ONLINE DISPUTE RESOLUTION FOR E-COMMERCE IN CHINA: PRESENT PRACTICES AND FUTURE DEVELOPMENTS

Xue Hong[*]

The rapid development of e-commerce in China has generated increasing demands for dispute resolution. This represents new challenges for the Chinese court system, particularly with regard to the admissibility of e-evidence and conflict of laws. A greater role for alternative dispute resolution services offered by the private sector is also called for. This article explores the development of online dispute resolution in China, particularly online arbitration and mediation, and analyses their legal environment, feasibility and operational procedures. It also examines the existing online dispute resolution systems in China, particularly the CNNIC Domain Name Dispute Resolution Procedure.

Introduction – Entering the Network Age

The Chinese Internet population has seen a remarkable surge over the past years in absolute terms, though its size relative to the total population is still quite small. Between 1997 and 2000, the number of Internet users doubled every six months. As of January 2004, China had 78 million Internet users – 1,000 times more than the number of users in 1997; and 25.72 million computers connected to the Internet – representing a three-fold increase in comparison with July 2002. China now has the second largest Internet population in the world, just behind the United States. The growth of the Internet population is closely related to access capacity. In 1997, China had a capacity of only 24.5Mbps for International Internet access, but this capacity increased to 18,599Mbps by the end of June 2003. Direct Internet interconnection has been established with the United States, Canada, Australia, the United Kingdom, France, Germany, Japan and South Korea. Nearly nine million Internet users have been able to use the bandwidth network to access the Internet. There are 25,0651 domain names registered under .cn and a total of 473,900 websites (inclusive of websites under .cn, .com, .net and .org) in China.[1]

* Research Assistant Professor, Faculty of Law, University of Hong Kong; Director of IT Law Center, China Foreign Affairs University, Beijing, China.

1 China Internet Network Information Center (CNNIC), "Memorabilia of the Development of the Internet in China" at http://www.cnnic.net.cn/timeline.shtml.

From 1995 to 2001, China achieved remarkable progress in the Information and Communications Technology (ICT) sector. The national economy grew at an annual rate of seven to eight per cent, while the average growth rate for the information technology (IT) industry reached 31.4 per cent, three times higher than that of traditional industries. Its contribution to the growth of GDP increased from 5.2 to 12.4 per cent and its share of GDP rose from 2 to 4 per cent in 2000.[2] In November 2002, the Ministry of Information Industry (MII) set the goal of making China a "world base" of information industry in five to 10 years.

The booming ICT industry and the growing Internet population are fueling e-commerce in China. According to the MII, by the end of the year 2000, 800 online shopping sites, 100 auction sites, 180 remote education sites and 20 remote medical sites were set up in China, apart from 300 Internet service providers and 1,000 portal sites. Business-to-consumer (B2C) e-commerce was still in its start-up phase in 1999, with a total volume of online shopping of US$3.8 million. Comparatively, China's e-commerce transaction volume soared to US$9.33 billion in 2000, which included US$47.17 million in B2C transactions and 9.29 billion in business-to-business (B2B) transactions.[3] Forecasts for mobile subscribers range from a conservative estimate of 230 million subscribers by 2005, to an optimistic one of more than 400 million subscribers by 2005, yielding a penetration rate of 31 per cent.[4] Financial services (in particular, banking, insurance and securities trading) are becoming the first to embrace the significant B2C "e-commerce".

Given its massive size and potential, the evolution of e-commerce in China will be a determinant for global as well as regional e-commerce volumes. Many Internet enterprises are setting a strategic goal of capturing a share in the potentially large Chinese market. IDC forecasted in July 2003 that the Chinese e-commerce revenue would be US$16 billion by 2005.

Dispute Resolution for E-commerce

Conflicts are inevitable in any community. With this explosion of activity and collaboration in cyberspace, and with the corresponding rise of what many call "virtual communities" on the Internet comes the certainty of online disputes. According to a survey of the China Internet Network Information Center (CNNIC) published in July 2003, 40.7 per cent of Internet users have been involved in e-commerce, but only a third of them were "quite satisfied" or "satisfied" with the experience. Many users complained for the following

[2] Xiang Huaicheng (the former Minister of China Treasury), "Fiscal Policies of China and Network Economy", speech at the Symposium on Network Economy and Economic Governance, Beijing, China, Apr 2001.

[3] *Ibid.*

[4] Economist Intelligence Unit, Nov 2001.

reasons: lack of security of transactions (25.1 per cent); uncertainty of quality of goods, after-sale services and goodwill of business (41 per cent); delay in delivery of goods (7.1 per cent); and unreliability of online commercial information (7 per cent).[5] Indeed, appropriate channels and methods of dispute resolution are absolutely crucial for the sustainable development of e-commerce and the establishment of consumer confidence.

Unfortunately, Chinese e-commerce enterprises have been largely unprepared for dispute resolution. In August 2003, the first survey on the status quo of dispute resolution in the Chinese e-commerce market was launched by the Internet Society of China (ISC).[6] The survey disclosed that most e-commerce enterprises had no dispute resolution policy at all, nor did they adopt any dispute resolution mechanism. Nearly 90 per cent of the enterprises had not included a dispute resolution clause in their online contracts. Even if they did, the dispute resolution clause simply reads: "parties should do their best to resolve the dispute by negotiation; if the negotiation cannot result in a resolution, any party may sue in court."[7]

The Judicial System Under Challenge

The court system has always played a vital role in dispute resolution, but e-commerce disputes bring new challenges to this system, particularly on the issues of admissibility of e-evidence and conflict of laws.

In the Chinese legal system, evidence in electronic form is admissible in court. In accordance with the Chinese Civil Procedure Law, electronic evidence is categorised as "audio-visual evidence", one of the seven statutory categories of evidence. E-mails, software stored in a floppy disk or hard disk, VCDs, DVDs, etc. may be submitted as evidence. In some court hearings (copyright disputes in particular), parties have been permitted to connect to the Internet so as to display the disputed websites or hyperlinks. Although

5 "Semi-Annual Survey Result on the Development of the Internet in China", CNNIC, July 2003 at http://www.cnnic.net.cn/download/manual/en-reports/12.pdf. The CNNIC conducts the Semi-Annual Survey on the Development of the Internet in China and has published the survey results since 1997. Statistics are collected by software-driver with online searches, questionnaires and offline sampling.

6 The ISC is a non-governmental organisation established on 25 May 2001 with more than 150 members, including Network access carriers, Internet service providers, facility manufacturers and research institutes. The goal of the ISC is to promote the healthy development of the Internet in China and to make it an active part of the World Internet Community. The ISC is expected to promote self-regulation in Internet business and the good reputation of companies, to protect members' legitimate rights and interests, to strengthen communication and coordination between the community and government, to improve the implementation of relevant policies and regulations, and to promote Internet application and public awareness. Since its establishment, the ISC has drafted the Code of Conduct on Self-Disciplining in the Internet Business (signed by many e-commerce enterprises) and organised the Anti-spamming E-mail Coordination Team. *See* http://www.isc.org.cn.

7 Even for the most successful and sophisticated e-commerce enterprises, such as Eachnet.com (one of China's largest auction websites purchased by Ebay in July 2003), the dispute resolution clauses incorporated into the text of the online contracts are very simple. *See* http://www.eachnet.com.

electronic evidence is admissible, its weight of proof is weaker than other categories of evidence, such as "physical objects" or "official documents". According to the Chinese Civil Procedure Law, a court shall firstly verify the truthfulness of the electronic evidence and then determine its weight of proof in the context of all the other evidence.[8] In e-commerce disputes, most of the evidence is in the form of electronic documents, such as agreements, receipts or negotiation records, which may not be admissible in courts or may have little weight of proof. Difficulties in moving online evidence offline hamper the parties in recourse to the judicial system.

Another problem is that uniform jurisdictional rules for online disputes have not been established in the judicial system. Thus, conflict of laws problem regarding jurisdiction is inevitable. In accordance with the Chinese Civil Procedure Law, a lawsuit initiated for a tort shall be under the jurisdiction of the court where the infringing act occurs or where the defendant has domicile; a lawsuit initiated under a breach of contract shall be under the jurisdiction of the court where the defendant has domicile or where the contract is performed. Parties to a contract may also agree on jurisdiction by including a choice-of-court clause in written form. Although it is customary that as far as possible jurisdictional rules for online dealings must not be different from those applied to offline dealings, special rules seem to be necessary in exceptional circumstances, for instance, when the contract is performed entirely online. Indeed, in the latter case, the link of the contract (and the potential dispute arising out of it) to the specific territory does not exist separately from the location of the parties to the contract. As for tortious acts committed on the Internet (such as spreading false commercial information, defamation, disclosing another's secret information, or infringing privacy or copyright), jurisdictional conflicts are even more severe and complicated.[9] In this regard,

8 The Chinese Supreme People's Court, in its interpretation called "Several Stipulations on Evidence in Civil Proceeding" (enacted on 21 Dec 2001), requires that admissible audio-visual evidence be stored in an original carrier; subsequent reproduction with the source and production process clearly recorded is only acceptable where the original carrier cannot be provided. In practice, parties tend to apply for notarisation of the electronic evidence, as notarised evidence would carry more weight as proof in court proceedings.

9 For example, in *Read Co v East Information Services Ltd* (Beijing Haidian District Court, 15 Apr 1999; Beijing First Intermediary Court, 1999), the plaintiff, who sued the defendant for illegally copying its homepage, sued in a court of its own domicile. The defendant claimed that the court had no jurisdiction. According to the Civil Procedure Law, the defendant may object to the court's jurisdiction when filing the bill of defence. The court shall examine such objection, and transfer the case to another court that does have jurisdiction, if the objection is tenable. In this case, the court held that it had jurisdiction because the alleged infringing act was committed in the locality of its jurisdiction. The defendant appealed to the Beijing First Intermediary Court. The second instance court held that once the infringing reproduction occurred, both the place in which the uploading server was located and the place where the accessing terminal was located may be treated as the venues where the infringing act occurred, and the plaintiff may select a jurisdictional court accordingly. Thus, it was not improper for the plaintiff to bring the action to the court in the venue where its "accessing terminal" was located. Finally, the first instance order was upheld.

the Chinese Supreme People's Court has been trying to establish special jurisdictional rules for specific types of online disputes. For example, the Chinese Supreme People's Court, in its "Interpretations on Application of Law in Trials of Computer Network Copyright Dispute Cases" published in November 2000, establishes jurisdictional rules for online copyright infringement disputes.[10] However, as regards disputes for which online jurisdictional rules have not been established, jurisdictional conflicts are still difficult to resolve.

Going to Online Dispute Resolution

As the judicial system faces new challenges, e-commerce enterprises call for a greater role for alternative dispute resolution (ADR) offered by the private sector. In China, ADR refers generally to various out-of-court methods for resolving disputes including negotiation, mediation, arbitration and their combination in various forms. All of these processes are less formal than litigation, and are typically also faster and less expensive.

It seems natural to conduct dispute resolution online when a dispute arises online. Those who conduct their business and personal affairs online are also more comfortable having conflicts resolved on the Internet. Tailoring ADR to the online environment breaths new life into the ADR movement. In China, traditional forms of ADR are now being adapted to the online arena, utilising the unique characteristics of the Internet to settle disputes.[11] Although most of these methods, processes or schemes are still in their preliminary stage, they represent the future of Chinese online dispute resolution (ODR).

The next two parts of this article will consider the future development of Chinese ODR, discussing online arbitration and mediation respectively, and analysing their legal environment, feasibility of establishment and operational procedures. The final part will explore the presently active ODR systems, with a special focus on the CNNIC Domain Name Dispute Resolution Procedure (CNDRP), and will consider whether the CNDRP can facilitate the future development of Chinese ODR.

[10] In accordance with the "Interpretations on Application of Law in Trials of Computer Network Copyright Dispute Cases", a lawsuit initiated for infringing network copyright shall be under the jurisdiction of the court in the venue where the infringing act occurs or where the defendant is domiciled. The place in which the infringing act occurs includes the place where the facilities (such as network servers, computer terminals, etc) used for the infringement are located. Where neither the place where the infringing act occurs nor the place where the defendant has domicile can be determined, the location of the facilities such as computer terminals, etc through which the plaintiff discovers the infringing content may be regarded as the place where the infringing act occurs.

[11] Online ADR allows users to take advantage of the Internet in three ways: (a) handle matters that previously required physical presence at a distance; (b) handle matters quickly, if not instantaneously, that might have been cumbersome or, in fact, impossible, to handle previously; and (c) acquire information-processing capabilities beyond those of human capabilities.

Online Arbitration

Arbitration has the advantage of allowing parties full autonomy to resolve disputes with flexibility, confidentiality, finality and enforceability of the award. More parties have come to choose and adopt arbitration for dispute resolution. Arbitration has been a relatively new addition to the Chinese dispute resolution system. Although an arbitral institution was established to handle international commercial disputes as early as 1956, arbitration received little serious consideration before the Chinese economic reform started at the end of 1970s.

In the early 1980s, arbitration bodies were created to deal with a growing number of disputes. However, without a uniform arbitration law, arbitral bodies were created by various administrative departments and lacked unifying concepts or principles; contradictory views of the function of arbitration contended, as confusion between administration and dispute resolution grew. By the end of the 1980s, the situation had become chaotic.[12] On 31 August 1994, the Arbitration Law (AL) was promulgated by the Chinese National People's Congress with the aim of establishing a coherent nationwide arbitral system. AL, entering into force as of 1 September 1995, defines arbitrable transactions, provides procedural rules for the conduct of arbitration, aims for professional arbitration personnel, endows arbitral awards with finality, and outlines the relationship between arbitration organisations and the courts. In accordance with AL, former arbitration organisations were dissolved and new arbitration commissions were established.

Before 1996, the Chinese arbitration system was strictly divided between "foreign-related" arbitration and domestic arbitration. With respect to the former, the China International Economic and Trade Arbitration Commission (CIETAC), which was set up in April 1956 within the China Council for the Promotion of International Trade (CCPIT), had enjoyed a monopoly with respect to international commercial disputes for four decades.[13] Only

[12] At that time, there were more than 20 different laws that created arbitration mechanisms for domestic matters. The sources of those laws varied from the State Council to highly specialised agencies such as the fishing administration. Multiple local arbitration regulations existed on such matters as contracts, product quality and prices, etc. Some 20 different types of arbitration organisations existed, varying on such fundamental issues as the requirement of an agreement between the parties as a prerequisite to arbitration and the relationship of arbitration and litigation.

[13] CIETAC has its headquarters in Beijing. The Shenzhen Sub-Commission and Shanghai Sub-Commission were established in 1989 and 1990 respectively in view of the expansion of arbitration activities. All these establishments constitute one institution. They use the same Arbitration Rules and Panel of Arbitrators when exercising their arbitration jurisdiction. After more than four decades of services, CIETAC enjoys a wide reputation domestically and internationally for its independence, impartiality, efficiency and expeditiousness in handling cases, and has become one of the major commercial arbitration institutions in the world. In the past few years, it has grown rapidly to become the world leader in terms of caseload. There have been parties from 45 countries and regions other than China involved in CIETAC arbitration cases. CIETAC awards are recognised and enforced in more than 140 countries and regions. *See* http://www.cietac.org.cn.

in July 1996 did the State Council decide that other arbitration commissions may have jurisdiction over disputes involving foreigners as far as foreigners agree.

When both existing arbitration organisations and emerging ODR service providers are keenly looking forward to the opportunities of offering online arbitration, many elements need to be taken into account.

Establishment of Online Arbitration

If an ODR service provider has a glance at AL, it will realise that it is not easy to enter the online arbitration market. In accordance with AL, establishment of online arbitration is subject to the restrictions and requirements for market entry discussed below.

Geographical locations

Arbitration commissions may be established in municipalities directly under the central government (Beijing, Shanghai, Tianjin and Chongqing), in municipalities where the provincial governments are situated, or, if necessary, in other cities with established districts.

Organisers

Arbitration commissions shall be organised by the local government and the chamber of commerce.

Registration

The establishment of an arbitration commission shall be registered with the local judicial administrative department.

Conditions

An arbitration commission shall have its own name, domicile and charter, possess the necessary property, and have its own staff and arbitrators for appointment. An arbitration commission shall comprise of a chairman, two to four vice-chairmen and seven to eleven members. The arbitration commission shall appoint fair and honest person as its arbitrators.[14]

[14] According to AL, the chairman, vice-chairmen and members of an arbitration commission should be specialised in law, economics and trade and have actual working experience. The number of specialists in law, economics and trade shall not be less than two-thirds of the members of an arbitration association. Arbitrators should have eight years of experience as arbitrators, lawyers or judges, or comparable qualifications. Lists of members of the panels are to be published.

Membership

Arbitration commissions are the members of the China Arbitration Association, which is a self-regulatory organisation of arbitration commissions responsible for maintaining professional discipline among the commissions. They supervise the arbitration commissions, their members and arbitrators in accordance with the charter.

Thus, if an ODR service provider really intends to label its service as "arbitration", it would have to carefully select the location of its headquarter, obtain approval from local government and chamber of commerce, apply to the competent authority for registration provided that it has fulfilled all the conditions of formation, and become a member of the China Arbitration Association.[15] Comparatively, it would be much easier for existing arbitration commissions to enter the online arbitration market.[16]

Arbitration Agreement

Arbitration commissions should accept the applications for arbitration submitted by a party in accordance with the arbitration agreement between the parties.[17] According to AL, the parties adopting arbitration for dispute resolution shall reach an agreement on a mutually voluntary basis when concluding their contract or after a dispute arises. The parties have the freedom to choose the arbitration commission and the composition of the arbitral tribunal. Once the parties have agreed to arbitration, a party may not take the dispute to a court or another arbitration commission. An arbitration agreement must express the intent of the parties to submit to arbitration, identify the matters to be arbitrated, and specify the arbitration commission that the parties have chosen.

In accordance with AL, an arbitration agreement shall be in written form. However, in an online transaction, an arbitration agreement or arbitration clause included in a contract usually is in electronic form and is online. Thus, the first legal question for online arbitration is whether an electronic arbitration agreement/clause is in the written form required by AL. The answer is affirmative. According to the Chinese Contract Law, a contract shall be in

[15] Fortunately, AL provides that arbitration commissions are independent and not subordinate to any administrative organ, court or other arbitration commissions.

[16] Recently, the call for the revision of AL has become stronger. It still unclear if AL could be revised in the short term and if the hurdles to market entry could be removed.

[17] In accordance with the Arbitration Law, all types of economic disputes, inclusive of disputes over contracts or other disputes involving rights and interests in property among citizens, legal persons and other organisations that are of equal status, may be submitted to arbitration. Disputes over family-related matters, namely those involving marriage, adoption, guardianship, support for the elderly and inheritance disputes, are not arbitrable, and neither are administrative disputes falling within the jurisdiction of relevant administrative organs according to law.

writing if the relevant law or administrative regulation so requires. Written form means a memorandum of contract, letter or electronic message (including telegram, telex, facsimile, electronic data exchange and electronic mail etc.) which is capable of expressing its content in a tangible form. Since an arbitration agreement concluded through e-mail exchanges or click-through process on a website is capable of expressing the content in a tangible form, it meets the requirement for written form.[18]

Even though an arbitration agreement has been concluded, it may be invalid. According to AL, if any party contests the validity of the arbitration agreement, before the start of the first hearing of the arbitration tribunal, that party may either apply to the arbitration commission for an award or to a court for a decision.[19]

An arbitration agreement is invalid if: (a) the matters agreed upon for arbitration are beyond the scope of arbitration prescribed by law; (b) the arbitration agreement is concluded by persons without or with limited capacity for civil acts (for instance, in B2C transactions, the consumer is proved to be a minor); (c) one party forces the other party to sign an arbitration agreement by means of duress; or (d) the agreement does not include the arbitration matter or the arbitration commission, and the parties fail to agree upon a supplementary agreement.[20]

In addition, the validity of an arbitration agreement may be challenged when it is in the form of standard terms prepared by an e-commerce enterprise. According to the Chinese Contract Law, standard terms are contract provisions which were prepared in advance by a party for repeated use, and which are not negotiated with the other party in the course of concluding the contract.[21] A standard arbitration clause may be imposed in the following

[18] According to the Chinese Contract Law, when a contract is concluded by the exchange of electronic messages, if the recipient of an electronic message (offer or acceptance) has designated a specific system to receive it, the time when the electronic message enters such specific system is deemed its time of arrival. If no specific system has been designated, the time when the electronic message first enters any of the recipient's systems is deemed its time of arrival. In such a case, the recipient's main place of business is the place of formation of the contract. If the recipient does not have a main place of business, its habitual residence is the place of formation of the contract. If the parties have agreed otherwise, such agreement prevails. Where parties enter into a contract by the exchange of electronic messages, one party may require execution of a confirmation letter before the contract is formed. The contract is formed upon execution of the confirmation letter.

[19] Where one party submits to the arbitration commission for an award, but the other party sues in court for a decision, the court shall make the decision. *See* the Chinese Arbitration Law.

[20] *See* the Chinese Arbitration Law.

[21] For example, many enterprises, in their foreign trade contracts, include the following model arbitration clause recommended by CIETAC: "any dispute arising from or in connection with this Contract shall be submitted to the China International Economic and Trade Arbitration Commission for arbitration which shall be conducted in accordance with the Commission's arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties."

ways: to place the clause in the "terms and conditions" or "conditions of use" section which each customer or user must agree to be bound by; to include the term with the product so that the consumer is confronted with the term after receiving the paid-for item; and to include the term in the "click wrap" window that pops up on a user's computer screen requiring the consumer's agreement before the transaction proceeds.

Thus, the second legal question for online arbitration would be how to design a valid arbitration agreement / clause in standard terms. An enterprise should be very prudent when using the following tactics: (a) providing an arbitration clause preventing the possibility of class action lawsuits against it. Such a term would undercut the legal protection for consumers by depriving the consumers' material right of seeking legal remedy,[22] and is thus invalid in law;[23] (b) burying an arbitration clause deep into a terms-and-conditions web page that can hardly be noticed by consumers. By doing so, the enterprise is pushing the consumer to make an uninformed decision. Since the party providing the standard term is legally obliged to take reasonable measures to incorporate the term into the contract and call the other party's attention thereto, the term so buried in deep link would not be valid;[24] (c) placing an arbitration clause online for users to browse, rather than asking them to show their consent by taking any affirmative steps (such as clicking on an "I agree" button). Different from a click-wrap agreement, such a "browse-wrap" agreement is very likely not to be binding because the user may contend that no agreement has ever been reached.[25]

Arbitration Procedure

According to AL, the party applying for arbitration shall submit to the arbitration commission the arbitration agreement and an application for arbitration. It is not required that in an application for arbitration, a defence statement and other documents served in arbitration procedure be in "paper"

[22] According to the Chinese Civil Procedure Law and related Interpretations issued by the Chinese Supreme People's Court, consumers may bring class action lawsuits in products / service defects disputes.

[23] According to the Chinese Contract Law, a standard term is invalid if it excludes the liabilities of the party providing such term, increases the liabilities of the other party, or deprives any of the material rights of the other party.

[24] In accordance with the Chinese Contract Law, where a contract is concluded by way of standard terms, the party providing the standard terms shall abide by the principle of fairness in prescribing the rights and obligations of the parties and shall, in a reasonable manner, call the other party's attention to the provision(s) whereby such party's liabilities are excluded or limited, and shall explain such provision(s) upon request by the other party.

[25] In accordance with the Chinese Contract Law, in case of any dispute concerning the construction of a standard term, such term shall be interpreted in accordance with common sense. If the standard term is subject to two or more interpretations, it shall be interpreted against the party providing it. If a discrepancy exists between the standard term and a non-standard term, the non-standard term prevails.

form. AL does not preclude arbitration commissions from receiving documents in electronic form and maintaining online arbitration procedures.[26]

When establishing online arbitration, the arbitration commissions should be careful in two aspects. First, in the arbitration procedure, a tribunal session shall be held to hear the case, unless the parties agree otherwise. Then the arbitration tribunal may render the award in accordance with the arbitration application, the defence statement and other documents.[27] Therefore, if an online arbitration procedure is merely conducted through digital textual communications, without including any oral hearing, it might be contradictory to the legal requirement in AL.

In practice, without a full-blown hearing with representation and the presentation of evidence and witnesses, an online discovery process limits the scope of discovery. So long as the facts are undisputed, this will provide no problem – the arbitrator can examine the record and use it as the basis of the decision. A very large obstacle appears, however, if key facts are disputed. Additionally, where the parties rely on witnesses to inform the arbitrator, the lack of a face-to-face encounter may deprive the arbitrator a chance to assess the witnesses' demeanour and credibility.

One possible way to work around any shortcomings arising from lack of physical interaction is to employ video-conferencing or streaming video. This can be used to allow the arbitrator to see the parties, and in some situations, to allow the parties to see each other. As the medium develops, it will very likely produce new tools for interaction in arbitration procedures. However, when adopting advanced technologies, the arbitration commissions should take into account the users' burden, broadband capacity and costs. In line with the CNNIC Survey 2003, only 5.3 per cent of the 1.3 billion Chinese population are Internet users, among which only 14 per cent are using the bandwidth network to access the Internet, while 66 per cent are still dialling up to the network.[28] If the usage of new technology, such as

[26] The arbitration procedure established by AL is like a simplified civil procedure for litigation. Unless the parties agree to appoint a single arbitrator, their dispute will be heard by a tribunal composed of three arbitrators. Each party may choose one arbitrator from the panel; the third, the presiding arbitrator, is chosen by the commission or the parties if they agree. Rules for disqualification of arbitrators are stated, including *ex parte* meetings with the parties or acceptance of entertainment or gifts. The tribunal may mediate the dispute if the parties agree. A decision is by majority opinion of the arbitrators. The award becomes effective on the date it is rendered.

[27] According to AL, the arbitration commission shall notify the parties of the date of the hearing. The parties may authorise their attorney or other agents to act as arbitration agents to deal with the matter relating to arbitration. The parties shall provide evidence in support of their claims. Any evidence shall be presented at the hearing. The parties may challenge the validity of such evidence. The parties have the right to argue during an arbitration procedure. At the end of the debate, the presiding arbitrator or the sole arbitrator shall ask for the final opinion of the parties. An arbitration tribunal shall make a written record of the hearing. The arbitrators, recording clerk, parties and other participants to the procedure shall sign or affix their seals to the record.

[28] *See* n 5 above.

video-conferencing, places a heavy burden on average consumers, it surely would not be successful. Another element that should be considered is arbitration fees. Although Chinese arbitration organisations advertise that their services are quite cheap, compared with their foreign counterparts, Chinese consumers still view their arbitration fees as burdensome.[29] If the adoption of new technology results in a further increase of the arbitration fees, it is quite certain that online arbitration would not be a popular form of dispute resolution at least in B2C transactions.

Second, AL requires that arbitration commissions ensure the confidentiality of the arbitration procedure. Only where the parties agree to a public hearing may the arbitration procedure proceed in public, except for those concerning state secrets. However, any online communication necessarily involves the copying of transferred information in servers located across the world. Copies will survive, at a minimum, on the hard drives of the sender and recipient, as well as on the Internet service provider's backup system and in a temporary storage file. The possibility of information being accessed by inappropriate persons is a serious threat to the confidentiality of the arbitration procedure. Therefore, it is necessary for the arbitration commissions to deploy effective technical measures (such as pseudonyms, re-mailer systems and encryption, etc.) to prevent unauthorised interception and modification of online communications.[30] If an arbitration commission discovers a hacking or other invasion of its online computer system, it should report to the local public security bureau in a timely manner and assist the bureau in investigating the case.[31] Illegal interceptive acts against another's computer networks are subject to administrative punishments, and if they constitute crimes, penal punishments.[32]

Enforcement of Arbitral Awards

In accordance with AL, an arbitral award shall be in the form of a written statement signed by the arbitrators, sealed by the arbitration commission,

[29] For example, according to the CIETAC Arbitration Fee Schedule, for a case with an amount of claim of 1,000,000 Yuan (US$120,482) or less, the arbitration fee is 3.5 per cent of the claimed amount. The minimum fee is 10,000 Yuan (US$1,204). Each case, when accepted, shall be charged an additional amount of 10,000 Yuan (US$1,204) as a registration fee which includes the expenses for examining the application for arbitration, initiating the arbitration proceedings, computerising management, and filing the documents. *See* http://www.cietac.org.cn/english/E_cd6/E_cd6.htm.

[30] According to the Regulations on Protection of the Security of the International Interconnection of Computer Information Networks, enacted by the Ministry of Public Security on 16 Dec 1997, any entity that uses the Internet shall establish a policy for protection of network security and take corresponsive technical measures. Otherwise, it is subject to administrative punishments imposed by the local public security bureau.

[31] *See* the Regulations on Protection of the Security of the International Interconnection of Computer Information Networks.

[32] *Ibid*. *See also* the Chinese Criminal Law and the Decision on Safeguarding the Internet Security made by the Standing Committee of the National People's Congress on 28 Dec 2000.

and it becomes effective on the date it is rendered.[33] The parties shall execute an arbitration award.[34] If one party fails to execute the award, the other party may apply to a court for enforcement in accordance with the Civil Procedure Law, and the court shall enforce the award.[35]

For online arbitration, though an award may be made and served on the parties in electronic form, it is necessary for the arbitration commission to prepare copies of the award in paper form in case any party needs to apply to the court for enforcement. Without a uniform e-commerce law or electronic signature law so far, the Chinese courts can hardly recognise the legal effect of electronic awards and the electronic signatures / seals thereon.[36]

After a court accepts an application for enforcement of an arbitral award, it may refuse to enforce the award on the grounds set out in the Civil Procedure Law, including: the parties did not include an arbitration agreement; the matters arbitrated exceed either the arbitration agreement or the jurisdiction of the arbitration commission; the composition of the tribunal violated AL; the main evidence on which the facts were ascertained was insufficient; or the law was incorrectly applied. It seems that the broadly expressed basis for refusing to enforce an award permits the court to engage in a wide-ranging reinvestigation of the arbitral procedure, which is an embedded defect in the Chinese arbitration process. The development of online arbitration would have to be in the shadow of such a defect within the legal system.

In addition, there are the extra-system barriers that may prevent the effective enforcement of arbitral awards. Among them, local protectionism is most threatening. Local protectionism refers to the fact that some courts tend to favour local parties when deciding cases of economic disputes between local

[33] In accordance with AL, an arbitral award shall set forth the arbitration claims, the matters in dispute, the grounds upon which an award is given, the results of the decision, the responsibility for the arbitration fees and the date of the award. If the parties agree not to include in the award the matters in dispute and the grounds on which the award is based, such matters may not be stated. Since the decision is by majority opinion of the arbitrators, the arbitrator who disagrees with the award may choose to sign or not to sign the award.

[34] According to AL, the award may be challenged in the local intermediate court for certain limited reasons, which include circumstances where: no arbitration agreement was reached; the award covered matters not within the scope of the agreement or the jurisdiction of the commission; the composition or the procedure of the tribunal violated the law; the evidence on which the award was based was fabricated; one party concealed evidence that affected the impartiality of the arbitration; or the arbitrators accepted bribes or practised favouritism.

[35] According to AL, if one party applies for the enforcement of an award while the other party applies for a cancellation of the award, the court receiving such application shall rule to suspend enforcement of the award. If a court rules to cancel an award, it shall rule to terminate enforcement. If the court overrules the application for cancellation of an award, it shall rule to resume enforcement. The party may also, on the basis of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), apply to a foreign court for enforcement of an award through a proper channel.

[36] The draft of the Chinese Electronic Signature Law was reviewed by the National People's Congress Standing Committee in Apr 2004. It is expected to be passed in 2005.

residents and other parties outside the region. Local protectionism is to protect local economic interests at the cost of judicial justice. Even if one prevails in an online arbitration proceeding, one may have to rally the coercive legal power of the jurisdiction in which the other party, or that party's property, resides. Due to local protectionism, an award made in the cyberspace may not be supported by a court in the real world.

Online Mediation

In China, the set of institution and practices generally under the name of "*tiaojie*" ("mediation" or "conciliation") is of great importance in the field of dispute resolution. The idea of mediating disputes online has captured the imagination of the dispute resolution profession. Experiments are now underway on a small scale, and it is likely that more online mediation will take place. If we want to know if online mediation will be successful in China, we need to understand the related cultural, traditional and legal environment, which is the soil in which online mediation is growing.

Mediation: Flower of Chinese Legal Culture

Culture plays a significant role in the perception, conception, management and settlement of disputes in every society. Although mediation is a common term used in both the East and West, in Western scholars' eyes, what is called mediation in China is very different from what is called mediation in Western ADR, to the point where it would be seriously misleading simply to use the English word without further explanation.[37] Traditionally, the Chinese concept of mediation is highly malleable. It may be characterised, on one hand, as a flexible and blended procedure of concessions, arrangements and compromises, while at other times it may take on some of the coercive aspects of adjudication.[38]

Chinese mediation has its deep roots in Confucian culture. The philosophic influence of Confucianism has been pervasive among the Chinese people from ancient to contemporary times. Confucianism inculcates and reinforces familial and collective objectives. The values cherished are those of cooperation and collaboration, hierarchy and harmony, peace and stability. According to Confucianism, disputes fundamentally disturb the social harmony and should generally to be shunned. Litigation basically runs contrary

[37] Donald C. Clarke, "Dispute Resolution in China" (1991) 5 *Journal of Chinese Law* 245.

[38] Michael J. Moser, *Law and Social Change in a Chinese Community: A Case Study From Rural Taiwan* (London: Oceana Publications, Inc, 1982), p 2.

to this objective, and is thereby to be avoided.[39] The Chinese methods of dealing with inevitable disputes lie in conciliation and mediation. In the tradition of Imperial China, great importance was consistently attached to the prevention of conflicts before they arose, rather than to ways and means of resolving them after they have broken out.

Even in modern day China, there exists an expectation that mediators are supposed not only to resolve disputes but also to prevent their occurrence. Due to the culture pattern, a striking feature of Chinese commercial behaviour is the strong desire to avoid acknowledgement of the existence of a serious dispute and to make disputes disappear. It is little wonder that commercial operators are generally propelled by culture to select mediation as the means of "dissolution" of disputes. In the e-commerce age, such cultural background indicates that mediation will play an important role in the future of the Chinese ODR system, and future online mediation will undeniably have Chinese characteristics.

Types of Mediation

In the Chinese legal system, mediation has been absorbed into various forms of dispute resolution, inclusive of court proceedings, administrative and arbitral proceeding. Thus, besides the "pure" mediation processes, there are mediation by courts, mediation by administrative bodies and mediation by arbitral tribunals.

According to the Chinese Civil Procedure Law, the court may, in civil proceedings, resolve a dispute through mediation on the basis of the parties' voluntary participation, and by ascertaining the facts and distinguishing right from wrong. Agreement on mediation must be reached between the two parties of their own accord and no coercion is allowed; contents of the agreement shall not go against the law. Where the parties have failed to reach agreement through mediation or one party goes back on his word before the delivery of the bill of mediation, the court shall adjudicate promptly.[40]

According to AL, before giving an award, an arbitral tribunal may mediate between the parties. Where the parties apply for mediation voluntarily,

[39] Goh Bee Chen, *Law without Lawyers, Justice without Courts* (Burlington: Ashgate Publishing Company, 2002), pp 1–23.

[40] In accordance with the Chinese Civil Procedure Law, mediation by the court may be presided over by a judge or a collegial bench, and it shall be conducted on the spot as far as possible. For the sake of mediation, the court may use simple ways to summon the parties and witnesses to court. The court may, according to the requirements of the case, invite the relevant units and people to assist in the mediation; and the invited units and individuals shall not refuse to assist. The court shall prepare a bill of mediation for an agreement reached through mediation. The bill of mediation shall include the request of litigation, facts of the case and the results of the mediation. The bill of mediation shall be signed by the judge and the recording clerk, sealed by the court and delivered to the parties. The bill of mediation becomes legally effective after it has been delivered to the parties and is signed by them. *See* the Chinese Civil Procedure Law, Ch 8 "Mediation".

the arbitral tribunal shall do so accordingly. Where mediation is unsuccessful, the arbitral tribunal shall make an award promptly.[41]

According to various administrative stipulations, the competent authorities may, in the administrative proceedings, mediate civil disputes between parties, in addition to making administrative decisions.[42]

The fact that mediation can be incorporated into other forms of dispute resolution does not prevent it from functioning independently. Indeed, the independent mediation processes, called "people's mediation", are very important in China. The basic design of people's mediation is to use the people's autonomous organs at the grass-root level to resolve civil disputes within the community. Although people's mediation is propagated as a creation of the Communist government, it is consistent with the Confucian tradition of seeking social harmony, and is in fact a continuation of private mediation that has been used in China for a millennium.

So much importance is attached to the people's mediation that it has been written into the Chinese Constitution.[43] On 5 May 1989, the State Council enacted the Organic Regulations on the People's Mediation Committees, which entered into force on the same date.[44] By the end of 1992, there were more than one million committees of people's mediation all over China with more than 10 million mediators. From 1985 to 1992, the committees handled over 5.26 million cases, almost five times the number received by the courts during the same period.[45]

[41] In accordance with AL, where a settlement agreement is reached through mediation, the arbitral tribunal shall prepare the mediation statement or the award on the basis of the results of the settlement agreement. A mediation statement shall have the same legal force as that of an award. A mediation statement shall set forth the arbitration claims and the contents of the agreement between the parties, and be signed by the arbitrators, sealed by the arbitration commission, and served on both parties. A mediation statement shall have legal effect once signed and accepted by the parties. Where the parties fall back on their words before the mediation statement is signed and accepted by them, the arbitral tribunal shall make the award promptly. *See* the Chinese Arbitration Law, Arts 51–52.

[42] For example, according to the Chinese Patent Law, in disputes resulting from patent infringement, the patentee or any interested party may request the patent authorities to handle the matter. Where the patent authorities consider the infringement well founded, it has the power to order the infringer to stop infringement immediately. The patent authorities may, upon the request of the parties concerned, mediate on the damages for patent infringement. If mediation does not work, the parties concerned may lodge a lawsuit with the court according to the Chinese Civil Procedure Law.

[43] According to Art 11 of the Chinese Constitution: "people's mediation committees may be established by residents' committees or villagers' committees in urban neighbourhood or rural villages ... to resolve civil disputes ... and communicate the people's ideas, requests and suggestions to the people's government."

[44] In the legal history of the People's Republic of China, the system of people's mediation was first established in accordance with the Provisional Organic Rules on the People's Mediation Committees enacted in 1954. During the Cultural Revolution, people's mediation committees were entirely suspended or abolished along with other legal institutions. With the end of the disaster, the Ministry of Justice not only revived people's mediation but also emphasised that it was to be a primary avenue for resolving civil disputes.

[45] An official survey shows that the cases handled by the mediation committees are civil disputes involving marriage, love affairs, inheritance, support of parents or children, housing, family relationships, relations between neighbours and debt. Theses cases can be grouped into three primary categories: personal, production-related, or property-related. *See Law Year Books of China*, from 1991 to 1998.

The role of mediation grew as economic disputes over economic contracts and private property multiplied. A variety of professional mediation organisations have been established to resolve economic disputes, including the Conciliation Centres of the China Council for the Promotion of International Trade (CCPIT), China Chamber of International Commerce (CCOIC) and its Sub-councils.[46] These professional organisations constitute the basis of the development of online mediation.

Online Mediation

According to the Organic Regulations on the People's Mediation Committees, resident's committees in urban neighbourhoods or rural villages may establish people's mediation committees, and shall operate under the guidance of the basic-level governments and courts.[47] Enterprises or non-profit organisations may also establish people's mediation committees by making reference to these regulations.[48] Legally, there is no prerequisite or restriction in respect of the establishment of online mediation organisations. Thus, after obtaining all the necessary approval for the establishment of an enterprise and registration with the competent authorities, an online mediation process may be established without any legal barriers from the Organic Regulations on People's Mediation Committee.

[46] The CCPIT Conciliation Centre was established in Beijing in 1987. It independently and impartially assists disputing parties to settle their disputes arising from commercial, maritime and other business by means of conciliation (mediation). To meet the needs of the continuous deepening of China's reform and opening-up as well as the development of conciliation business, since 1992 CCPIT / CCOIC has set up more than 30 conciliation centres within its sub-councils in various provinces, municipalities and major cities in China. It has thus created a conciliation network all over the country. These local conciliation centres are functioning under the direction of the CCPIT Conciliation Centre in respect of their professional work, using uniform conciliation rules. By the end of 1999, the conciliation network had handled an accumulative caseload of more than 2000 cases with a success rate of above 80 per cent. Parties involved spread over more than 30 countries and regions. Since 1987, the Centre has signed cooperation agreements with the Argentine-China Conciliation Centre, the New York Conciliation Centre, etc. The CCPIT Conciliation Centre joined the International Federation of Commercial Arbitration Institutions (IFCAL) in 1995 and signed an Agreement for Cooperation in Conciliation (Mediation) with the London Court of International Arbitration (LCIA) in 1997. *See* http://www.cietac.org.cn/BBC/a18.html.

[47] The basic level governments guide and supervise the work of the people's mediation committees through judicial assistants, who are judicial administrative workers at the basic level of the people's governments, specifically responsible for the work of handling people's disputes. *See* the Regulations on Judicial Assistants enacted by the Ministry of Justice in 1990.

[48] Obviously, some provisions in the Organic Regulations on People's Mediation Committees may not be applied to those committees established by the enterprises or non-profit organisations. For instance, in line with the regulations, the committees should not charge any fee for resolving civil disputes, and should be subsidised by the committees in urban neighbourhoods or rural villages. In reality, all "private" professional mediation organisations are self-sustained and charge fees for their services. *See* "Schedule of Fees of CCPIT Conciliation Centre" at http://www.cietac.org.cn/BBC/a22.html.

Mediation processes are flexible in accepting cases. A mediation organisation may accept a case in accordance with a conciliation agreement between parties or in accordance with an application for conciliation from one party with the consent of the other party to conciliate.[49]

Three basic principles have been developed for mediation, both offline and online. First, mediation shall never go against the law. Mediation shall be conducted in accordance with the law, regulations, rules and policies. Where there are no clear stipulations in any of the above normative documents, mediation must rely on social morality, the terms of the contract, international practice and the principle of being just, fair and reasonable, in order to bring about mutual understanding and concessions between the parties, and help them to reach an amicable settlement. For mediation of disputes arising from online transactions, those customs or practices that have been developed within an online community (*netizens' nettiques*) may also be taken into account. Second, mediation should be on the basis of the parties' voluntariness and equality. The parties should participate in the mediation process and reach a settlement on a completely voluntary basis. Third, mediation is not a prerequisite to bringing an action in court. Parties who have not gone through mediation or have been unsuccessful in mediation may sue in court.

In accordance with the Organic Regulations on People's Mediation Committees, mediation committees should conduct conciliation on the basis of ascertaining facts and distinguishing right from wrong, and use persuasion and education in assisting the parties to reach a mutually acceptable solution which is consistent with the laws and policies. In practice, mediators may conduct mediation in the manner deemed appropriate, and may meet or communicate with the parties in an appropriate manner.

Different ODR services offer various versions of the processes. Some attempt to reproduce, as faithfully as possible, traditional face-to-face mediation, while others offer processes deviating from traditional mediation. Generally, for an online mediation process, the scope of services, mediation rules, schedules of fees and other essential information should be published online.

Online mediation, as opposed to traditional mediation, is conducted on the Internet through digital communications between the parties and the mediator. Usually, current technology makes use of textual communications among all concerned, either through e-mails or other platforms with specially designed software. Although this can be supplemented by telephone calls

[49] In accordance with the Organic Regulations on People's Mediation Committee, even without any application from the parties, a committee may mediate the dispute, provided that neither party raises an objection. However, such stipulation should not be applied in the private mediation of economic disputes.

and face-to-face meetings, the current infrastructure does not allow for widespread videoconferencing over the web.[50]

Textual digital communications, unlike face-to-face discussions, have permanence, a distinction that is bound to have a significant impact on mediation. In Western countries, concern has been raised on how online mediation can be more transparent and accessible to the general public.[51] However, in China, privacy has never been a serious concern for mediation.[52] Unlike its Western counterparts, Chinese mediation, traditionally, tends to be "open". Not only are the mediation processes recorded by mediators with mediation statements issued at the request of the parties, the mediation process may also be open to the public for the purpose of educating others as well as the parties to obey laws and disciplines and to respect social ethics.[53] Publicising the dispute and the resolution has long been used as an effective method of "social sanction" to prevent the occurrence of future disputes.[54] Only recently, some professional mediation organisations have, under the influence of Western mediation, taken some measures to ensure the confidentiality of their mediation processes.[55]

Mediation, either offline or online, may result in settlement agreements between the parties. There used to be different understandings of the legal

[50] Some indicate that textual communications have limitations. For example, there is no tone of voice, no accompanying body language, and no ability to monitor reactions to statements made. Obviously, this problem can be addressed by the introduction of new technologies, but the question remains whether these new settings will be able to offer the wealth of subtle information available in a face-to-face meeting. As for people's feelings towards mediation in writing, it naturally differs from one person to another. Some people feel more comfortable speaking and find oral communication easier, while for others textual communication offers a better opportunity for a free and candid discussion of their feelings and interests. *See* Orna Rabinovich-Einy, "Going Public: Diminishing Privacy In Dispute Resolution In The Internet Age" (2002) 7 *Virginia Journal of Law & Technology* 4.

[51] In the West, mediation tends to be private: mediation proceedings are closed to the public, the resolutions are not necessarily published, and the parties themselves, as well as the mediator, are often sworn to secrecy regarding the dispute and the terms of its settlement. However, Prof Ethan Katsh has predicted that in the long-term there will be a decline in privacy considerations and a shift to a more transparent society. Mediation will not be immune to these changes if they occur. *See* Ethan Katsh, *The Electronic Media and the Transformation of Law* (New York: Oxford University Press, 1989) at p 197.

[52] It may be surprising that China has no uniform and coherent legal protection for privacy. The Chinese General Principles of Civil Law do not mention the "privacy" right at all. In practice, a court would follow the interpretation issued by the Chinese Supreme People's Court that privacy is not protectable unless unauthorised disclosure of a matter infringes the person's right of reputation.

[53] *See* the Organic Regulations on People's Mediation Committees.

[54] Social sanctions are enforced principally through public opinion. The Chinese obsession with the concept of "face" makes social sanctions extremely powerful. *See* n 39 above, pp 43–64.

[55] For example, in accordance with the CCPIT Conciliation Rules, when the conciliator receives information from one party, the conciliator may disclose or not disclose it to the other party; however, if one party gives information to the conciliator and requests that the information be kept confidential, the conciliator shall respect the party's request. If conciliation fails, the parties shall not invoke any statements, views, opinions or proposals that have been put forward, proposed, admitted or indicated to be acceptable by the parties or the conciliator in the course of conciliation as grounds for claim or defence in the subsequent arbitration proceedings or litigation proceedings. *See* n 46 above.

effectiveness of a settlement agreement. Some believed that any party had the liberty to go back on his/her word even after a settlement agreement has been reached through mediation. However, the Supreme People's Court of China in judicial interpretations enacted in 2002 clarified that a settlement agreement regarding civil rights and obligations, signed or sealed by the parties and reached through the mediation of a people's mediation committee, is as binding as a civil contract.[56] Therefore, any party shall not unilaterally change the content of the settlement agreement or withdraw from the settlement agreement. The binding nature of the settlement agreement would facilitate the development of online mediation.

The CNNIC Domain Name Dispute Resolution Procedure

Presently in China, there are a few active ODR systems, among which are Eachnet's rating system and the CNNIC Domain Name Dispute Resolution Procedure.

Eachnet's rating system, which is very similar to Ebay's system, allows for the ratings of buyers and sellers and deters those who wish to use Eachnet's services in the future from behaving strategically. Eachnet also provides a "transaction security fund", which permits one who suffered from another user's fraudulent act to file a complaint and apply for a sum approximately equivalent to his or her damage, up to the maximum amount of 1,000 Yuan (US$120.50).[57]

The CNNIC Domain Name Dispute Resolution Procedure is a *sui generis* dispute resolution system. It is unique not only because it is only applicable for domain name disputes in China, but also because it is different from any traditional dispute resolution system (arbitration, mediation, etc.). Its basic design is that any civil right owner that believes its civil right is infringed by the registration and / or use of a domain name may sue the domain name registrant. Although there is no agreement between the parties regarding submission of the dispute to the CNNIC Domain Name Dispute Resolution Procedure, the domain name registrant is required to submit to such proceeding once it is sued. The rationale of such mandatory proceeding is that any domain name registrant has agreed to be bound by the CNNIC Domain Name Dispute Resolution Procedure when it applied for registration of the domain name. This novel online dispute resolution system is worthy of careful attention.

[56] *See* "Several Stipulations Regarding Adjudication of the Civil Cases Involving People's Mediation", enacted by the Supreme People's Court on 16 Sep 2002 and effective as of 1 Nov 2002.

[57] *See* http://pages.eachnet.com/st/page/harbor/harbor.htm.

CNDRP: From Trial Implementation to Unified System

In China, ADR for domain name disputes is growing quickly. On 1 November 2000, CNNIC, the management body of dot "cn", published the "Policy of Chinese-Language Domain Name Dispute Resolution (Trial Implementation)", and authorised the Domain Name Dispute Settlement Centre of CIETAC (CIETAC Centre) to provide the domain name dispute resolution service. Under the Policy, the dispute resolution procedure only applies to the resolution of disputes concerning conflicts between Chinese-language domain names managed by CNNIC and trademarks that are protected by Chinese law. By the end of 2002, twenty-two cases were decided and published on CIETAC's website.[58] In these cases, there are several foreign complainants, including Bertelsmann AG (Germany), A Lassonde Inc (Canada), Pepsi Co Inc (USA), Jardine Matheson (Bermuda) Ltd and Imperial Chemical Industry Ltd (UK). These foreign enterprises complained that their trademarks in the Chinese language were pre-emptively registered in domain names by some Chinese people or enterprises. Since these foreign enterprises usually are well known for their Chinese-language names or marks in the Chinese market (for example, "pepsi" is known as "BAISHI" in Chinese characters, and "dulux" is known as "DUOLESHI" in Chinese characters), CIETAC's proceedings were helpful for them to protect their trademark rights against cyber squatting.

The 2002 China Internet Domain Name Regulations, enacted by the Ministry of Information Industry (MII), finally establish a unified domain name dispute resolution system for both Latin domain names under .cn and the domain names in Chinese characters.[59] On 25 September 2002, CNNIC published the "CNNIC Domain Name Dispute Resolution Policy" (CNDRP) and the "Rules for CNNIC Domain Name Dispute Resolution Policy" (CNDRP Rules), both of which entered into force on 30 September 2002, and the "Policy of Chinese-Language Domain Name Dispute Resolution (Trial Implementation)" ceased to have effect simultaneously. CNNIC authorized two dispute resolution service providers, namely the CIETAC Centre and the Hong Kong International Arbitration Centre (HKIAC). Up to 30 September 2003, 81 cases have been resolved through the two service providers (79 cases through CIETAC, and 2 cases through HKIAC).[60]

[58] *See* http://dndrc.cietac.org/cietac.jsp.

[59] The MII is the national administration for the information industry in China. The CNNIC is under the leadership of the MII.

[60] *See* http://dndrc.cietac.org/static/cnddr/frmaincnddr.html and http://dn.hkiac.org/cn/cns_decisions.html.

CNDRP: An Experiment of ODR

In the CNDRP, after a complaint is accepted by a service provider, an expert panel (either a single or a three-member panel) should be appointed for trial of the case. The decision should be made within 14 days after the panel is constituted. Remedies for complainants under the CNDRP are limited to cancellation of the domain names, or transfer of the domain names to complainants. The CNDRP proceedings are not final and any party may commence an action in the Chinese court in respect of the same subject matter or submit the dispute to an arbitration organisation.

The CNDRP sets up an ODR system in China. The service providers (CIETAC and HKIAC) have established online case management systems respectively. In any given case, communications may be conducted through facsimile transmissions, postal or courier services, or electronic transmissions via the Internet, provided the transmission may be recorded properly. Generally, a decision should be made on the basis of the statements and documents submitted by the parties.

In-person hearings (including teleconference, video-conference or web-conference) would only be arranged upon the request of the parties, provided that they are willing to bear the expense. As a panel only has 14 days to render a decision, it is unlikely that an in-person hearing would happen. The panel's decision shall be submitted both in electronic and paper form signed by all the panellists. Except in extraordinary circumstances, the decisions should be published on the websites of the service providers.

CNDRP: An Assessment

The CNDRP has been operating for nearly four years. The system was set up in accordance with the principles of being quick, cheap, effective and fair. The analysis below will determine if the CNDRP has followed these principles.

Is it quick?

On average, the entire proceedings, from acceptance of the complaint to publication of the decision, will take two months. In comparison with judicial or arbitral proceedings, the CNDRP is quick in resolving disputes.

Is it cheap?

In terms with the CIETAC Centre's Supplementary Rules, for a dispute involving one domain name and decided by a single panelist, the fee is 3,000 Yuan (US$361.40). It is apparently cheaper than traditional arbitral proceedings, but it is still expensive to ordinary consumers.

Is it effective?

The CNDRP has a built-in enforcement mechanism. Any decision for transfer or cancellation of a domain name is to be enforced by the registrar directly. In this regard, it is very effective in comparison with arbitral awards that depend on the enforcement by the courts. Although, unlike arbitral awards, decisions in the CNDRP system have no finality, up to 30 December 2003, there are only three CNDRP decisions that have been challenged by the parties in the Chinese courts.

Is it fair?

In most CNDRP cases, the disputed domain names were transferred to the complainants. A rough assessment on these decisions shows that the procedure is "almost" fair.

There is no doubt that the CNDRP has its problems and still needs improvement, but it is a valuable experiment for the Chinese ODR system. The lessons learned from the CNDRP may become the basis of developing ODR for transaction disputes in e-commerce.

Conclusion

At a time when e-commerce is developing very quickly, Chinese enterprises have realised that deployment of proper dispute resolution mechanisms will increase trust and consumer confidence and ultimately produce favourable results. The development of ODR addressed such demand from businesses in a timely manner. It is not incautious to say that ODR is now entering into a golden age. However, the optimistic estimation should not prevent us from understanding the challenges along with the opportunity before ODR services. There are still a number of legal barriers and practical difficulties on the road to ODR. The development of ODR not only depends on the efforts of ODR providers and other e-commerce enterprises, but also relies on legal reform and administrative improvements of the Chinese authorities.