Chapter 7
Conclusion

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.

In Chaps. 4–6, the author has reached the conclusion that there are three major issues that must be addressed. First of all, it is important to establish both the formal and substantive validity requirements of an e-ADR agreement. This is crucial given that the ADR agreement opens the gate to dispute resolution. Second, the author focused on the procedure of ODR itself. The questions that the author examined relate to the minimal procedural standards that should be adhered to during the proceedings. Third, the author dealt with the enforcement, be it voluntarily or not, of the outcome of the ODR procedure.

In this conclusion, the author will present you with the most relevant findings of the research. First, the author will present the three challenges to the development of ODR. Second, based on these challenges, the author will make recommendations for the design of future ODR mechanism. Last, the author will envisage the future development of ODR.

7.1 Challenges to the Future ODR Development

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 the difficulty in cross-border recognition of e-ADR agreements, the lack of procedural fairness in ODR, and the lack of enforceability mechanism for ODR outcomes.
7.1.1 Cross-Border Recognition of E-ADR Agreements

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.

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 UNICITRAL 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\(^1\) and electronic signatures\(^2\) 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.

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. In England, both the piecemeal approach and statutory rules have been adopted to evaluate the substantive validity of e-ADR agreements. The English law intervenes less in B2B e-ADR agreements whereas a more restrictive statutory control is exerted on B2C e-ADR agreements. While the EU uses the fundamental principle of effective judicial protection and consumer protection rules\(^3\) to regulate e-ADR agreements that have deprived the consumer’s right to access to the court, China adopts standard form contract rules\(^4\) 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

\(^1\) UNCITRAL Model Law on E-commerce, Article 6 to 8; ECD, Article 9–11.

\(^2\) UNCITRAL Model Law on Electronic Signatures, Article 6; eIDAS Regulation, recital 63 and Article 46; PESL, Article 4, 5, 8.

\(^3\) Unfair Terms in Consumer Contracts Directive, EU Directive on Consumer ADR, EU Regulation on Consumer ODR, Consumer Rights Directive.

\(^4\) PRC Contract Law, Article 39 and 40; PRC Consumer Protection Law, Article 26.
over B2C e-ADR agreements, there is uncertainty with the validity assessment of e-ADR agreements as e-ADR agreements that are admitted in one jurisdiction may not have legal effect in another jurisdiction. For example, the B2C arbitration clauses that are incorporated into the terms and conditions of a website by a hyperlink are treated as unfair terms in the EU legal framework while it may be recognized in China. In the absence of a consumer arbitration regime, the EU legal framework is more favorable to consumers as it secures consumers’ dispute resolution rights in cross-border e-commerce disputes.

### 7.1.2 Lack of Procedural Fairness in ODR

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. 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 empirical study of current ODR rules (online arbitration, domain name dispute resolution, and marketplace internal dispute resolution) reveals that current procedural rules are not in full compliance with the procedural standards previously prescribed in Sect. 5.1. As a conclusion, 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 limited judicial review, both the UDRP decisions and Taobao decisions can be replaced by court decisions. Although 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 secure parties’ 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 reducing the processing time of dispute resolution.

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5United 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.
7.1.3 Lack of Enforceability Mechanism for ODR Outcomes

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 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.

In the context of the public enforcement mechanism, online arbitral awards and online MSAs can be enforced in accordance with 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.

In the context of the private enforcement mechanism, there are the automatic execution mechanism and the incentive-driven enforcement mechanism. 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 incentives or because of the penalties that may drive the party out of the marketplace. 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 merchants.

7.2 Recommendations for the Future ODR System Design

This section will wrap up the book 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.
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.

7.2.1 Establish Common Grounds in Recognizing the Validity of E-ADR Agreements

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. 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 single 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, the author proposed that a functional approach can be used to determine the formal validity of electronic contracts. The formal 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.

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. 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. The comparison between English law and Chinese law on the limitation of consent in e-ADR agreements showed that English consumer law provides clearer standards than Chinese law in ascertaining that a pre-dispute

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6Such as the minimalist approach and two-tiered approach in the legislation of electronic signatures.
standard form B2C e-ADR agreement that has deprived consumer’s right to bring a case in court shall be non-binding on consumers. 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.

7.2.2 Improve Procedural Fairness in ODR

The author has tried to establish a set of procedural fairness standards that have been commonly recognized in different jurisdictions. Firstly, there are three cornerstones in civil justice that can also be applied to assess the procedural fairness of ODR: namely, access to justice, procedural fairness and procedural efficiency.\(^7\) 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. Secondly, sources of procedural fairness can also be found in ADR principles and rules such as the principles of expertise, independence, impartiality, transparency, effectiveness, fairness and legality. Lastly, special features of ODR in respect of security, trust and non-territoriality should also be considered in procedural fairness of ODR rules.

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.

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.

In public regulation, governments should also play a role in supporting ODR by providing accreditation mechanism of ODR service providers and enhance the public awareness of ODR. For example, 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. Moreover, governments should provide minimum quality requirements for ODR services through soft laws and hard laws. The minimum procedural fairness rules that are stipulated in Sect. 5.1 can be used as a benchmark to evaluate the procedural justice of ODR rules. Lastly, the judicial

\(^7\)See Sect. 5.1.2.
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review can also be applied to supervise the quality of specific types of ODR outcomes in the spectrum of national jurisdictions.

7.2.3 Enhance the Enforcement Mechanism of ODR Outcomes

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. 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.

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.

7.3 ODR Development in the Future

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.

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8For example, the decisions of Spanish Online Consumer Arbitration Board are directly enforceable in courts in Spain.
entirely relying on algorithms and machines to resolve disputes.\textsuperscript{9} Artificial intelligence will be able to replace human beings in certain types of ODR (such as blind-bidding) and for certain types of disputes (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 disputes.\textsuperscript{10}

The global outbreak of Coronavirus reminds people that they should speed up the development of ODR to prepare for future crises. Despite the potential challenges to the development of ODR as regards the concerns of security and fairness,\textsuperscript{11} ODR will continue to grow as an efficient and effective dispute resolution mechanism for disputes arising from e-commerce transactions and perhaps from other sectors as well. 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 also keep an eye on the quality control over ODR services to ensure a sustainable development of ODR. 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.\textsuperscript{12} 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 with a minimum procedural guarantee.

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\textsuperscript{9}Carneiro et al. (2014), 211–240, 231.
\textsuperscript{10}ODR has been expanded to resolve different types of disputes which have been discussed extensively by Katsh and Rabinovich-Einy (2017) in Chaps. 3, 4, 5, and 6 of the book.
\textsuperscript{11}Ebner and Zeleznikow (2015), 156–159.
\textsuperscript{12}Such as the ODR platform established by the EU allowing for certification of ODR providers.