

THE RISE OF ONLINE DISPUTE RESOLUTION-LED JUSTICE IN CHINA: AN INITIAL LOOK

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ABSTRACT

The use of online dispute resolution ('ODR') in courts is a growing topic of interest. By focusing on the recent development of ODR-connected online courts in China, this paper explores the potential effects of ODR on the Chinese legal system in relation to the role of courts and legal professionals, due process rights and information safety. It also reflects on dispute resolution theories that are shifting from emphasising conflict resolution to dispute prevention. It is argued that ODR-led court reforms have come to attention because they cater to the specific purposes of recent Chinese rule of law reforms by prioritising efficiency goals and enhancing individualist justice experiences. Based on these general findings and the promising technological options for ODR, we recommend ways to better implement ODR in Chinese courts to take full advantage of technological advancements.

I INTRODUCTION

The use of online dispute resolution ('ODR') in courts is a topic of growing academic interest.¹ In recent years, some of the most aggressive and notable developments of ODR-connected public justice systems have taken place in the People's Republic of China.² In China, online conflict resolution systems were first adapted by e-commerce platforms to resolve small-volume disputes between online sellers and shoppers.³ Before long, the Chinese government began to invest enormous resources into its courts to explore how ODR technologies could be used in the judiciary, forming the basis of the 'Smart Court Construction' campaign.⁴ By the end of 2019, China had established three internet courts in Hangzhou, Beijing and Guangzhou that have

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¹ See, eg, Anjanette H Raymond and Scott J Shackelford, 'Technology, Ethics and Access to Justice: Should an Algorithm be Deciding Your Case' (2014) 35(3) *Michigan Journal of International Law* 485; Dorcas Quek Anderson, 'Ethical Concerns in Court-connected Online Dispute Resolution' (2019) 5(1-2) *International Journal of Online Dispute Resolution* 20; Orna Rabinovich-Einy and Ethan Katsh, 'The New New Courts' (2017) 67 *American University Law Review* 165; David A Larson, 'Designing and Implementing a State Court ODR System: From Disappointment to Celebration' [2019] (2) *Journal of Dispute Resolution* 1, 77.

² Amy Schmitz, 'Expanding Access to Remedies through E-Court Initiatives' (2019) 67(1) *Buffalo Law Review* 89, 125.

³ Lizhi Liu and Barry R Weingast, 'Taobao, Federalism, and the Emergence of Law, Chinese Style' (2018) 102 *Minnesota Law Review* 1563, 1583.

⁴ See Supreme People's Court of People's Republic of China, 《中国法院的互联网司法》 [*Chinese Courts and Internet Judiciary White Paper*] (White Paper, 2019) <<https://file.chinacourt.org/f.php?id=43639&class=file>> ('White Paper').

handled around 120,000 disputes since they formed.⁵ Scholars, practitioners and business parties are all wondering how these rapidly emerging ODR forums, whether private or public, might transform traditional concepts of justice in China.

This paper provides one of the first comprehensive scholarly examinations of ODR technologies adopted by Chinese courts.⁶ In Part II of this paper, we provide an overview of the development of ODR in China, which includes an examination of the background of the organic growth of ODR on e-commerce platforms and traditional alternative dispute resolution ('ADR') service providers. We also examine the Smart Court Construction campaign, which has become one of the recent reform priorities of the Chinese judiciary. Part III discusses the effects of ODR on the Chinese legal system and conceptions of justice using a system-design approach. It focuses on three areas: 1) the role of courts; 2) due process; and 3) data safety. Ultimately, this paper raises critical questions and cautions related to the assurance of fairness and transparency in the evolution of the Chinese justice system in the long term.

II AN OVERVIEW OF THE DEVELOPMENT OF ODR IN CHINA

ODR first developed in China's private sphere in response to China's booming e-commerce sectors, which continue to generate a large number of transactions and disputes. In 2019, China had the world's largest number of internet users (over 800 million) through both cable and mobile access.⁷ These frequent virtual interactions have been accompanied by the emergence of large numbers of new types of online disputes.

Two forms of private sphere ODR warrant some discussion in this section, as they provide insights into China's early attempts to digitalise dispute resolution: 1) self-contained ODR platforms hosted by e-commerce platforms and institution; and 2) industry-supported online ADR, particularly online mediation. These digitalised systems have spurred changes in dispute resolution mindsets and industry norms, as they are easier to use and allow parties to

⁵ «五方面展示中国法院互联网司法制度优势和治理能力» [Five Aspects of Progress in Chinese Internet Courts], *The Supreme People's Court of the People's Republic of China* (Web Page, 4 December 2019) <<http://www.court.gov.cn/zixun-xiangqing-205741.html>>; *White Paper* (n 4) 73.

⁶ ODR in China has been subject to extensive research; however, to date most research has focused on private (rather than court-annexed) ODR: Jennifer Sackin, 'Online Dispute Resolution with China: Advantageous, but at What Costs?' (2010) 12(245) *Cardozo Journal of Conflict Resolution* 245, 246; Xuhui Fang, 'Recent ODR Developments in China' (2017) 4(2) *International Journal of Online Dispute Resolution* 32; Jia Wang and Lei Chen, 'Will Innovative Technology Result in Innovative Legal Frameworks?—Smart Contracts in China' (2018) 26(6) *European Review of Private Law* 921.

⁷ 《中国互联网络发展状况统计报告》 [Annual Report on China's Internet Development, China Academy of Information and Technology Communications] (2018) 20; *White Paper* (n 4) 1.

resolve commercial disputes in a cost-effective manner. In the latter part of this part of the paper, we will focus on China's Smart Court Construction campaign, a nation-wide judicial reform project that aims to update justice values and system dynamics in the internet era.⁸

A Self-Contained Online Dispute Resolution Platforms

Headquartered in Hangzhou, China, Alibaba Group's *Taobao* is now the world's biggest consumer-to-consumer e-commerce platform. It hosts more than 10 million active sellers and 423 million active buyers.⁹ China's first and most important self-contained ODR platform (i.e., the Taobao ODR system) emerged in 2010 and was modelled on eBay's consumer ODR model.¹⁰ Like eBay, it first adopted a text-based negotiation assistance program specialised in resolving buyer-seller disputes. When a buyer submits a claim against a seller, the Taobao ODR Centre makes a decision within 10 days based on evidence submitted by both parties.¹¹ Gradually, the Taobao ODR Centre also started to accept claims submitted by brand owners alleging the existence of counterfeit products online. Such claims are assigned to a human adjudicator, usually a Taobao employee, who reviews the case to determine if a particular product is counterfeit.¹²

To increase the perceived fairness and transparency of the system, the Alibaba Public Jury, a jury-like adjudication system, was introduced to the Taobao ODR Centre.¹³ When a dispute arises, the party initiating a case can elect to have either a designated Taobao employee or a jury-like panel adjudicate their matter.¹⁴ Taobao community members volunteer to become jurors and are selected based on a combination of factors used by Taobao to determine their reputation within the Taobao system.¹⁵ By a majority voting process, the public jury decides on the case. This system allows Taobao to address a large and growing number of complaints.¹⁶ The Taobao ODR model was also diffused to address implementations of ODR systems across some of China's other internet platforms, such as WeChat and Didi (a share-ride platform similar to

⁸ See *White Paper* (n 4) 63.

⁹ See Liu and Weingast (n 3) 1576.

¹⁰ For a detailed description of the eBay model, see: Colin Rule, 'Making Peace on eBay: Resolving Disputes in the World's Largest Marketplace' [2008] (Fall) *AC Resolution* 1.

¹¹ See Liu and Weingast (n 3) 1581.

¹² *Ibid* 1580.

¹³ «大众评审»['Alibaba Public Jury About Us'] (Web Page) <<https://pan.taobao.com/#n4>>.

¹⁴ Liu and Weingast (n 3) 1581.

¹⁵ *Ibid*.

¹⁶ 2016 阿里巴巴平台治理报告 [*Alibaba Public Governance Annual 2016*] (Report, 2016) 11 <<http://download.taobao.com/freedom/37886/pdf/p1bdauvnh1kakdfphrg3p6mj4.pdf>>.

Uber). Notably, none of these other systems have had the same popularity or success as the Taobao ODR system.¹⁷

B *Private Online Alternative Dispute Resolution Platforms*

In addition to the self-contained ODR platforms, existing ADR providers and industrial organisations resolve some disputes online via various platforms. One of the first recorded private ODR programs in China was the ODR Court affiliated with the China International Economic and Trade Arbitration Commission ('CIETAC').¹⁸ As one of the web-based dispute resolution service providers accredited by the Internet Corporation for Assigned Names and Numbers ('ICANN'), the ODR Court resolves disputes about the ownership of a registered domain name between a trademark owner and an alleged 'cyber-squatter' by engaging a panel of registered domain name panellists as online adjudicators.¹⁹ This process is conducted in ways similar to an online arbitration, and domain name decisions are rendered and immediately implemented online by the ICANN.

Outside the domain name industry, China's e-commerce-related dispute mediation platform was launched in 2010. This platform, named Dian Su Bao, provides an online portal for consumers to file their electronic complaints. It also enables external mediators to resolve disputes through online mediation.²⁰ The Dian Su Bao platform is external to any e-commerce company; however, it is affiliated with an e-commerce business association that comprises China's major e-commerce companies.²¹ A consumer may file a complaint against any member through Dian Su Bao.²² The platform then engages a neutral third party to resolve the complaint.²³ As a reputation-sanction system, complaints or feedback are directly posted on the Dian Su Bao website to warn consumers about the potentially abusive behaviours of any members. Similar to Dian Su Bao, the China Council for the Promotion of International Trade also launched an

¹⁷ «解决1500万起纠纷，腾讯滴滴都学习，阿里首创这项机制成共识» ['Tencent and Didi Both Learnt from Alibaba's Pioneering Dispute Resolution Mechanism'] (Web Page, 7 January 2019) <<https://kuailiao.qq.com/s/20190107A0FML800?refer=spider>>.

¹⁸ Zhao Yun et al, 'Online Dispute Resolution in Asia' in Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2013).

¹⁹ See 'Uniform Domain Name Dispute Resolution Policy', ICANN (Web Page) <<https://www.icann.org/resources/pages/help/dndr/udrp-en>>.

²⁰ See «电诉宝-电商消费纠纷调解平台用户协议» ['Dian Su Bao—Platform for Resolving E-Commerce Consumer Disputes User Agreement'] (Web Page), <http://show.s.315.100ec.cn/index.php?_a=product&f=agreement>.

²¹ See «电诉宝-电商消费纠纷调解平台关于我们» ['Dian Su Bao—Platform for Resolving E-Commerce Consumer Disputes About Us'] (Web Page) <http://show.s.315.100ec.cn/index.php?_a=product&f=about> ('Dian Su Bao').

²² See «电诉宝-电商消费纠纷调解平台受理流程» ['Dian Su Bao—Platform for Resolving E-Commerce Consumer Disputes Claim Handling Procedures'] (Web Page) <http://show.s.315.100ec.cn/index.php?_a=product&f=accept>.

²³ Dian Su Bao (n 21).

Online Mediation Platform, which includes an e-mediation portal that allows for the online filing of a request for mediation and offers some limited levels of online mediation.²⁴

Compared to self-contained ODR forums, private service platforms have certain disadvantages. In self-contained dispute resolution forums, the marketplace can rapidly respond to parties that fail to comply. The payment system internal to the marketplace is usually linked to the ODR system. The use of these internal payment systems is an important means of compliance and is often heralded as an essential feature of successful private ODR platforms.²⁵ In the absence of effective enforcement measures, private ODR platforms prompt the adoption of some innovative and flexible ways for resolving disputes in online forms. However, it should be noted that their use seems rather limited in China.

C The Development of Smart Court Campaign

After witnessing the success of ODR on e-commerce platforms, China launched its ‘Smart Justice’ campaign in late 2016.²⁶ Since then, the digitalisation of the judiciary has advanced astronomically. In 2017, the establishment of the first internet court in Hangzhou marked a new era in the short history of ODR development in China.²⁷ It represented China’s ambition to move the entire trial process online and was given the mandate of exploring new ways of using technology to improve access to justice, judicial efficiency and confidence in the judiciary.²⁸ Soon, two more internet courts were launched in Beijing and Guangzhou.²⁹ In 2019, the preliminary ‘Smart Court’ system began connecting internal judicial work systems with external litigation service systems, such as personal computer and mobile systems.³⁰ China’s Smart Courts have the capacity to handle a large number of cases. According to its own statistics, the Beijing Internet

²⁴See «中国国际贸易促进委员会调解中心» [‘China Council for the Promotion of International Trade Mediation Centre’] (Web Page) <<https://adr.ccpit.org/>>.

²⁵ Vikki Rogers, ‘Knitting the Security Blanket for New Market Opportunities—Establishing a Global Online Dispute Resolution System for Cross-Border Online Transaction for the Sale of Goods’ in Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2013) 95.

²⁶ 周强[Zhou Qiang], «加快智慧法院建设促进司法为民公正司法» [‘Speed Up the Creation of “Smart Courts” to Promote Justice and Fairness’] *Cyberspace Administration of China* (Web Page, 18 November 2016) 4 <http://www.cac.gov.cn/2016-11/18/c_1119937773.htm>.

²⁷ Dani Deahl, ‘China Launches Cyber-Court to Handle Internet-Related Disputes’, *The Verge* (Web Page, 18 August 2017) <<https://www.theverge.com/tech/2017/8/18/16167836/china-cyber-court-hangzhou-internet-disputes>>.

²⁸ *Ibid.*

²⁹ Sara Xia, ‘China’s Internet Courts are Spreading: Online Dispute Resolution is Working’, *China Law Blog* (Web Page, 23 December 2018) <<https://www.chinalawblog.com/2018/12/chinas-internet-courts-are-spreading-online-dispute-resolution-is-working.html>>.

³⁰ *White Paper* (n 4) 61.

Court has handled over 40,000 cases, all of which were filed online.³¹ While the Guangzhou Internet Court accepted over 30,000 cases during 2018 and 2019.³²

The Smart Court campaign emerged as one of the priority goals of China's judicial reforms for three reasons. First, it is a natural extension of reform efforts that were already aiming to use internet technology to improve judicial transparency and individuals' experiences of the judicial system.³³ By creating an environment that arguably has higher transparency than traditional courtrooms, ODR strengthens justice by facilitating the closer monitoring of the judicial process by the general public. Second, artificial intelligence ('AI') and other technologies are largely improving the efficiency and cost-effectiveness of court proceedings.³⁴ The adoption of ODR helps courts reduce their caseloads by channelling disputes to quicker, less expensive and more flexible processes.³⁵ Third, ODR minimises conflict and fits closely with China's overarching dispute resolution agenda. ODR-connected courts that employ AI and other automated technologies may be better at predictive functions.³⁶ The use of ODR platforms for data collection and analysis streamlines traditional dispute resolution procedures and also helps to identify *why* and the *ways in which* conflicts occur.³⁷ In this new reality, the focus of dispute resolution moves from developing law through resolving individual claims to making law more proactive in preventing disputes, which better reflects China's pursuit of societal harmony.³⁸

III HOW ODR EFFECTS THE CHINESE JUSTICE SYSTEM

The Smart Court Construction campaign spurred the development of so-called ODR-led justice institutions, which have the potential to replace traditional justice institutions and

³¹ *White Paper* (n 4) 6.

³² For example, by August 26, 2019, 32,428 people registered to join the Guangzhou ODR platform. There has been a total of 116,517 visits, 13,126 smart consultations, 17,508 cases accepted for mediation, 16,501 successful mediations: Wenli Guo, 'The Four Major Judicial Innovations of China's Guangzhou Internet Court', *China Law Connect* [2019] (September) 6.

³³ *White Paper* (n 4) 3.

³⁴ See, eg, Richard M Re and Alicia Solow-Niederman, 'Developing Artificially Intelligent Justice' (2019) 22 *Stanford Technology Law Review* 242, 255-61.

³⁵ *White Paper* (n 4) 9; see also Rabinovich-Einy and Katsh (n 1) 172, 175.

³⁶ Kashmir Hill, 'How Nextdoor Reduced Racist Posts by 75%', *Splinter News* (Web Page, 25 August 2016) <<https://splinternews.com/how-nextdoor-reduced-racist-posts-by-75-1793861389>>; Robert J Condlin, 'Online Dispute Resolution: Stinky, Repugnant, or Drab' (2017) 18 *Cardozo Journal of Conflict Resolution*, 712; Andrew D. Martin et al, 'Competing Approaches to Predicting Supreme Court Decision Making' (2004) 2(4) *Perspectives on Politics* 761, 761-67.

³⁷ 龙飞 [Long Fei], «大数据时代纠纷解决模式之变革» ['Transformation of Dispute Resolution Models in the Era of Big Data'], 人民法院报 [*People's Court Daily*] (Web Page, 2 November 2016) 8 <http://rmfyb.chinacourt.org/paper/images/2016-11/02/08/2016110208_pdf.pdf>.

³⁸ *Ibid.*

represent a challenge to due process and substantive jurisprudence. This section examines how ODR and court-connected ODR in particular affect the Chinese justice system.

ODR has revolutionised the manner in which justice is delivered and received. In China, newly emerging ODR-connected courts blur the boundaries between different phases of the trial process and incorporate ADR into judge-led dispute resolution procedures more naturally. Additionally, ODR-led justice has changed the nature of interactions between judges, lawyers and litigants by allowing litigants to participate in the dispute resolution process more directly.³⁹ More importantly, the increasing use of digital software to analyse correlations in vast amounts of data has also facilitated predictive decision making and dispute prevention.⁴⁰ ODR-led justice is much more than an online courthouse; it has drastically reshaped the way justice is administered and perceived in China.

Primarily, ODR-led justice in China has diversified the conflict resolution goals of traditional justice. To ensure ‘justice’ is achieved in traditional conflict resolution processes, parties ‘receive’ fair results through a fairly designed process.⁴¹ For countries with less developed judicial systems, such as China, ODR offers a quicker and less costly reform alternative, under which justice is more visible, participatory and transformative. Further, the technology-led reform improves the public’s perception of courts by emphasising judicial transparency and accessibility. In the construction of the Hangzhou and Guangzhou Internet Courts, adopting technologies that broadcast trials made existing trial processes more open to the general public. In October 2019, the Beijing Internet Court introduced the new ‘Sharing Trial Screen’ technology that enables judges to screen evidence provided by remotely sitting litigants and conduct live broadcasts of the trial process.⁴² Labelled ‘judgment in the sun’,⁴³ these newly implemented internet technologies allow judicial processes to be more transparently and widely presented to the general public. Through various communication channels, ODR enables all interested stakeholders to have their voices better heard in decision-making processes. ADR methods, such as negotiation and mediation, are more readily woven into Smart Courts’ dispute resolution

³⁹ See J J Prescott, ‘Improving Access to Justice in State Courts with Platform Technology’ (2016) 70(6) *Vanderbilt Law Review*; Ayelet Sela, ‘Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation’ (2016) 26(2) *Cornell Journal of Law and Public Policy*.

⁴⁰ See, eg, Kevin Strom, *Research on the Impact of Technology on Policing Strategy in the 21st Century* (Final Report No 251140, National Criminal Justice Reference Service, May 2016).

⁴¹ For a discussion on the complex interplaying factors of justice from a conflict resolution perspective, see Michelle Maise and Heidi Burgess, ‘Types of Justice’, in Guy Burgess and Heidi Burgess (eds), *Beyond Intractability* (Conflict Research Consortium, University of Colorado, Boulder, July 2013) <https://www.beyondintractability.org/essay/types_of_justice>.

⁴² «一部手机就是一间法庭» [A Mobile Phone is A Court]» *Beijing Daily* (Web Page, 22 August 2019) <http://www.cac.gov.cn/2019-08/22/c_1124906789.htm>.

⁴³ «司法公开：在阳光下播撒正义» [Judicial Transparency: Sowing Justice in the Sun], *People’s Court News* (9 September 2019), <http://rmfyb.chinacourt.org/paper/html/2019-09/09/content_159832.htm?div=-1>.

processes, which encourage increased cooperation among parties to help them find a middle ground that will better satisfy the needs of the interested parties.⁴⁴ These new norms, which were made possible by the Smart Court Construction campaign, created and redefined the justice framework within which parties interacted and created new roles. The ever-increasing hyper-connectivity of China's online courts makes judicial processes more inclusive, which should increase people's faith in the transparency of the judicial system and counter the perception that justice is arbitrarily or covertly imposed.

For a summary of the differences between the goals of dispute resolution in traditional justice and ODR-led justice, see the first row of Table 1. Part III of this paper discusses the following three major areas of the Chinese legal system that have been significantly affected by the rise of ODR-led justice: 1) the role of courts and legal professionals; 2) due process; and 3) data safety. The major differences in these areas in traditional justice compared to ODR-led justice are summarised in the last four rows of Table 1. Admittedly, it is still not completely clear how the rise of ODR-led justice in China will eventually change the law itself.⁴⁵

Table 1. Comparison of Traditional Justice and ODR-led Justice Tools

	Traditional justice	ODR-led justice
Goals of dispute resolution	Fairness in results and issue resolution	Diverse goals (fairness in results and issue resolution, transparency, participation and transformative justice)
Role of courts	Arbiters	Process managers
Role of legal professionals	Problem solvers	Facilitators
Due process	Guaranteed by procedural safeguards	Flexibility needs and perceptions of parties
Data Safety	Confidentiality of process and legal records	Data and information safety based on external and internal considerations

⁴⁴ Ruha Devanesan and Jeffery Aresty, 'ODR and Justice', in Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice* (Eleven International Publishing, 2013).

⁴⁵ Daniel L Chen, 'Judicial Analytics and the Great Transformation of America Law' (2019) 27(1) *Artificial Intelligence and Law* 15, 39-40; Re and Solow-Niederman (n 34).

A Role of Courts and Legal Professionals

In China, as in most other countries, the court system has the capacity to adapt to and incorporate the various functions offered by ODR.⁴⁶ The adoption of ODR can reduce caseloads and costs, which would be welcomed by litigants, overworked judges and court personnel. ODR has already assisted courts to address the overflowing number of court cases and the changing needs of an increasing number of litigants.⁴⁷ Additionally, ODR has made it easier to incorporate court-referred ADR and has led judges to inform litigants about ADR options more frequently.⁴⁸ For example, in the ODR application developed by the Zhejiang Highest People's Court, early neutral evaluation, mediation and arbitration are all explicitly listed on the front page of the user interface, encouraging ODR users to consider ADR options when they initiate their ODR claims.⁴⁹ The new ODR platform of the Shanghai Highest People's Court also strongly promotes its online mediation feature.⁵⁰ In response to these changes, the Chinese public has become more receptive to ADR and online mediation in particular and now views both ADR and online mediation as essential components of resolving disputes online.⁵¹

ODR programs have also transformed the role of judges in court rooms. In ODR-led justice, the court adopts a far more proactive role by collectively undertaking conflict analysis, prevention, mitigation and resolution functions. Accordingly, judges act as overseers rather than decision makers. In turn, courts become coordinators of resolution options rather than adjudicators of justice. Similarly, as ODR technologies offer more ADR options, courts will potentially evolve into forums for settlement rather than adjudication. Unfortunately, thus far, the majority of Chinese judges are unprepared for the changing means of justice. Many lack the adequate digital and internet literacy required to interpret and take full advantage of ODR technologies.⁵²

⁴⁶ Elayne E Greenberg and Noam Ebner, 'Strengthening Online Dispute Resolution Justice' (St John's Legal Studies Research Paper No 19-0032, 8 August 2019) 24-5.

⁴⁷ Rabinovich-Einy and Katsh (n 1) 181-84.

⁴⁸ Greenberg and Ebner (n 46) 24.

⁴⁹ Apple, 'Zhejiang Highest People's Court app', *App Store* (Web Page) <<https://apps.apple.com/us/app/%E6%B5%99%E6%B1%9Fodr/id1304181509>>.

⁵⁰ «上海高级人民法院在线调解平台» [Shanghai Highest People's Court Online Mediation Forum] (Web Page) <http://www.hshfy.sh.cn/shfy/wstj2017/login_dsr.jsp?ptlx=zxsfqr>.

⁵¹ See, eg, 袁玮 [Yuan Wei], «被告之一在武汉?在线调解+「零接触」式送达» ['One Defendant in Wuhan? Online Mediation and Touchless Delivery'], 新民晚报 [*Xin Min News*] (Web Page, 28 February 2020)

<<https://wap.xinmin.cn/content/31673036.html>>, which describes how ODR helped to deliver trial documents online during the COVID-19 pandemic.

⁵² Greenberg and Ebner (n 46) 43-4; according to Greenberg, digital literacy involves both technological fluency or the ability to use a widening range of technological platforms and technologies and the ability to communicate effectively through online media.

Additionally, most ODR approaches not only allow parties to assume a more central role in decision making and in voicing their desires or needs, but also in developing a new understanding of the role of legal professionals.⁵³ Legal tasks are increasingly disrupted by new technologies.⁵⁴ The introduction of more automated systems, which provide clients with self-help options to negotiate and mediate an outcome or reach a settlement, have eliminated the need for legal professionals in negotiations and mediations.

As in many Western countries, some legal professionals in China have been hesitant to adopt ODR into their daily practices. This hesitation is coupled with the traditionally negative view held by Chinese legal professionals about ADR and mediators.⁵⁵ As mediation service charges are currently below the market level in China, lawyers have weak incentives to incorporate mediation into their practice or to establish a mediation practice. Bilingual or trilingual lawyers trained in more than one jurisdiction have stronger incentives to adopt more profitable dispute resolution practices, such as arbitration, and are thus equally lukewarm about the uptake of ODR. The potential of ODR to ‘de-lawyerise’ disputes and lower legal fees has also meant that it has received a hostile reception.

The Chinese government and judicial system are determined to change the attitude of China’s legal professionals. The Supreme People’s Court of China has established an online platform to support lawyers in filing, accessing case files and inquiring about the status of cases online. This platform also facilitates virtual communication with judges and the serving of legal documents.⁵⁶ As remote working options became necessary after the COVID-19 outbreak in China, local lawyer associations successfully mobilised lawyers to participate in ODR training or to adapt their methods of working to accommodate ODR.⁵⁷ Further, Chinese law schools have established new research institutes and now offer new programs that aim to promote technological innovation in the legal sphere, such as the Law and Technology Institute at Renmin University,⁵⁸ the School of Artificial Intelligence and Law at Southwest University of Political

⁵³ Carrie Menkel-Meadow, ‘Towards Another View of Legal Negotiation: The Structure of Problem Solving’ (1983) 31 *UCLA Law Review* 754, 759–64, which states that the problem-solving model can reach more optimal outcomes because advocates focus on actual objectives rather than assumed objectives.

⁵⁴ See, eg, Elayne E Greenberg and Noam Ebner, ‘What Dinosaurs Can Teach Lawyers About How to Avoid Extinction in the ODR Evolution’ (2019) (St John’s Legal Research Paper No 19-0004, 17 January 2019), which discusses how the legal profession should adapt to ODR’s changing role in the justice system.

⁵⁵ «人民调解法» [People’s Mediation Law] (People’s Republic of China) National People’s Congress, Order No 43, 28 August 2010, art 4: ‘People’s mediation is free of charge in China’.

⁵⁶ «最高人民法院诉讼服务网» [‘Supreme People’s Court of China Online Litigation Services’] (Web Page) <<http://ssfw.court.gov.cn/ssfw>>.

⁵⁷ «杨浦律师在线调解法院委托案件» [‘Yangpu Lawyers in Online Mediation During the Virus Outbreak’] (Web Page) <http://sfj.sh.gov.cn/zwdt_ywzx/20200306/fd00a560d9cc4757bed535c5677c3ad5.html>.

⁵⁸ ‘Renmin University Law and Technology Institute’, *Renmin University of China* (Web Page) <<http://lti.ruc.edu.cn/home/index.htm>>.

Science and Law⁵⁹ and a computational law summer course at Tsinghua University.⁶⁰ However, the differences among these programs in terms of their depth and quality have made it hard to assess if they adequately prepare future legal professionals for the changes in the field.⁶¹

B Due Process

Due process is essential to the design of any ODR system.⁶² As the application of technology in dispute resolution processes becomes more prevalent, our understanding of due process needs to be updated. The National Centre for Technology and Online Dispute Resolution has articulated new standards for the use of ODR in courts.⁶³ However, some inherent features of ODR make ODR-connected courts extremely vulnerable to the erosion of procedural due process. These features are outlined below.

1 Efficiency

In today's legal world, efficiency is a priority for litigants. Many litigants are willing to forego traditional courts and participate in ODR processes without considering the disadvantages.⁶⁴ Compared to the Western public, the Chinese public is more enthusiastic about the availability of ODR in courts and less concerned with procedural safeguards. This is likely because the Chinese public views digitalised courts as a quick solution to addressing access to justice problems in China. The term 'access to justice' is not commonly used in China; however, the seemingly inevitable adoption of technology, particularly AI and automation technologies, represents a pragmatic approach to the resolution of problems faced by the Chinese government when the judicial system is strained, such as when there are dramatic increases in judicial

⁵⁹ School of Artificial Intelligence and Law, Southwest University of Political Science and Law (Web Page) <<http://alc.swupl.edu.cn/>>.

⁶⁰ 'Tsinghua University Law School Held the First Computational Law Summer Boot Camp', *Tsinghua University Law School* (Web Page) <http://www.law.tsinghua.edu.cn/publish/law/3567/2018/20180716144310660990896/20180716144310660990896_.html>.

⁶¹ See, eg, 高学强 [Gao Xueqiang], «人工智能时代的中国司法» ['Chinese Justice in the Age of Artificial Intelligence'] (2019) 49(4) *浙江大学学报 (人文社会科学版)* *Journal of Zhejiang University (Humanities and Social Sciences)*, 229-40, which discusses the negative effects of the use of automated decision-making systems on the legal profession.

⁶² However, ODR has yet to adopt its own definition of due process and fair play: 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(1) *Northwestern Journal of International Law and Business* 9.

⁶³ Ethical Principles for ODR Initiative, *The National Center for Technology & Dispute Resolution* (Web Page) <<http://odr.info/ethics-and-odr/>>.

⁶⁴ See Lee Rainie and Janna Anderson, *The Internet of Things Connectivity Binge: What Are the Implications?* (Pew Research Center Report, 6 June 2017).

caseloads and system backlogs.⁶⁵ In a recent report, the Shanghai Second Intermediate People's Court reported that, despite only employing a quarter of the staff compared to 2008, the Court has adjudicated three times the number of cases per employee per year. They attribute this increase to the adoption of new technologies.⁶⁶ Despite many ODR advocates recognising that efficiency may often come at a cost to fairness, which is ensured by due process safeguards, litigants are less concerned with these challenges.⁶⁷ Thus, a cautious approach must be adopted, as more intensified development of ODR in the country might undermine existing attempts to reform procedural justice and improve the quality of trials in China.

In seeking to maximise efficiency, some Chinese internet courts have created dispute resolution rules that unduly prioritise the convenience of litigants but are in direct conflict with procedural laws. For example, 'asynchronous trials', a feature of some internet courts, allow litigants and their representatives to log-on to online systems at different times and places to participate in mediation, cross-examination and other litigation processes.⁶⁸ Official sources estimate that this new mode of conducting trials saves up to six hours of travel time per case.⁶⁹ However, art 144 of the *People's Republic of China Civil Procedure Law* ('*PRC Civil Procedure Law*') stipulates that a court may make a judgment in absentia if a defendant refuses to appear in the court without justified reasons after having been served with a summons or if the defendant withdraws during a court session without the court's permission.⁷⁰ This seems to be in conflict with asynchronous trials.

Similarly, art 68 of the *PRC Civil Procedure Law* specifies that full evidence shall be presented in court and subject to cross-examination by concerned parties.⁷¹ Article 14 of the *Procedural Guidelines for Financial and Contractual Internet Trial Disputes* ('*Procedural Guidelines*'), which were recently produced by the Guangzhou Internet Court and are applicable to disputes related to online loans, states that if parties have exchanged evidence before the court, evidence discovery and cross-examination is not required (i.e., the parties are not required to

⁶⁵ For an explanation of the reasons leading to overflowing court caseloads in China, see: 陈柏峰 [Chen Bofeng], «从基层纠纷及其解决体系看法官职业生态» [Viewing the Professional Ecology of Judges from the Grassroots Dispute Settlement System] (Web Page, 19 April 2017) <https://www.guancha.cn/ChenBaiFeng/2017_04_19_404298_2.shtml>.

⁶⁶ «当司法遇上人工智能, 秒判可能吗» [When Justice Meets Artificial Intelligence, Is It Possible to Deliver Judgments in Seconds?], *Wei Hui Po* (14 January 2020) <http://www.cbdo.com/BigData/2020-01/14/content_6154136.html>.

⁶⁷ Julia Hörmle, *Cross-Border Internet Dispute Resolution* (Cambridge University Press, 2009) 17, which discusses the conflict between effectiveness and due process in ODR; Rabinovich-Einy and Katsh (n 1) 181, which states that a preference for efficiency is usually at the expense of justice.

⁶⁸ *White Paper* (n 4) 74.

⁶⁹ *Ibid.*

⁷⁰ «中华人民共和国民事诉讼法» [*People's Republic of China Civil Procedure Law*] (People's Republic of China) National People's Congress, [Order No] 9 April 1991, art 144 ('*PRC Civil Procedure Law*').

⁷¹ *Ibid* art 68.

present full evidence in court).⁷² This raises questions as to whether the *Procedural Guidelines* should adhere to the provisions of the *PRC Civil Procedural Laws* and about how conflicts to which these provisions apply should be resolved. The current law and court precedent provides little guidance. Such innovative measures, which aim to improve efficiency and lower costs for litigants, provide a viable choice for parties between efficiency and due process safeguards.

2 *Inherent Bias in Algorithms*

Another obstacle to due process arises because of the inherent biases in algorithm-based decisions. Such biases undermine the use of algorithms by the Chinese judiciary.⁷³ These biases include the accuracy of results, ‘algorithm black boxes’ of ODR codes and conflicts of interests in public-private partnerships when creating ODR systems, each of which are explained further below. A common problem of ODR systems is that the results of algorithm-based decisions are not always accurate.⁷⁴ AI and other types of well-built algorithms may help individuals make determinations; however, the usefulness of these algorithms in more sophisticated cases is not well understood.⁷⁵ Further, systematic biases have been discovered in algorithm-based decision-making mechanisms, and coding errors and code biases may also lead to skewed results.⁷⁶ This problem will become persistent, as internet court programs in China have started to use AI to determine results based on an analysis of similar cases and to deliver decisions in groups of similar cases.⁷⁷

The use of AI-based decision-making systems also depends on the data being accurately interpreted so that informed decisions can be made. However, most judicial professionals lack adequate technological and data analytical training.⁷⁸ If such biases are hard to eliminate, users

⁷² «广州互联网法院金融借款、小额借款合同纠纷在线批量化解程序指引» [Procedural Guidelines for Financial and Contractual Internet Trial Disputes] (People’s Republic of China) Guangzhou Internet Court, 13 August 2019, art 14 (*Procedural Guidelines*).

⁷³ Agnieszka Jablonowska et al, ‘Consumer Law and Artificial Intelligence: Challenges to the EU Consumer Law and Policy Stemming from the Business’ Use of Artificial Intelligence’ (EUI Department of Law Research Paper No. 2018/11, Erasmus University Institute, 8 August 2018), 34–7.

⁷⁴ See, eg, Rabinovich-Einy and Katsh (n 1); Kiel Brennan-Marquez, ‘Plausible Cause: Explanatory Standards in the Age of Powerful Machines’ (2017) 70 *Vanderbilt Law Review* 1249, 1255–57, which argues that the use of algorithm in law enforcement decision making threatens the traditional criminal justice system; Tal Z Zarsky, ‘Transparent Predictions’ [2013] 4 *University of Illinois Law Review* 1503, 1506, which states that the use of predictive practices based on analysis of personal information and data mining by law enforcement may result in biases.

⁷⁵ Brennan-Marquez (n 74) 1255–57.

⁷⁶ See Sam Corbett-Davies et al, ‘Algorithm Decision Making and the Cost of Fairness’ (Conference Paper, 23rd ACM SIGKDD International Conference, August 2017); Emily Berman, ‘A Government of Laws and Not of Machines’ (2018) 98(5) *Boston University Law Review* 1277, 1280.

⁷⁷ Berman (n 76) 1280–83.

⁷⁸ Greenberg and Ebner (n 54), 40.

should at least be forewarned of the potential for bias. Regulations may be required to ensure the use of bias-free decision matrices in AI applications.⁷⁹

The use of algorithms and data analytics could also render a system less trustworthy because the reasons for the decisions made by these automated tools are subject to little public oversight.⁸⁰ The AI systems that learn to recognise patterns in data to make decisions are often described as ‘black boxes’, as even their developers often do not know how they reach conclusions. As the algorithms that drive ODR are secret and known only to their owners and creators, participants in such systems have no way of knowing how a correct outcome is conceived by the algorithms or whether the information used by the algorithms to make decisions is indeed accurate. This, in turn, affects the trustworthiness of ODR systems.⁸¹

One other potential bias in ODR platforms is the public-private partnership model used by the Chinese judiciary. These partnerships are inherently beneficial, as they allow cost-effective collaboration models to be used in the development of technological innovation and are thus favoured by both ODR technology developers and the Chinese judiciary.⁸² However, such public-private partnerships raise additional impartiality concerns.⁸³ Courts hiring third-party technology providers must take special care to ensure that such public-private collaborations do not create any appearance of bias and that no potential conflicts of interest arise.⁸⁴ Thus, these collaborations must be subject to a high level of scrutiny when they affect the quality of the justice system.

Overall, the expectation that there is no bias in the judicial decision-making process makes it important that there is impartiality in ODR-led courts. Eventually, internet courts must incorporate due process in their procedures. These new systems must accommodate traditional procedural safeguards, such as the full litigation of cases, neutral decision making, transparency in addressing new needs (e.g., participation and accuracy) and a bias-free process. Internet courts and ODR professionals must also abide by the fundamental standards of confidentiality, impartiality, competence and quality.⁸⁵

⁷⁹ Berman (n 76), 1280.

⁸⁰ Condlin (n 36) 724–26.

⁸¹ Ibid.

⁸² For example, Gridsum Holding company (NASDAQ: GSUM), a Chinese company listed on the NASDAQ is a publicly traded company that has collaborated with the Chinese judiciary in developing court-connected ODR systems: ‘Gridsum is Contracted to Implement an ODR Platform for the Supreme People’s Court of China’ *Gridsum* (Web Page) <<https://www.gridsum.com/case/judiciary/index.html>>.

⁸³ Schmitz (n 2) 144.

⁸⁴ Ibid.

⁸⁵ See Daniel Rainey, ‘Third-Party Ethics in the Age of the Fourth Party’ (2014) 1(1) *International Journal of Online Dispute Resolution* 37.

C Data Safety

Finally, a related concern is users' safety and security during the ODR process. ODR relies on data and internet-driven processes much more than traditional dispute resolution. This raises additional data safety concerns. Two data safety and security issues that are particularly salient in ODR are: 1) protecting private case information from external parties seeking to hack the system to obtain this information ('external protection'); and 2) protecting private case information from improper disclosure or misuse by those managing the system ('internal protection').

1 External Protection

External protection concerns the integrity of the platform or the system itself when it is used to generate, send, receive, store, exchange or otherwise process information.⁸⁶ The maintenance and transmission of data plays a key role in ODR processes. Compared to traditional dispute resolution techniques, ODR is more data dependent. Many ODR technologies rely on big data to monitor the quality of their process and outcomes and uncover biases and problems. ODR technology can analyse collected data to automatically uncover disputes before parties are even aware of them. For example, Judge Long Fei noted that the integrated online platform of the Traffic Court of Yuhang District (Hangzhou, Zhejiang) used nation-wide traffic accident and litigation data to identify higher risk drivers and locations and in doing so, turned a traffic dispute resolution forum into an accident prevention research hub.⁸⁷ This better serves the goal of preventing disputes before they arise. It can also help to indicate more broadly whose problems are not being addressed within the legal system and signal the need for the law to generate appropriate compensation scales and provide better redress.

Significant increases in the use of data give rise to the need to better address data security. The meaning of data safety has evolved with the development of the internet. New forms of threats to online systems and data have emerged that have the potential to result in data security breaches.⁸⁸ Worldwide, protecting data against external threats remains a concern and is believed to be one of the biggest obstacles preventing the wider adoption of ODR. The issue of data safety itself also remains insufficiently explored.⁸⁹ In a Thomson Reuters study conducted in 2016 on

⁸⁶ *United Nations Commission on International Trade Law, Technical Notes on Online Dispute Resolution* (April 2017) 4.

⁸⁷ Long Fei (n 37).

⁸⁸ Noam Ebner and John Zeleznikow, 'Fairness, Trust and Security in Online Dispute Resolution' (2015) 36(2) *Hamline University's School of Law's Journal of Public Law and Policy* 143, 157.

⁸⁹ *Ibid* 157-59.

the effects of ODR technology on dispute resolution in the United Kingdom, many interviewees highlighted the importance of adequate safeguards for online systems.⁹⁰ One corporate general counsel mentioned that ‘high standards and data security were seen as a basic requirement to ensure trust and take-up of ODR technologies’.⁹¹ However, in China, despite the rapid speed at which ODR has developed, there have been little to no corresponding changes to ensure system data safety. Few studies and only limited scholarly research have focused on this area; thus, there are important gaps in this area of research that need to be addressed.

2 *Internal Protection*

The issue of protecting data from internal misuse or improper disclosure has been slightly better explored.⁹² Currently, many types of dispute prevention technologies developed by China ODR forums rely on the extensive collection, analysis and sharing of a large amount of user information and litigation-related data; however, this gives rise to hidden dangers related to internal data security.⁹³ Notably, the *Chinese Courts and Internet Judiciary White Paper* mentioned that an intelligent service platform built by the Jiaxing Intermediate People’s Court collects ‘litigants’ address information with mobile phone numbers, active address of civil activities, addresses registered with governmental agencies and successful service records in courts’.⁹⁴ The collection of large quantities of personal information requires that measures be implemented to ensure that this information is safely used and managed.⁹⁵

To protect information during the ODR process in China, it is essential to regulate the processes and personnel who manage this data. On 28 May 2019, the People’s Republic of China National Internet Information Office published the *Measures for Data Security Management (Draft for Comments)* (the ‘*Measures*’) that provide more stringent requirements for data collection, use, supervision and management.⁹⁶ The *Measures* focus more on the internal risks associated with the collection and use of data and information than external risks, such as hacks and cyber-attacks. However, many of the provisions in the *Measures* are vague and

⁹⁰ *The Impact of ODR Technology on Dispute Resolution in the UK* (Thomson Reuters, Spring 2016), 15.

⁹¹ *Ibid.*

⁹² Hunton Andrews Kurth, ‘China Issues Draft of Data Security Administrative Measures’, *Privacy and Information Security Law Blog* (Web Page, 19 June 2019) <<https://www.huntonprivacyblog.com/2019/06/10/china-issues-draft-of-data-security-administrative-measures/>>.

⁹³ See Table 1 of this Paper.

⁹⁴ *White Paper* (n 4) 77.

⁹⁵ *Ibid.*

⁹⁶ «数据安全管理办法 (征求意见稿)» [*Measures for Data Security Management (Draft for Comments)*], 28 May 2019 chs 2-4 (‘*Measures*’).

unenforceable. On 30 December 2019, the Chinese Ministry of Industry and Information Technology further promulgated a new regulation, *Guidelines on Determining Illegal and Illicit Collection and Use of Private Information by Applications*, to elevate the standards for collecting personal information by commercial applications.⁹⁷ This regulation purportedly applies to the illicit and illegal collection of personal information ‘by applications’, which should include ODR applications; however, it is unclear whether and how government entity applications are bound by these regulations. Given that government interference in individual privacy is an extremely sensitive issue in China, it would be challenging to limit any form of government power, including the government’s ability to collect private information.

A further issue is the increasing tension between confidentiality and convenience, particularly in relation to how information shared by a user will be used by internet courts. In traditional negotiation processes, the information shared can affect the results obtained. Thus, deliberate rules governing the use and sharing of dispute resolution-related information are considered in most ADR processes.⁹⁸ However, the convenience of ODR and its data driven processes has affected the confidentiality of users’ information, which could affect trial outcomes.

ODR users in China must be reassured that measures have been taken to ensure the internal security of the information held by systems. At the education or self-help stage of the ODR process, explicit rules need to be implemented to ensure that shared information will not be publicly disclosed. One solution for courts is to determine which data needs to be disclosed and to obtain written consent from litigants for this disclosure. ODR courts will also need to inform prospective users about the potential limits to confidentiality and that any information shared might be anonymised and aggregated for the purpose of data analysis.

IV CONCLUSION

Many people view ODR as both a dispute resolution method and a disruptive tool that challenges traditional thinking in the justice domain.⁹⁹ China has historically been criticised for its weak rule

⁹⁷ «App违法违规收集使用个人信息行为认定方法» [Guidelines on Determining Illegal and Illicit Collection and Use of Private Information by Apps] (People’s Republic of China) Cyberspace Administration of China, Ministry of Industry and Information Technology, Ministry of Public Security and State Administration for Market Regulation, 28 November 2019.

⁹⁸ See, eg, James J Restivo Jr and Debra A Mangus, ‘Confidentiality in Alternative Dispute Resolution (ADR): Alternative Dispute Resolution: Confidential Problem-Solving or Every Man’s Evidence?’ (1984) 2(5) *Alternatives to High Costs of Litigation* 5.

⁹⁹ See, eg, Rabinovich-Einy and Katsh (n 1).

of law system due to its insufficient procedural safeguards and the difficulties that individuals can encounter in seeking access to justice; however, China has proven itself as the leader of ODR in its recent reforms that involve both private dispute resolution service providers and public adjudicative forums.¹⁰⁰ The advantages of ODR, including those related to improvements in efficiency, cost-effectiveness and flexibility in the dispute resolution process, and its positive effects on consistency, transparency and predictability, could help China to improve the image of its dispute resolution sectors around the world. However, the jurisdictional premise of ODR, which asserts that the outcomes dictated by algorithms based on big data will produce just results, has never been tested against traditional standards of procedural fairness or substantive justice.¹⁰¹ Thus, the quick rise of ODR-led justice in China should be viewed with caution.

ODR-led justice has transformed traditional notions of justice in many significant ways. The increased use of ODR technologies in the construction of internet courts in China has altered power relations within courts among legal practitioners and litigants, has transformed institutional capacities, judicial outcomes and will ultimately transform the overall justice experience. Policy incentives leading to the faster adoption of ODR technologies in courts will continue to highlight the positives of ODR, including accessibility, efficiency, predictability and dispute prevention. However, ODR also poses serious concerns to traditional justice principles, such as those related to impartiality, confidentiality and data safety in the dispute resolution process. If courts are to become equipped with ODR capacities in the near future, important steps need to be taken to ensure that ODR processes in China are fair, unbiased and safeguard procedural rights. AI and other types of technologies with the potential to infringe the privacy of ODR users should be used with caution. Before a fully integrated ODR system is developed in Chinese courts, consideration must be given to the effects of technology on conceptions of justice. Given the increasing amounts of research being conducted in this area, the prospects are promising for the future success of ODR technologies.

¹⁰⁰ Schmitz (n 2) 131–34.

¹⁰¹ See, eg, Raymond and Shackelford (n 1).