporting ODR by providing accreditation mechanism of ODR service providers and enhance the public awareness of ODR. The EU ODR platform serves both the accreditation function and educational function by requiring businesses to provide the link to the ODR platform on their websites. In public regulation, governments should provide minimum quality requirements for ODR services through soft laws and hard laws. The minimum procedural fairness rules that are stipulated in Section 4.1 can be used as a benchmark to evaluate the procedural justice of ODR rules. Moreover, judicial review can also be used to supervise the quality of specific types of ODR outcomes in the spectrum of national legislation.

6.2.3. Enhance the enforcement mechanism of ODR outcomes

789. The future development of ODR is largely dependent on the enforceability of ODR outcomes. The virtual nature and flexible character of ODR create challenges for the public enforcement of ODR outcomes as the national legislature has not clarified the position of ODR in their legal framework. Despite that the public enforcement mechanism is guaranteed with more legal certainty, it is only suitable for ODR outcomes arising from B2B disputes. For ODR outcomes arising from B2C disputes, a specialized enforcement mechanism can be established so that consumers can also enjoy judicial enforcement.[1725] It is suggested that an international platform could be established to join consumer protection authorities in various jurisdictions so that decisions made by a certified B2C arbitration provider in one country can be enforced by national consumer protection authorities in another country. Moreover, in order to improve the efficiency and reduce the cost of public enforcement, it is suggested that online courts could be used for parties to apply for enforcement of online arbitral awards and online MSAs.

790. Compared to public enforcement mechanism, the private enforcement mechanism may play a better role in enforcing ODR outcomes because of its efficiency and cost-effectiveness. The private enforcement mechanism either relies on the automatic enforcement by third-parties who take control of social resources or relies on the reputation management system which urges parties to execute ODR outcomes voluntarily. On the one hand, the government should provide legitimacy to new types of electronic transactions which use escrow account and blockchain technologies. This can ensure that private parties who take control of social resources have a sound legal base. On the other hand, the incentive-driven enforcement mechanism should also be supervised and funded by governments with minimum quality standards to avoid conflict of interests and ensure the neutrality of the third-party accreditors who provides trustmark services, blacklisting system, rating system or punitive measures.

6.3. ODR development in the future

791. With the growth of technology, it is foreseen that ODR will evolve from technology-assisted ODR relying on human beings to make decisions to technology-based ODR entirely relying on algorithms and machines to resolve disputes. Artificial intelligence will be able to replace human beings in certain types of ODR (such as blind-bidding) and for certain types of disputes

[1725] For example, the decisions of Spanish Online Consumer Arbitration Board are directly enforceable in courts in Spain.

(which are rather simple and can be programmed). The application scope of ODR is also expanding from e-commerce disputes to other types of disputes such as health care dispute, international war conflict or employment dispute.[1726]

792. Despite the potential challenges to the development of ODR as regards the concerns of security and fairness,[1727] ODR will continue to grow as an efficient and effective dispute resolution mechanism for disputes arising from e-commerce transactions. By applying the latest information technology (such as algorithms and machine learning) to dispute resolution, ODR can largely improve the efficiency of dispute resolution procedures and reduce cost burdens of the parties. Nevertheless, while enjoying the convenience of ODR, we should watch for the quality control over ODR services. Governments, ODR service providers and online trading platforms should work together in promoting the fair use of ODR. Governments should improve the public awareness of ODR and supervise the quality of ODR service providers by establishing an accreditation system.[1728] ODR service providers should regulate themselves by adhering to a high-level ODR procedural rules and standards. Finally, the online trading platforms should provide proper internal ODR mechanisms both for their business users and consumer users to facilitate transactions and resolve disputes.

[1726] ODR has been expanded to resolve different types of disputes which have been discussed extensively by Katsh and Rabinovich-Einy in (n 26) Chapters 3, 4, 5, and 6.
[1727] Ebner and Zeleznikow, 'Fairness, Trust and Security in Online Dispute Resolution' (n 249) 156-159.
[1728] Such as the ODR platform established by the EU.

Annex 1. Guangzhou Arbitration Commission (GZAC) Online Arbitration Rules

Chapter 1 General Provisions

Article 1 Aim

The Online Arbitration Rules (hereinafter the "Rules") are intended to use online arbitration to resolve civil disputes among parties with equal positions in accordance with the principles of fairness and effectiveness. The Rules are part of GZAC Arbitration Rules.

Article 2 Definition of Online Arbitration

Online arbitration refers to the online alternative dispute resolution that uses information technology to provide professional knowledge and arbitration service.

Article 3 Definition of Terms

I. The "Commission" refers to GZAC. "Sub-commissions" refer to Guangzhou Arbitration Commission Dongguan Sub-commission and Zhongshan Sub-commission. Special arbitration commissions refer to China Guangzhou International Arbitration Commission, China Guangzhou Online Arbitration Commission, China Guangzhou Financial Arbitration Commission, China Guangzhou Intellectual Property Arbitration Commission and China Guangzhou Maritime Arbitration Commission.

II. "Arbitration Rules" refer to currently effective "GZAC Arbitration Rules".

III. The "list of arbitrators" refers to the currently effective "GZAC Arbitrators List".

IV. The "online arbitration platform" refers to the platform specially designed to handle disputes online, and the website is http://odr.gzac.org/ .

V. "Writing form" refers to the data messages which the information contained therein can be accessible so as to be usable for subsequent references, including without limitation, contracts (including user's agreements), letters and electronic data (including telegrams, telex, fax, EDI, email, instant electronic communications), etc.

VI. "Electronic data" refers to information formed or stored in electronic data devices such as e-mails, electronic data interchange, online chatting record, blogpost, micro-blog, text messages, electronic signature, domain name.

VII. “Electronic signature” refers to electronic data which is used to identify the signatory and indicate the signatory’s approval of the information contained in the data message.

VIII. “Online hearing” refers to the court proceedings using online video conferencing or other electronic communications.

IX. “Online” refers to activities that are conducted via virtual media such as Internet; “offline” refers to activities that take place in real.

Article 4 Application scope

I. The Rules are applicable to GZAC, its sub-commissions, specialized arbitration court and China Nansha International Arbitration Center.

II. When parties have agreed to use the Rules without designating the arbitration institution, they are presumed to agree to submit the dispute to GZAC.

III. When parties have agreed to submit the dispute to GZAC using online arbitration (electronic arbitration, online arbitration, etc.), they are presumed to agree to arbitrate in accordance with the Rules.

IV. Disputes, regardless of whether or not arising from the Internet, can all be submitted to online arbitration in accordance with the Rules.

V. In case of any inconsistency between GZAC Arbitration Rules and the Rules, the Rules shall prevail. In case of the issues that are not stipulated by the Rules, GZAC Arbitration Rules shall apply.

Article 5 Form of arbitration agreement

Online arbitration agreement shall be in written form, including but not limited to:

I. An arbitration clause concluded by the parties either in a paper contract or in an electronic contract;

II. An arbitration agreement in paper form or electronic form signed by the parties before or after the dispute arises;

III. An arbitration clause embedded in online terms agreement or service agreement signed by the party;

Article 6 Online Arbitration Conditions

When parties have made an online arbitration agreement, they are presumed to be equipped with the necessary facilities and have technical capabilities (including without limitation receiving emails, using mobile telecommunication tools and participating in online video conference) in participating online arbitration.

Article 7 Place of arbitration

Unless stipulated otherwise, the place of arbitration is the seat of arbitration. The Commission can also designate other places as the seat of arbitration in accordance with specific situation. The arbitral award is presumed to be made at the seat of arbitration.

Chapter 2 Document submission and electronic delivery

Article 8 Document submission and delivery

The submission and delivery of documents shall be in accordance with the following requirements:

I. All the documents of the parties shall be submitted through the online arbitration platform of GZAC. The documents submitted by the parties shall be easily accessible at any time. GZAC may send the copy of the documents to the other party.

II. When GZAC send documents to one party, it can send a copy of the documents to the other party.

III. The sending parties are obliged to keep track of the document delivery and record the detailed information about the delivery so that relevant parties can access the delivery information.

Article 9 Electronic delivery address

I. The parties shall agree on the email address and electronic communication number (including without limitation mobile phone number, Wechat account or QQ account) as their electronic delivery address or electronic communication number during arbitration.

II. When the parties apply for the arbitration or defend for themselves, they shall confirm with the Commission of their email address and mobile phone number as electronic delivery address or number.

III. When neither have the parties agreed on electronic delivery address nor confirmed with

the Commission of their electronic delivery information, the email address or mobile phone number that has been used by the parties in electronic transactions or during registration of the websites may be used as electronic delivery address or number.

IV. When the parties change their electronic delivery address or number during the online arbitration proceedings, they should inform the Commission immediately.

Article 10 Electronic delivery

I. The arbitration documents shall be sent to the recipient's email address. The successful delivery date displayed on the online arbitration platform is the date of delivery. In case of any inconsistency between the delivery time between the system of GZAC and the recipient's system, the delivery time of the recipient's system prevails on the condition that sufficient evidence has been provided by the recipient.

II. When GZAC sends arbitration documents to the recipient's email address, it will also end a text message to the recipient's mobile communication as a reminder.

Article 11 Delivery in special circumstances

I. If GZAC and the other party cannot possibly find the recipient's email address with reasonable efforts, GZAC will create an email address for the party via its online arbitration platform as the party's email address.

II. The Commission send the recipient the arbitration notification by postal delivery in accordance with Article 49 of GZAC Arbitration Rules[1729] and inform the recipient of the email address and password created for him/her.

III. If the recipient has confirmed the above-mentioned email address or provide new email address, any arbitration documents that have been sent to the confirmed email address are deemed to be delivered.

IV. If the recipient has not confirmed the above-mentioned email address, the Commission will deliver the arbitration documents to the recipient in accordance with Article 49 of GZAC Arbitration Rules.

[1] GZAC Arbitration Rules, Article 49: the arbitration documents will be delivered by post to the recipient in accordance with a certain set of rules.

Chapter 3 Evidence

Article 12 Submission of evidence

I. The parties shall submit evidence via GZAC online arbitration platform.

II. Electronic data can be submitted directly.

III. The parties shall convert documentary evidence, physical evidence, audio-visual material, expert opinion, record of inspection and examination into electronic data which is able to present the content and can be accessible to be used for consequent reference.

IV. All the evidence in this Article can be presented in online video proceedings.

Article 13 Collection of evidence

If the tribunal deems it necessary, it can investigate into relevant issues and collect evidence from e-commerce service providers, logistic companies, third-party payment platforms or electronic authentication service providers (such as time-stamping trust service providers). The parties have obligations to cooperate with the tribunal. The evidence collected by the tribunal shall be examined by both parties.

Article 14 Electronic data verification

I. The tribunal shall consider the following factors in examining the authenticity of electronic data evidence:

(i) The reliability of the method to create, store or transmit electronic data;

(ii) The reliability of the method to keep the integrity of the electronic data;

(iii) The reliability of the method to identity the sender of the electronic data;

(iv) Other relevant factors.

II. If any of the following electronic data authentication means has been used, electronic data is deemed to meet the originality requirement of laws and regulations:

(i) the electronic data has been notarized when it was created;

(ii) the electronic data has been authenticated by electronic authentication service provider (such as time stamping service provider);

(iii) other electronic data that can be ensured with integrity and non-alternation ever since its creation, but any formal changes during endorsement on the electronic data, data exchange, storage or display process do not affect the integrity of electronic data.

III. The parties can use reliable electronic signatures which have equal legal effect as handwritten signatures and seals. The reliable electronic signature shall meet the following conditions:

(i) When any data made by electronic signature is used for electronic signature, and it is owned exclusively by the electronic signatory;

(ii) The data made by electronic signature is controlled only by the electronic signatory when signing;

(iii) Any alteration on electronic signature after signing can be found out; and

(iv) Any alteration on the contents and form of any electronic data can be found out after signing.

The electronic signature authenticated by legally established electronic authentication service providers are reliable electronic signatures. The parties may also choose to use the electronic signature with reliable conditions, which complies with their stipulations.

IV. The arbitral tribunal shall examine electronic data objectively in accordance with relevant laws, judicial interpretations, electronic transaction customs, and applying principles of common knowledge as a whole to have a comprehensive evaluation towards electronic data.

Chapter 4 Arbitration proceedings

Article 15 Arbitration application

The applicant shall submit the arbitration application from the online arbitration platform, together with evidence and identification documents of the parties.

Article 16 Advance payment of the arbitration acceptance fee

I. The applicant shall pay arbitration fee via the third-party payment platform approved by GZAC. If the applicant failed to pay the arbitration fee, it is presumed that the applicant has not lodged the arbitration application.

II. The charge for online arbitration cases shall be in accordance with the arbitration fee rules of GZAC.

Article 17 Acceptance of the arbitration application

After GZAC has received the arbitration application and found it has met the acceptance conditions, it shall notify the parties for the acceptance of the case within 3 days upon the arbitration fee has been paid. If GZAC has found that the application is not in accordance with the acceptance conditions, it shall notify the parties the rejection decision and reasons thereof.

Article 18 Arbitration notification

Upon accepting the arbitration application, GZAC shall, within 5 days, send the arbitration notification, these Online Arbitration Rules and the list of arbitrators to the applicant and the respondent.

Article 19 Defense and counter-claim

The respondent shall submit his/her arguments, opinion of examination of evidence, and relevant documents within 5 days upon receiving the arbitration notification. The respondent shall file a counter-claim within 5 days upon receiving the arbitration notification. If the respondent files a counter-claim exceeding 5 days, the arbitral tribunal shall decide whether to accept it or not.

Article 20 Applicant's submission and defense against the counter-claim

The Commission shall send defense, opinion of examination of evidence, and evidential material to the claimant within 5 days upon receiving these documents from the respondent. The claimant shall submit defense opinion and argument opinion within 5 days upon receiving the above-mentioned documents from the respondent. If there is a counter-claim, the claimant shall submit the defense opinion against the counter-claim within the above period.

Article 21 Objection to jurisdiction

If the parties have any objections to the existence or validity of the arbitration agreement, or the jurisdiction to arbitration, they should mention it within 5 days upon receiving the arbitration notification. The decision on the jurisdictional challenge shall be made by the Commission before the composition of the arbitral tribunal and by the arbitral tribunal after the composition.

Article 22 Variation of arbitration application or counter-claim

If the parties have requested to change the arbitration application or file a counter-claim, they should do so within 5 days upon receiving the acceptance notification or arbitration notification. If the request is made exceeding the above-mentioned period, the arbitral tribunal shall decide whether to accept such a request.

Article 23 Composition of the arbitral tribunal

I. When the disputed claim does not exceed 500,000 RMB, the arbitral tribunal will be consisted of one arbitrator. The parties shall jointly appoint an arbitrator within 5 days upon receiving the acceptance notification or arbitration notification. If the parties fail to appoint the arbitrator within the designated period, the chief of the Commission shall appoint the arbitrator.

II. If the disputed claim exceeds 500,000 RMB, the arbitral tribunal will be consisted of three arbitrators. Each party shall appoint an individual arbitrator within 5 days upon receiving the acceptance notification or arbitration notification, and jointly appoint a chairman of the tribunal. If the parties fail to appoint the arbitrators within the designated period, the chief of the Commission shall appoint arbitrators.

III. If the disputed claim exceeds 500,000 RMB and upon the written approval of the parties, the arbitral tribunal will be consisted of one arbitrator.

Article 24 Arbitration proceedings

I. The arbitral tribunal will adjudicate Internet arbitration cases based on written submission. The arbitral tribunal can send question lists to parties via the online arbitration platform. The parties shall make explanations to the questions via the online arbitration platform within 5 days. If the parties fail to make explanations, it is presumed that they waive their rights to explain.

II. If the arbitral tribunal deems necessary, it can adjudicate cases by using appropriate methods such as online video conferences, online communication, telephone conferences to ensure that it treat parties equally.

III. If the arbitral tribunal adjudicate case by online hearings in accordance with subsection II, it shall notify parties 5 days in advance of the time of hearing and the medium in which the hearing will be held. If the parties apply to postpone the hearing, they shall make the request

2 days before the hearing. The arbitral tribunal will decide if the postponement request is approved.

Article 25 Procedural conversion

I. The parties shall submit their identification documents to the Commission. If the claimant has not submitted the identification documents of the parties, neither has the respondent submitted the identification document, nor is the arbitral tribunal able to confirm the identities of the parties via online investigation, the case shall be converted into offline procedures in accordance with the Arbitration Rules of the GZAC.

II. When the parties have disputes with regard to the authenticity of the evidence and the arbitral tribunal is unable to confirm the authenticity via online proceedings, the case can be converted into offline procedures in accordance with the Arbitration Rules of the GZAC.

III. When the parties agree or when the arbitral tribunal deems the case is complicated, the arbitral tribunal can convert the case into offline procedures in accordance with the Arbitration Rules of GZAC.

Article 26 Termination of the case

I. The arbitral tribunal shall make arbitral awards within 30 days upon the composition of the arbitral tribunal. If there are any special circumstances to extend the decision making, the chairman of the tribunal of the sole arbitrator shall make such application upon the approval of the chief of the Commission.

II. When the parties reach a settlement agreement, the arbitral tribunal shall make settlement agreement or arbitral award in accordance with the settlement agreement.

III. When the claimant withdraws the arbitration application, such a decision shall be made by the Commission before the composition of the arbitral tribunal and by the arbitral tribunal after the composition of the arbitral tribunal.

Article 27 Types of decisions

I. The decision, arbitral award, or settlement agreement shall bear electronic signature(s) of the arbitrator(s) and stamp of the Commission.

II. When the decision, arbitral award, or settlement agreement have reached electronic delivery address or number of the parties, it is presumed that the decision, arbitral award or

settlement agreement have been delivered. When the parties request these documents in paper form, they shall make such requests to the Commission.

Article 28 Electronic filing

The Commission will arrange the case materials and make electronic filing.

Chapter 5 Miscellaneous

Article 29 Security assurance

GZAC provides security assurance to the online transmission of case data among parties, the arbitral tribunal and the Commission and data encryption for the confidentiality of the case information.

However, GZAC shall take no responsibility for any damages caused by the leak of relevant information to a third-party other than the recipient either due to *force majeure*, computer virus, hacker attack, unstable system, Internet error, etc.

Article 30 Interpretation of rules

I. The title of the provisions is only indicative and is not used to interpret the meaning of them.

II. GZAC is capable of interpreting the Rules.

Article 31 Implementation of rules

The Rules are effective from 1 October 2015.

Annex 2. Alibaba's Standard of Penalty Points Incurred for Non-compliance of Transactions[1730]

Category of transaction dispute	Sub-category of transaction dispute	Notes	General disputes(unresolved)	Serious disputes (resolved)	Serious disputes (unresolved)
Product not received	1. Product not received				
	1.1 No product delivery upon receiving payment	By the date of acceptance of the complaint, the respondent has received payment but not yet delivered the product.	/	6	48
	1.2 Illusory delivery	The respondent presents forged evidence of delivery after receiving the payment so no actual product has been received by the complainant.	/	6	48
	1.3 No action after receiving returned product	The respondent refuses to take further action to resolve the dispute (such as refusal or unreasonable delay in delivery of a new product, refund, or is unreachable) after the complainant has returned the product upon mutual agreement.	/	6	48
	1.4 Others	The respondent has sent the product, yet the complainant has not received the product by the date of acceptance of the complaint due to loss, detention by customs, or return of product caused by the respondent.	/	6	48
	2. Failure to deliver product after a	Where a Secure Payment order has been concluded, the respondent fails to deliver the product within the specified period after receiving payment, which	3	/	/

[1730] Available at: < https://rule.alibaba.com/rule/detail/3310.htm> accessed 31 October 2018.

	transaction is concluded	results in closure of the order by the system and refund to the complainant.			
Payment not received	3. No payment upon receiving product	The respondent fails to make payment in accordance with the contract after receiving the product.	/	6	48
Product inconsistent with contracted product descriptions	4. Quality				
	4.1 Serious quality problems	The characteristics (such as material, composition, category or safety standard etc.) of the product received by the complainant are seriously inconsistent with the agreed descriptions, or the product malfunctions or is unusable, or is of inferior quality etc., (excludes suspected counterfeit products).	/	6	48
	4.2 General quality problems	The product received by the complainant has relatively minor quality problems, and is inconsistent with the agreed standards, yet is still usable or has caused no apparent harm.	6	/	/
	5. Quantity				
	5.1 Seriously short of quantity agreed	The quantity (or value) of the product delivered by the respondent is less than that agreed by 20% or more.	/	6	48
	5.1 Generally short of quantity agreed	The quantity (or value) of the product delivered by the respondent is less than that agreed by less than 20%, and the respondent fails to provide a reasonable solution (excludes suspected fraud).	6	/	/
	6. Counterfeit	The product received by the complainant is not that of the agreed nature or brand, or the respondent cannot provide proof of its authorized dealership or ownership of the brand.	/	12	48

Malicious acts	7. Malicious order	The respondent places orders multiple times (twice or more against the same complainant), yet fails to make payment as agreed, which results in locking of the Trade Assurance limit or inventory of the complainant, affecting the complainant's ability to conduct online transactions.	/	6	48
	8. Malicious review	The respondent makes an apparently false review without factual basis multiple times (twice or more against the same complainant).	/	6	48
	9. Malicious complaint	The respondent, without reasonable grounds, files a complaint which is not substantiated multiple times (twice or more against the same complainant).	/	6	48
Other disputes	10. Dispute over other losses	The respondent changes the freight charges / port / mode of logistics / time of delivery or incurs other costs at the last minute without the consent of the complainant, and the complainant has received the product yet suffers from other losses, based on which a complaint is filed.	3	/	/
	11. After-sales dispute	The respondent fails to perform agreed after-sales services or agreed undertakings.	3	/	/
Remarks	Apart from the above circumstances, where any user commits other acts that breach honest trade and compliance principles of conducting transactions, Alibaba.com has the right to impose relevant enforcement action and deduct 3-48 penalty points, depending on the degree of fault of the respondent and the losses of the complainant.				

ABBREVIATIONS

CCA China Consumers' Association

CPC Communist Party of China

CA Certificate Authority

AIC Administration for Industry and Commerce

ADR Alternative Dispute Resolution

ODR Online Dispute Resolution

ECD Electronic Commerce Directive

ECHR European Court of Human Rights

ESD Electronic Signatures Directive of the EU

eIDAS Regulation on Electronic Identification and Trust Services for Electronic Transactions in Internal Market

e-ADR Electronic Alternative Dispute Resolution

e-Commerce Electronic Commerce

GZAC Guangzhou Arbitration Commission

ICANN Internet Corporation for Assigned Names and Numbers

MSA Mediated Settlement Agreement

MIIT Ministry of Industry and Information Technology

PBOC People's Bank of China

PIN Personal ID number

PML People's Mediation Law

PRC People's Republic of China

PESL People's Electronic Signatures Law

SAIC State Administration for Industry and Commerce

UNCITRAL United Nations Commission on International Trade Law

UDRP Uniform Domain Name Dispute Resolution Policy

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