

ONLINE DISPUTE RESOLUTION WITH CHINA: ADVANTAGEOUS, BUT AT WHAT COST?

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INTRODUCTION

This Note will discuss the use of Online Dispute Resolution (ODR)¹ between businesses and consumers in the United States (U.S.) and their counterparts in the People's Republic of China (P.R.C.).² ODR is a growing, highly attractive, and arguably necessary phenomenon in the e-commerce world. It is an accommodating and useful process in that it employs online technology to provide traditional alternative dispute resolution (ADR) mechanisms via the Internet.³

Part I of this Note will discuss the increasing trend of international electronic commerce (e-commerce) in the U.S. and the P.R.C. International e-commerce has been fueled by the growth of the Internet, as individuals around the world recognize their increased ability to do business with people and businesses globally. This has resulted in the situation where sustainable foreign investment and bilateral trade have attained economic significance on a worldwide and vast magnitude.⁴ Part II of this Note will discuss the use of ODR to resolve disputes that arise online, highlighting ODR's advantages and drawbacks, as well as discussing the ODR mechanisms that have been put in place. Part III will discuss the importance of understanding the dynamics of cross-cultural dispute resolution, as these transactional disputes are taking place between parties from different parts of the world. Part IV will discuss China's approach toward ADR, particularly mediation and arbitra-

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¹ ODR has been defined in many ways. Essentially, it is "the use of information and communications technology to help parties and resolution professionals manage, transform, and resolve conflict." Hon. Bruce T. Cooper, *Online Dispute Resolution Comes of Age*, THE PRAC. LITIGATOR 33, 34 (July 2009).

² The People's Republic of China will be referred to as either "China" or "P.R.C." throughout the remainder of this note.

³ See Jay E. Grenig, *Alternative Dispute Resolution Current Through the 2010 Update*, ALT. DISP. RESOL. § 2:75 (3d ed. 2005).

⁴ See ARTHUR J. GEMMELL, WESTERN AND CHINESE ARBITRATION: THE ARBITRAL CHAIN viii (University Press of America 1998).

tion, and the ODR systems and processes that have been established in the P.R.C.⁵ Part V will then address the question of whether the use of ODR is likely to be successful between the U.S. and the P.R.C. in light of cultural differences and, specifically, a lack of trust caused by the P.R.C. government's heavy censorship of the Internet. This Note concludes that the P.R.C.'s censorship of the Internet is antithetical to the core values of dispute resolution. As such, if the Internet censorship persists, despite the ODR mechanisms China has put in place, ODR will not reach its full potential between businesses and consumers of the two countries. Censorship in China could cause ODR to fail to reach its full potential to resolve disputes in the international business community.

I. BACKGROUND: THE GROWTH OF INTERNATIONAL ELECTRONIC COMMERCE

As of 2004, statistics regarding the countries' Internet usage have documented that the U.S. and the P.R.C. are the two countries with the largest populations actively using the Internet.⁶ The number and types of online transactions in both the U.S. and the P.R.C. have increased significantly with the rapid growth of both Internet technologies and individuals' ability to access those technologies.⁷ New methods of business have been adopted as both companies and consumers have discovered new ways to interact with one another over the Internet.⁸

⁵ China has been chosen as the country of focus (in addition to the U.S.) in this Note since, as Arthur J. Gemmel in his book, *Western and Chinese Arbitration*, states, "[i]n recent times, one can hardly pick up a newspaper without the economic importance of The People's Republic of China's being discussed, dissected, and deliberated." *Id.* at 113.

⁶ See Xue Hong, *Online Dispute Resolution for E-commerce in China: Present Practices and Future Developments*, 34 H.K. L.J. 377 (2004). See also Jane Spencer & Kevin J. Delaney, *YouTube Unplugged*, THE WALL ST. J. ONLINE, Mar. 21, 2008, available at http://online.wsj.com/public/article_print/SB120605651500353307.html (stating that China has the "world's largest population of Internet users . . .").

⁷ See Ethan Katsch & Leah Wing, *Ten Years of Online Dispute Resolution: Looking at the Past and Constructing the Future*, 38 U. TOL. L. REV. 19, 22 (2006) (discussing two major changes in Internet use, which "changed the status quo"—that of increased university student access to the Internet, and the removal of restrictions by the National Science Foundation on commercial use of the Internet); see also Martyn Williams, *A Brief History of the Internet in China*, PC WORLD BUSINESS, July 17, 2004, available at http://www.pcworld.idg.com.au/article/128099/china_celebrates_10_years_being_connected_internet?pp=2&fp=2&fpid=1 (providing a timeline of the development of Internet use in China starting from the year 1986).

⁸ U.S. G.A.O., REPORT TO THE RANKING SENATE MINORITY MEMBER OF THE JOINT ECONOMIC COMMITTEE. INTERNATIONAL ELECTRONIC COMMERCE: DEFINITIONS AND POLICY IMPLI-

While there are various definitions of e-commerce (some broad definitions including devices such as fax machines, and others narrowly referring to the mere use of the Internet),⁹ Black's Law Dictionary specifically defines e-commerce as "the practice of buying and selling goods and services through online consumer services on the Internet."¹⁰ The general understanding, as gleaned from the institutions that compile e-commerce data,¹¹ is that in order for an online transaction to be considered e-commerce, there has to be some sort of an online agreement or contract to sell a good or product "that results in the import or export of goods."¹² Although there is no uniform and internationally recognized definition of international electronic commerce (IEC),¹³ IEC is commonly described as a division within the "total electronic commerce"¹⁴ that "involves cross-border transactions through computer networks."¹⁵ Electronic commerce can be divided into four groups: Business-to-Business (B-to-B), Business-to-Consumer (B-to-C), Consumer-to-Consumer (C-to-C), and Government-to-Consumer (G-to-C).¹⁶ This Note ultimately focuses on international B-to-B¹⁷ and B-to-C¹⁸ electronic commerce, as it is largely the result of the expansion of international trade¹⁹ that conflicts have arisen, which have necessitated the need for an ODR sys-

CATIONS, at 1 (2002) (stating that electronic commerce has led to wider marketplaces, in which transactions and business relationships can be facilitated, an increase in online commitments/contracts to buy and sell goods with electronic signatures, etc.).

⁹ See U.S. G.A.O., *supra* note 8.

¹⁰ BLACK'S LAW DICTIONARY 234 (8th ed. 2004).

¹¹ Such as the U.S. General Accounting Office.

¹² U.S. G.A.O., *supra* note 8, at 9.

¹³ See *id.* at 8; for further discussion of how there is no exact definition of IEC, see also OECD Business-To-Consumer E-Commerce Statistics, www.oecd.org/dataoecd/34/36/1864439.pdf (last visited Nov. 2, 2010).

¹⁴ U.S. G.A.O., *supra* note 8, at 2.

¹⁵ *Id.* at 9.

¹⁶ See Fred Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, 2009 U. ILL. J.L. TECH. & POL'Y 1, 69 n.4.

¹⁷ Definition on Business-to-Business (b2b), BusinessDictionary.com, <http://www.businessdictionary.com/definition/business-to-business-B2B.html> (last visited Feb. 3, 2010) (B-to-B generally refers to commerce between businesses.).

¹⁸ Definition on Business-to-Consumer (b2c), BusinessDictionary.com, <http://www.businessdictionary.com/definition/business-to-consumer-B2C.html> (last visited Feb. 3, 2010) (Business-to-Consumer e-commerce is defined as the sale of "individual products to consumers.").

¹⁹ See The International Business and Trade Help Center, *Business To Business Ecommerce - Internet Marketing Strategies*, <http://www.importexporthelp.com/internetmarketing01.htm> (last visited Feb. 4, 2010) (mentioning that in order to enhance chances of profits and success in international trade, businesses should engage in business-to-business e-commerce, since it is an extremely cost-effective tool that is able to reach greater audiences).

tem.²⁰ Furthermore, electronic commerce statistics generally measure B-to-B and B-to-C transactions.²¹

Various statistics illustrate the popularity and growth of e-commerce in the U.S. and in the P.R.C. The U.S. Census Bureau released a report on May 28, 2009, analyzing four major economic sectors.²² The report stated that e-commerce in the U.S. “grew faster than total economic activity in three of the four major economic sectors.”²³ Forrester Researcher, Inc., an independent technology and market research company, declared in a press release that, “Americans will continue to flock to the Internet for clothing, computers, and even cars.”²⁴ The same press release stated that online retail rose seventeen percent in 2008 to \$204 billion.²⁵

Similarly, both statistics and developments by the Chinese also demonstrate that e-commerce transactions are on the rise. In 2000, the Ministry of Information Industry (MII)²⁶ stated that “China had 800 online shopping sites, 100 auction sites, 180 remote education sites, and 20 remote medical sites. It also had 300 Internet service providers and 1,000 portals.”²⁷ Despite these remarkable figures, in 2007, China was merely in the beginning stages of the e-commerce phenomenon.²⁸ E-commerce’s lagging growth in the P.R.C. was primarily attributed to three factors: 1) a lack of economic policies instituted by the government that would be geared toward the development of e-commerce; 2) a rudimentary and

²⁰ See *infra* Part II.

²¹ See U.S. G.A.O., *supra* note 8, at 80.

²² These four economic sectors are manufacturing, merchant wholesale trade, retail trade, and selected services.

²³ U.S. Census Bureau’s E-Stats, U.S. CENSUS BUREAU, May 28, 2009, available at <http://www.census.gov/econ/estats/index.html>.

²⁴ Press Release, Forrester Researcher, Inc., *Forrester Online Sales to Climb Despite Struggling Economy According to Shop.org* (Apr. 8, 2008), available at <http://www.forrester.com/ER/Press/Release/0,1769,1205,00.html>.

²⁵ See *id.*

²⁶ See Clara Liang, *Red Light, Green Light: Has China Achieved Its Goals Through the 2000 Internet Regulations?*, 34 VAND J. TRANSNAT’L. L. 1417, 1431 (2001) (discussing the creation of the MII. In 1998, the MII replaced the Ministry of Posts and Communication (MPT) and the Ministry of Electronic Industries (MEI). The MPT “had the authority to screen out” information found to be unfavorable to the CCP before the information could be accessed by the “lay Chinese Internet user.” The MII has control over the entire information industry, including the Internet.); see also JINGZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* 182 (Kluwer Law International 2004).

²⁷ See Hong, *supra* note 6, at 378.

²⁸ Alice Woudhuysen, *China Internet: The Long March Toward E-commerce*, THE ECONOMIST INTELLIGENCE UNIT’S GLOBAL TECHNOLOGY FORUM, July 10, 2007, available at http://globaltechforum.eiu.com/index.asp?layout=rich_story&doc_id=11038.

problematic credit system,²⁹ and 3) the need to hone further logistical details of the electronic transaction process.³⁰ Thus, in 2007, the Chinese government created a five-year plan—the “E-Commerce Development Plan during the 11th Five-Year Period”—to increase the development of e-commerce in China.³¹ The government intended that, during the five-year plan, China would develop the technical system to support an e-commerce marketplace from which, it was hoped, China would benefit both economically and socially. The credit system in the P.R.C. has also been improved, as banks in China have been working toward the development of the use of credit cards in online transactions, specifically targeting younger Internet users who constitute the bulk of online shoppers in China. An additional step toward improving the Chinese credit system occurred when global banks (such as Citibank and HSBC) began investing in Chinese banks.³²

China’s logistical problems have been addressed by the U.S.’s burgeoning B-to-B e-commerce market foreign investment in the Chinese market. This has benefited China and resulted in the creation of B-to-B transaction service providers in China.³³ In 1999, the B-to-B transaction service provider, Alibaba.com, was founded.³⁴ Alibaba.com facilitates the occurrence of online transactions between Chinese and worldwide buyers and sellers in three marketplaces: 1) a global trade marketplace (www.alibaba.com) through which importers and exporters interact, 2) a Chinese marketplace for domestic trade and online interactions in China (www.alibaba.com.cn), and 3) a Japanese marketplace, from which trade with Japan is conducted (www.alibaba.co.jp).³⁵ In 2005, the U.S. portal Yahoo! bought a forty percent stake in Alibaba, and since its inception, Alibaba has maintained its status as an expansive online B-to-B marketplace for Chinese businesses and consumers to

²⁹ *See id.* (discussing how B-to-C e-commerce transactions are made easier with the use of credit card purchases. However, in the past, it has been hard for Chinese citizens to obtain credit cards because of an “inefficient” banking system. In 2006, there were fewer than 50 million credit cards in circulation in China).

³⁰ *See id.* (providing a discussion of how the logistical problems had to do with the fact that there were restricted distribution networks—if a buyer and seller were deemed to be too distant from one another, it would be hard to send an ordered product—and in determining how to send purchased items far distances).

³¹ *See id.*

³² *See id.*

³³ *See id.*

³⁴ *See* Alibaba.com, <http://news.alibaba.com/specials/aboutalibaba/index.html> (last visited Jan. 31, 2010).

³⁵ *See id.*

transact both domestically and globally.³⁶ In May 2009, Alibaba.com reported that the number of Chinese exporters jumped “96% year on year,” resulting in a total of 55,810.³⁷

The creation of B-to-C service providers, Joyo/Amazon, Dangdang.com, and Cncard.com, have also aided in addressing the logistical problems.³⁸ Joyo/Amazon, Dangdang.com, and Cncard.com control a large percentage of the B-to-C market.³⁹ Foreign Internet retailers, such as Google, Amazon, MySpace, and eBay, have attempted to enter the Chinese market by furthering the development of e-commerce in China,⁴⁰ and their participation has sparked the establishment of multiple B-to-C online marketplaces. For example, after U.S. Internet-retailer, Amazon, invested in China and created Joyo.com, Amazon implemented business procedures on Joyo.com, introducing its expertise of the market (such as free shipping) to the Chinese market. Its aim was to rectify certain logistical issues.⁴¹

The preparations for the development of e-commerce in the P.R.C. appear to have been successful, as China’s online travel reservation market has steadily grown from 0.85 billion yuan⁴² in the second quarter of fiscal year 2009, compared with 0.8 billion yuan in the first quarter, and 0.77 billion yuan in the second quarter of fiscal year 2008.⁴³ China’s online shopping market size was 56.36 billion yuan, up 91.9 percent over the same period in 2008 and up

³⁶ See *id.* (stating that today, over 15 million Chinese businesses and consumers use Alibaba.com).

³⁷ See Alibaba.com, *Jack Ma Gives Students 100 Reasons to Care About Alibaba.com*, May 7, 2009, <http://news.alibaba.com/article/detail/alibaba/100099064-1-jack-ma-gives-students-100.html>.

³⁸ See Woudhuysen, *supra* note 28.

³⁹ See *id.*

⁴⁰ See *id.* Interestingly, however, in January and February 2010, Google threatened to pull out of China. See *infra* Part V (providing a more detailed discussion of current Internet events in China).

⁴¹ In addition to introducing free shipping, Amazon provides recommendations to customers of possible items they would also be interested in purchasing based on their previous purchases. This, too, Amazon attempted to introduce into the Chinese Internet market. See *id.*

⁴² According to both the Google currency conversion application and another China Currency Calculator website, the yuan is currently equal to \$0.146484 U.S. dollars. For a precise conversion, the reader can check this website: <http://www.greenwichmeantime.com/time-zone/asia/china/currency.htm>.

⁴³ See Hu YuanYuan, *iResearch: 09Q2 China Online Travel Reservation Market Size is 0.85 billion yuan*, iRESEARCH CHINA RESEARCH INTERNET CENTER, Sept. 23, 2009, http://english.iresearch.com.cn/views/E_Commerce/DetailNews.asp?id=9052 (iResearch is an organization that specializes in studies of, and provides data regarding, customer behavior in Internet media, e-commerce, and online games).

20.7 percent compared to the number of last quarter.⁴⁴ “The total transaction volume of China’s e-commerce market surged forty-three percent from a year earlier to RMB⁴⁵ 3.1 trillion in 2008.”⁴⁶

As illustrated by U.S. businesses’ aid to and investment in China’s online market, U.S. and China have opened their markets to one another, providing for the opportunity of growth of e-commerce transactions between the two countries.⁴⁷

II. THE GROWING NEED FOR ONLINE DISPUTE RESOLUTION

“Make your product easier to buy than your competition, or you will find your customers buying from them, not you.”

– Billionaire Mark Cuban.⁴⁸

Few businesses could really afford to miss out on the competitive edge associated with B-to-B electronic commerce.⁴⁹ This is because an Internet presence adds to a company’s service capabilities at a relatively reasonable cost and in an efficient manner.⁵⁰ International e-commerce is extremely beneficial to both consumers and vendors.⁵¹ For consumers, the appeal of electronic commerce is that it is, essentially, a “24-hour marketplace”⁵² in which they can shop in the comfort and convenience of their homes, and easily compare the price

⁴⁴ See Zhang Yanping, iResearch: 2009Q2 China Online Shopping Market Size Was 56.36 Billion Yuan, iRESEARCH CHINA RESEARCH INTERNET CENTER Sept. 3, 2009, http://english.iresearch.com.cn/views/E_Commerce/DetailNews.asp?id=9048.

⁴⁵ RMB stands for renminbi, which literally translates to the “people’s currency.” See The RMB Guide, <http://www.rmbguide.com/> (last visited Oct. 3, 2010).

⁴⁶ Alibaba.com, China’s E-Commerce Transactions Hit RMB 3.1 Trln in 2008, May 04, 2009, <http://news.alibaba.com/article/detail/business-in-china/100096582-1-china%2527s-e-commerce-transactions-hit-rmb.html>.

⁴⁷ See Woudhuysen, *supra* note 28.

⁴⁸ See Dan Frommer, *The Dot-Com Billionaire: Mark Cuban*, FORBES.COM, Feb. 14, 2006, http://www.forbes.com/2006/02/11/mark-cuban-money_cx_de_money06_0214cuban.html (giving biographical information about Mark Cuban. Mark Cuban, co-founder of Broadcast.com and owner of the Dallas Mavericks, is an investor in cutting-edge technological innovations).

⁴⁹ See Alexander Ellinger et al., *B-to-B E-Commerce: A Content Analytical Assessment of Motor Carrier Websites*, 24 J. BUS. LOGISTICS 199 (2003), available at http://findarticles.com/p/articles/mi_qa3705/is_200301/ai_n9193692/?tag=content;coll.

⁵⁰ See KPMG LLP, Strategic Directions in E-Transportation, unpublished report. NetMarketing 200 (Sept. 2000), www.netb2b.com (citing John Fontanella, *The Web-Based Supply Chain*, 3 SUPPLY CHAIN MGMT REV. 17 (2000)).

⁵¹ See Galves, *supra* note 16, at 2.

⁵² *Id.*

differences of products from different sellers.⁵³ The benefit to sellers is the ability to utilize the Internet for inexpensive advertising to the huge market of virtually unlimited potential consumers.⁵⁴

However, international e-commerce creates increased probability of disputes⁵⁵ and opportunities for criminal behavior such as fraud⁵⁶ and invasions of privacy.⁵⁷ In addition, due to the global nature of e-commerce and the consequent increase in access to information, disputes can arise between buyers and sellers at various geographic locations concerning quantity, quality, and delivery of goods.⁵⁸ In fact, these types of disputes are, in all likelihood, bound to occur.⁵⁹

A. Problems Pertaining to Resolving Online Disputes Offline and The Advantages of Online Dispute Resolution

In order to ensure that online transactions continue, consumer protection, a means of safeguarding private data, and the promo-

⁵³ See Thomas L. Mesenbourg, *Measuring Electronic Business: Definitions, Underlying Concepts, and Measurement Plans*, U.S. CENSUS BUREAU (1999), <http://www.census.gov/epcd/www/ebusines.htm>.

⁵⁴ See Galves, *supra* note 16, at 2.

⁵⁵ See Ethan Katsh, *Online Dispute Resolution: Designing New Legal Processes for Cyberspace*, Conference in Athens titled Proceedings of the WebSci'09: Society On-Line (Mar. 18–20, 2009), available at <http://journal.webscience.org/191/> (stating that there is a causal connection between “increase in online transactions; increase in online relationships and interactions; increase in value of information; increase in distribution of and access to information; increase in novel uses of information; increase in virtual goods and virtual property; increase in innovation and creative activity; increase in complexity; increase in pace of change; increase in bugs in software,” and online disputes).

⁵⁶ See Galves, *supra* note 16, at 17 (for example, a seller of a book on eBay could potentially become the victim of fraudulent claims made by a consumer who might have received the product that the seller had contracted to send, yet claims he/she did not. If the consumer brings the claim, the defendant seller may settle rather than litigate to death and endure costly litigation).

⁵⁷ See Jeanette Teh, *Privacy Wars in Cyberspace: An Examination of the Legal and Business Tensions in Information Privacy*, 4 YALE SYMP. ON L. & TECH. 1 (2001-2002).

⁵⁸ See Katsh, *supra* note 55, at 1.

⁵⁹ See Jim Keane & Debbie Miller-Moore, *Linking Information Technology and Dispute Resolution*, DISP. RESOL. J. (Feb.-Apr. 2004), available at http://findarticles.com/p/articles/mi_qa3923/is_200402/ai_n9392195/.

tion of consumer confidence in e-commerce are needed.⁶⁰ ODR plays a major role in e-commerce for these purposes.⁶¹

Advantage 1: ODR can be used to address the risks posed to consumers and sellers from conducting business using the Internet.

The Internet should be considered a “trustworthy online global marketplace fully operating under the rule of law.”⁶² Without any uniform, legally enforceable method for resolving e-commerce disputes, both the consumer and seller of an online transaction are taking risks, mainly because of jurisdictional and conflict of law issues.⁶³ These issues could hinder the success of the pursuit of an appropriate and fair legal remedy.⁶⁴

To explain the issues surrounding the resolution of electronic commerce disputes, a simple, domestic e-commerce dispute hypothetical will be used. This hypothetical will demonstrate why adequate legal redress offline may be difficult, and will illustrate the additional advantages of ODR methods.

*Hypothetical: A buyer from Florida bids \$500 for two books from a seller in Arizona. The buyer receives only one of the books in the mail.*⁶⁵

Advantage 2. Online Dispute Resolution Resolves Jurisdictional Issues for Parties who are Geographically Distant

If this were a typical offline transaction, the buyer might seek relief in a physical small claims court by filing a lawsuit.⁶⁶ While the buyer in an online transaction case can file a claim in small

⁶⁰ Indeed, the continuation of e-commerce depends on Internet users both “being able to conduct transactions” and “willing to do so.” See Katsch & Wing, *supra* note 7, at 25 (emphasis added).

⁶¹ See Keane & Miller-Moore, *supra* note 59.

⁶² See Galves, *supra* note 16, at 3.

⁶³ See *id.* at 5–6; see also Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2003 DUKE L. & TECH. REV. 4 (2003), available at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0004.html> (discussing additional problems faced if parties litigate Internet disputes in traditional, physical courts. The additional problems include length of time and significant expense. These are also issues faced by those involved in offline disputes).

⁶⁴ See Galves, *supra* note 16, at 6–7.

⁶⁵ See *id.* at 10. Although this is a different hypothetical from the one used in Fred Galves’ *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, it is modeled after the author’s hypothetical in that article, which sets a foundation for a clear-cut analysis of the legal issues surrounding the litigation of online disputes.

⁶⁶ See *id.* at 11.

claims court, she would inevitably run into certain problems. One problem is determining a court that has jurisdiction over the seller.⁶⁷ If the buyer's home state—Florida in this hypothetical—has jurisdiction over the seller, it would work in the buyer's favor. On the other hand, if Florida does not have jurisdiction over the buyer, then just the travel costs to Arizona alone could make the lawsuit prohibitively expensive for the buyer, since a plane ticket could potentially cost around the same price as, or even more than, the book that the buyer did not receive.⁶⁸

Personal jurisdiction over a party can be asserted by U.S. courts in many ways. If, while a defendant is physically present or domiciled in a state, she is served and thereby notified of a lawsuit initiated against her, then personal jurisdiction over the defendant may be found to be appropriate.⁶⁹ However, the physical presence and domicile standards are clearly challenging in cases where the transaction was conducted online. For example, in this hypothetical, one party presumably lives or maintains a business or residence in Florida and the other party lives or maintains a business or residence in Arizona. Thus, the chances of the defendant being in Florida to receive service of process are low, unless the defendant conducts business in Florida and often makes trips pursuant to business arrangements. In the event that physical presence and domicile are impossible, the traditional personal jurisdiction (specific

⁶⁷ See *id.* at 2; see also Hong, *supra* note 6, at 381 (discussing the ways in which offline resolution methods of online disputes can be difficult. In the P.R.C., like in the U.S., jurisdictional issues arise. Chinese Civil Procedure Law maintains that a lawsuit for a tort should be brought in the jurisdiction where the tort occurred, or where the defendant is domiciled. Similarly, a lawsuit for a contractual breach should be brought in the jurisdiction where the defendant is domiciled, or “where the contract was performed.” This system, therefore, presents the same issues parties to an online dispute face in the U.S. When a business deal or a tort (such as defamation) is performed entirely online, questions arise as to where the lawsuit should ultimately be brought. Additional evidentiary issues in the P.R.C. show the need for ODR mechanisms. In Chinese courts, electronic evidence does not carry the same weight as physical, tangible evidence. Thus, since the evidence of an online dispute is likely to be primarily electronic, it may be hard for the parties or courts to go forward with the case, since the available evidence might not be accepted or may be perceived to be extremely weak).

⁶⁸ See Galves, *supra* note 16, at 2; see also Goodman, *supra* note 63 (stating that for individuals who are unable to travel far distances, cyber-mediation might really be the only way to resolve a dispute).

⁶⁹ See Galves, *supra* note 16, at 33 (discussing *Pennoyer v. Neff*, where the court did not exercise personal jurisdiction over the defendant because he was not “personally served with process while physically present in the state.” The author also mentions *Burnham v. Superior Court*, however, to state that courts are split on whether physical presence is enough).

and general) analysis⁷⁰ has to be conducted, and this too, creates certain problems.⁷¹

First, it must be determined whether the state has a long-arm jurisdictional statute, which would enable the state to assert jurisdiction over a party.⁷² The next step in the jurisdictional analysis involves the constitutional concern of due process.⁷³ This entails determining whether the non-resident defendant has maintained “systematic and continuous” activities in the forum state in order to find general jurisdiction,⁷⁴ or whether the defendant has “sufficient minimum contacts”⁷⁵ with Florida to make it appropriate and “fair for the court” to assert specific jurisdiction over the defendant.⁷⁶ The defendant from Arizona would probably not be amenable under general jurisdiction in Florida from this one transaction.⁷⁷ It remains ambiguous as to whether a court would find that a person or business with a website could reasonably foresee being sued in the buyer’s state.⁷⁸ A lengthier analysis would need to be conducted in order to determine whether the defendant seller “purposefully availed”⁷⁹ herself of the forum state in order to

⁷⁰ See BLACK’S LAW DICTIONARY, *supra* note 10, at 395 (defining “specific jurisdiction” as “jurisdiction that stems from the defendant’s having certain minimum contacts with the forum state so that the court may hear a case whose issues arise from those minimum contacts.” The dictionary also defines “general jurisdiction” as the authority of a court “to hear all claims against a defendant, at the place of the defendant’s domicile or the place of service, without any showing that a connection exists between the claims and the forum state.”).

⁷¹ See Galves, *supra* note 16, at 12.

⁷² See *id.* at 15; see also BLACK’S LAW DICTIONARY, *supra* note 10, at 438 (defining a “long-arm” statute as “[a] statute providing for jurisdiction over a nonresident defendant who has had contacts with the territory where the statute is in effect.”).

⁷³ See *Pennoyer v. Neff*, 95 U.S. 714 (1878) (discussing the idea that the Due Process Clause of the Fourteenth Amendment can limit a state’s *in personam* jurisdiction over a non-resident).

⁷⁴ See *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122 (1997) (citing *Helicopteros Nacionales, S.A. v. Hall*, 466 U.S. 408 (1984)).

⁷⁵ See *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

⁷⁶ See Galves, *supra* note 16, at 13.

⁷⁷ See *id.* at 8. In the author’s hypothetical transaction, the seller did not have general jurisdiction in New Jersey from the one transaction conducted over the Internet.

⁷⁸ See *id.* at 13 (stating that this is a way in which the exercise of specific jurisdiction by a court can be found. The 3-prong test used to determine whether a court has specific jurisdiction over a party is the following: “1) does the defendant have minimum contacts with the forum state; 2) are those contacts highly related to the cause of action; and 3) is personal jurisdiction over the defendant reasonable.” The article cites *Helicopteros Nacionales, S.A. v. Hall*, which stood for the proposition that “[d]ue process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant that has certain minimum contacts” with the forum state “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” 466 U.S. at 414 (1984)).

⁷⁹ *Hanson v. Deckla*, 357 U.S. 235, 250–51 (1958).

find sufficient contacts to establish that there is personal jurisdiction over the seller.

One of the first cases to deal with changing technology as it relates to problems with jurisdiction was *Hanson v. Deckla*.⁸⁰ In *Hanson*, the court stated that “[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase.”⁸¹ The Supreme Court reconsidered this issue in *Burger King v. Rudzewicz*,⁸² where the Court stated that because many commercial transactions were taking place crossing state lines (through the mail, for example), the need to have a physical presence in the state was less important.⁸³ In *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*,⁸⁴ the court confronted the growing trend of using the Internet to conduct business worldwide and to provide information and products to consumers.⁸⁵ *Zippo* devised a “sliding-scale” standard by which jurisdiction could be found based on an entity’s “nature and quality of commercial activity conducted over the Internet.”⁸⁶

However, the *Zippo* “sliding-scale” standard is extremely vague, as the level of interaction and the commercial nature of a website must be determined in order to conclude that there is jurisdiction.⁸⁷ In applying the standard, courts have been split as to when general jurisdiction can be found over a website.⁸⁸ There-

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Burger King v. Rudzewicz*, 471 U.S. 462 (1985).

⁸³ *See id.* at 476.

⁸⁴ *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1119 (1997).

⁸⁵ *See id.* at 1123.

⁸⁶ *Id.* at 1124 (The test divides the activity into three different levels. On one extreme is the situation where the defendant entity “clearly does business over the Internet” by entering into contracts with residents of another jurisdiction, and transmitting computer files, etc. This is considered to be active participation in that jurisdiction. On the other extreme, the defendant merely posts information on a website. Just posting information (making information more accessible) is considered to be passive participation, and will not result in jurisdiction in the foreign jurisdiction. In between these two extremes is the middle ground, where the website is interactive, and exchanges information. Personal jurisdiction will be found based on the “level of interactivity and the commercial nature” of the information that is found on the website.).

⁸⁷ *See Galves, supra* note 16, at 25 (discussing how on the Internet, defendants do not have the type of control as to who is accessing their websites, or where they are from, and the level of when a website is passive or within the middle ground, is hard to determine).

⁸⁸ *See Kristin Woeste, General Jurisdiction and the Internet: Sliding Too Far?*, 73 U. CIN. L. REV. 793, 814 (2004) (arguing that the standards for general jurisdiction should remain “substantial,” and that using the *Zippo* standard has the potential of violating constitutional due process rights. The author finds that suggesting that merely the interactive nature of a website could satisfy the standards to find general jurisdiction is “dangerous for the future of e-commerce.”).

fore, the standards have to be more “refined”⁸⁹ to enable businesses and other entities on the web to know when they could be haled into the court of a foreign jurisdiction.⁹⁰

These jurisdictional issues are clearly problematic since they draw attention away from the merits of the case, and instead focus on procedural aspects.⁹¹ Additionally, this analysis is time-consuming and wasteful.⁹² Parties in an international transaction will presumably prefer to resolve their disputes online, as opposed to taking the chance that one entity will possibly have to travel across the world to resolve a commercial dispute because its website was sufficient to warrant personal jurisdiction in that area.⁹³

Advantage 3. ODR’s Uniform Set of Laws Enables the Focus of a Dispute to be on the Merits, Not on Choice of Law Issues

Another issue that detracts from the merits of the case is the conflict over the applicable substantive body of law.⁹⁴ Generally, the substantive laws that apply will be the laws of the area in which the injury occurred, or that relate to a “key aspect of the dispute.”⁹⁵ Parties would advocate for the laws that best suited their purpose,⁹⁶ which, again, has nothing to do with resolving the dispute on the merits.⁹⁷ While this would be complicated enough in a domestic dispute, it would be even harder for parties in an international dispute. Determining which country’s body of law would be applicable is dependent “on how a country approaches the question of jurisdiction and applicable law.”⁹⁸ Without a single set of international legal rules to be applied to e-commerce,⁹⁹ a party would have to be aware of the intricacies of the laws of countries with which it does business, in order for even a fraction of predictability of what result would ensue if the party is drawn into a lawsuit there.¹⁰⁰ Thus, there seems to be a general consensus among

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *See Galves, supra* note 16, at 23.

⁹² *See id.*

⁹³ *See Karen Alboukrek, Adapting to a New World of E-Commerce: The Need for Uniform Consumer Protection in the International Electronic Marketplace*, 35 *GEO. WASH. INT’L L. REV.* 425, 425 (2003).

⁹⁴ *See Galves, supra* note 16, at 19.

⁹⁵ *Id.* at 20.

⁹⁶ *See id.* at 22.

⁹⁷ *See id.* at 23.

⁹⁸ Alboukrek, *supra* note 93, at 434.

⁹⁹ *See id.* at 425.

¹⁰⁰ *See Alboukrek, supra* note 93, at 434 (stating that businesses have to know “hundreds of different consumer protection laws.”).

experts that a uniform set of rules should be applied,¹⁰¹ since even pre-dispute forum selection clauses and applicable law clauses do not completely solve problems.¹⁰²

The idea that e-commerce disputes should be left to the medium from which they arise is increasingly being supported.¹⁰³ ODR can include the ability to file cases and conduct discovery online, communicate online, negotiate online, and track cases online.¹⁰⁴ Resolving online disputes through ODR has significant advantages.¹⁰⁵ Like traditional ADR, ODR focuses more precisely on the specific needs of the disputing parties.¹⁰⁶ Using the Internet to resolve the disputes can lead to creative, unique, and innovative methods of resolution.¹⁰⁷ In addition, ODR is convenient, cost-effective, and prevents the jurisdictional and substantive law conflicts.¹⁰⁸

B. The Different ODR Methods Available

In recognition of the fact that ODR has many advantages, and in response to the U.S. government's relatively backward role in the development of ODR, ODR scholars in the U.S. have begun working on designing online legal systems and principles with offi-

¹⁰¹ See Galves, *supra* note 16, at 30.

¹⁰² See *id.* at 34 (such as the time-consumption, fairness, and physical barriers issues).

¹⁰³ See Ethan Katsh, *The Online Ombuds Office: Adapting Dispute Resolution to Cyberspace*, <http://www.umass.edu/dispute/ncair/katsh.htm> (last visited Oct. 28, 2009) (citing Richard Shell, who stated that the technology is available for parties to interact in cyberspace, discuss the complexities of their disputes, and ultimately reach a binding settlement); see also Galves, *supra* note 16, at 34 (arguing that the answer to e-commerce disputes "involves the very technology that makes e-commerce possible in the first place.").

¹⁰⁴ See Debbie Miller-Moore & Maryan Jennings, *At the Forefront of ODR: Recent Developments at the AAA*, *DISPUTE RESOL. J.* 4 (Feb.-Apr. 2007), available at http://findarticles.com/p/articles/mi_qa3923/is_200702/ai_n19197552/.

¹⁰⁵ See Goodman, *supra* note 63.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* See also Hong, *supra* note 6, at n.11 (stating three reasons which give credence to the idea that ODR will be useful in resolving online disputes. Specifically, the author states that: 1) ODR will allow a party or legal counsel to handle a matter from a great distance, whereas before the lack of physical presence created a significant hindrance to the resolution of the conflict; 2) a party or legal counsel can handle matters more quickly online than offline; and 3) the information-processing of technology can be much faster than humans' information-processing abilities).

cial legal authority in cyberspace.¹⁰⁹ While some argue that legal rules governing cyberspace should come from territorial states¹¹⁰ and some territorial lawmakers feel threatened by the undermining of legitimacy of laws based on geographic boundaries,¹¹¹ most states have encouraged the privatization of dispute resolution in cyberspace. Such privatization has resulted in a decrease of trials and the extension of ADR to the virtual world.¹¹²

The National Center for Automated Information Research (NCAIR) held a conference in 1996 to discuss ODR, which provided a significant step toward the creation and initiation of ODR systems.¹¹³ As a result of the conference, three trial ODR projects were created: the Virtual Magistrate project, which aimed to resolve disputes between Internet Service Providers (ISPs) and users; the University of Massachusetts Online Ombuds Office, which focused on resolving disputes online generally; and the University of Massachusetts' ODR program that concentrated on resolving family and domestic disputes.¹¹⁴ Since then, many ODR systems have been created.

Like traditional ADR, ODR includes online negotiation, mediation, and arbitration. The goals of ODR are essentially the same as those of traditional dispute resolution, the difference being merely in the form of communication and the use of technology.¹¹⁵

1. Online Mediation

Online mediation involves the facilitation of communication between disputing parties by a neutral, third party mediator by email, chat rooms, or other online channels.¹¹⁶ The mediation process is intended to develop objectives toward achieving an ultimate

¹⁰⁹ See Ethan Katsh, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*, 10 LEX ELECTRONICA (Winter 2006), available at <http://www.lex-electronica.org/articles/v10-3/katsh.pdf> [hereinafter *Some Implications*].

¹¹⁰ See *id.*

¹¹¹ See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

¹¹² See *Some Implications*, *supra* note 109 (describing how there has been slow movement in rule-making in cyberspace. The author has expended effort in establishing ODR programs such as eBay, ICANN.).

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See Susan Summer Raines, *The Practice of Mediation Online: Techniques to Use or Avoid When Mediating in Cyberspace*, THE NATIONAL CENTER FOR TECHNOLOGY AND DISPUTE RESOLUTION, available at <http://www.odr.info/unforum2004/raines.htm>.

¹¹⁶ See Llewellyn Joseph Gibbons et al., *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M. L. REV. 27 (2002).

agreement and actual steps for reaching that agreement.¹¹⁷ Like traditional mediation, online mediation is binding when parties are able to reach an agreement, and then either party has his mediator or another lawyer draft a contract memorializing the agreement.¹¹⁸ An example of online mediation is the American Arbitration Association's (AAA) online mediation of claims under \$10,000.¹¹⁹ The AAA's website states that online mediation can be done in just "4 easy steps."¹²⁰ Each party must: 1) register and create a profile; 2) agree to the Terms of Use and acknowledge an Agreement to Participate; 3) complete a Request for Mediation form; and 4) submit payment for a trained AAA staff mediator who is then assigned to the matter.¹²¹ The mediation is conducted through instant messaging or chat rooms, and the mediator reserves the right to "meet" individually with each party in a private chat room.¹²² The AAA claims that issues can be resolved in around thirty days.¹²³

2. Online Arbitration

Online arbitration, like offline arbitration, is a dispute resolution mechanism employed to reach a binding resolution of a dispute by a neutral, third party arbitrator or tribunal.¹²⁴ In arbitration, the parties agree to submit their dispute to arbitration, and a neutral is appointed to reach a final, binding resolution.¹²⁵ There are numerous online arbitration systems. One example is FINRA's Arbitration Online Claim Filing, where a disgruntled party (albeit related to securities, similar programs exist for commercial transactions) can file a claim online, submit a signed agreement and other necessary documents, and obtain a printed receipt with a tracking number.¹²⁶

¹¹⁷ See Raines, *supra* note 115.

¹¹⁸ See CARRIE MENKEL-MEADOW ET AL., *MEDIATION PRACTICE, POLICY, AND ETHICS* 248–49 (Aspen Publishers, 2006).

¹¹⁹ See American Arbitration Association, *AAA Online Mediation for Claims Under \$10,000*, https://services.adr.org/eroom/faces/welcome_and_steps.jspx (last visited Feb. 1, 2010) [hereinafter *AAA*].

¹²⁰ *Id.*

¹²¹ See *id.*

¹²² This is a technique known as "caucusing" in traditional offline mediation. See MENKEL-MEADOW ET AL., *supra* note 118, at 245.

¹²³ See *AAA*, *supra* note 119.

¹²⁴ See Mediate.com, *What is Arbitration?*, <http://www.mediate.com/articles/grant.cfm> (last visited Feb. 1, 2010).

¹²⁵ MENKEL-MEADOW ET AL., *supra* note 118, at 14.

¹²⁶ See Arbitration Online Claim Filing, FINRA, <http://www.finra.org/ArbitrationMediation/Parties/ArbitrationProcess/ArbitrationOnlineClaimFiling/> (last visited Feb. 1, 2010).

Other websites with online settlement mechanisms include eBay, ICANN,¹²⁷ and SquareTrade.¹²⁸ eBay and SquareTrade dispute resolution programs operate in a manner similar to the FINRA Online Claim Filing described above. With the eBay resolution program, a dissatisfied seller or buyer can alert eBay's Resolution Center of a problem. The other party will receive an email, which describes the trading partner's complaint. The party receiving the email can respond and communication ensues until the case is resolved.¹²⁹ If the parties cannot reach an agreement, eBay Customer Support will intervene as an arbitrator and decide the ultimate outcome.¹³⁰ ICANN is an Internet site devoted to regulating the domain name system.¹³¹ Additionally, it has designed a dispute resolution system for domain name disputes.

If all ODR programs are similarly structured to the ones outlined above, ODR seems simple and user-friendly enough so that disputing parties, particularly with small claim problems, would not hesitate to utilize these or other similar ODR programs.

C. Drawbacks of ODR

Although ODR is an extremely innovative and helpful way to resolve online disputes, it is not without problems. "[C]yberspace is not a 'mirror image' of the physical world,"¹³² and unique problems that result from interactions in a virtual world are bound to arise. The Internet has the ability to simultaneously connect and distance individuals from the consequences of their actions.¹³³

Drawback 1. ODR hinders the ability to cultivate relationship building and trust.¹³⁴

Generally, people are skeptical of new and foreign technology. This was no less true when the use of the Internet, resulting in

¹²⁷ See *Some Implications*, *supra* note 111.

¹²⁸ See Raines, *supra* note 115.

¹²⁹ See eBay, *Resolving Transaction Problems in the Resolution Center*, <http://pages.ebay.com/help/buy/resolving-problems.html> (last visited Feb. 1, 2010).

¹³⁰ See *id.*

¹³¹ See ICANN, *Online Dispute Resolution Standards of Practice*, <http://www.icann.org/ombudsman/odr-standards-of-practice-en.htm> (last visited Feb. 2, 2010).

¹³² Goodman, *supra* note 63, citing Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, 1308 (1998).

¹³³ See Timothy L. Fort & Liu Junhai, *Chinese Business and the Internet: The Infrastructure for Trust*, 35 VAND. J. TRANSNAT'L L. 1545, 1555 (2002).

¹³⁴ See Katsch & Wing, *supra* note 7, at 27.

worldwide communication, grew.¹³⁵ As explained above, ODR has arisen partially because of the skepticism online consumers and sellers feel toward online commercial transactions. Companies have added private policies to their websites, providing increased security for credit card transactions.¹³⁶ However, when disputes arise online and parties advocate for the use of ODR, the Internet may again increase skepticism.

Relationship building in an informal setting has traditionally been vital to the success of mediation and other alternative dispute resolution methods.¹³⁷ Because of the use of technology in ODR to resolve online disputes, there is no face-to-face interaction without using video-conferencing (which could require technology that Internet users do not necessarily have). The parties cannot truly know the person with whom they are interacting by email or chat room.¹³⁸ Typed statements are in danger of being misinterpreted as a result of an “absence of social cues.”¹³⁹ In addition, if email is being used, a person can merely walk away from her computer, either because of frustration from the process or because of a lack of concentration.¹⁴⁰ There is no one present to whom a disputing party is directly accountable. Thus, a lack of trust is bound to arise between the parties, which would significantly impact the dispute resolution process.

Drawback 2. ODR creates greater liability for parties.

Parties must proceed with caution in typing everything they wish to say, as accurately as possible.¹⁴¹ The use of email can be problematic since parties often feel exhilarated and particularly free when communicating by email. This has the ability to lead to the situation where angry disputants say exactly how they feel (often without tact), which could be detrimental to the ODR process.¹⁴² Furthermore, everything each party types can be printed, allowing little room for mistakes.

¹³⁵ See Fort & Junhai, *supra* note 133, at 1553.

¹³⁶ See *id.*

¹³⁷ See Goodman, *supra* note 63.

¹³⁸ See Raines, *supra* note 115.

¹³⁹ Janice Nadler, *Electronically-Mediated Dispute Resolution and E-Commerce*, 17 *NEGOT. J.* 333 (2001).

¹⁴⁰ See *id.*

¹⁴¹ See Katsch & Wing, *supra* note 7, at 39.

¹⁴² See Raines, *supra* note 115.

The problems outlined above would be exacerbated in cross-cultural negotiations, as the difference in culture would present an additional barrier to the dispute resolution process.¹⁴³

III. CROSS-CULTURAL DISPUTE RESOLUTION

In many ways people are similar to one another, in that there are general common goals and shared values that most people all over the world care about.¹⁴⁴ Nonetheless, there are probably an equal number of differences in interests as there are similarities.¹⁴⁵ These differences can cross over into the realm of dispute resolution and influence different parties' "styles of communication."¹⁴⁶ In addition, these differences will inevitably have greater influence in cross-cultural dispute resolution processes, which are inherently more difficult than intra-cultural dispute resolution processes.¹⁴⁷ A study by the Global Center for Dispute Resolution Research found that parties to international disputes most want "a fair and just result."¹⁴⁸ To achieve this in international dispute resolution, more than intellectual rigor is required. It is also necessary for the parties to believe that they have been heard and understood in their cultural context.¹⁴⁹ As a result, the recent growth in international trade has stressed the need to confront the challenge of gaining a better understanding of other cultures and their customs and expectations.¹⁵⁰

"Culture" is an ambiguous term. It has been defined in an abundance of ways, with some definitions being broader and more

¹⁴³ See section on Cross Cultural Negotiations, *infra* part III.

¹⁴⁴ See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 166 (2d ed.) (For example, these shared goals and values include the quest to feel loved, the feeling of not wanting to be taken advantage of, and respecting others).

¹⁴⁵ See *id.* (Such differences include differences in characteristics—some people are shy, while others are outgoing; some people can be brutally honest, while others maintain appropriate levels of tact; some people are aggressive, while others remain generally composed or maintained, etc.).

¹⁴⁶ *Id.*

¹⁴⁷ See Urs Martin Laeuchli, *Negotiations and Other ADR with the Chinese*, [MEDIATE.COM](http://www.mediate.com/articles/lauchli.cfm), <http://www.mediate.com/articles/lauchli.cfm> (last visited Nov. 1, 2010); see also William K. Slate II, *Paying Attention to Culture in International Commercial Arbitration* (May 18, 2004), in *DISP. RESOL.* J. 3 (Aug./Oct. 2004).

¹⁴⁸ Slate, *supra* note 149, at 3.

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* at 2; see also Karen J. Bannan, *Lost in Translation*, [BTOBONLINE.COM](http://www.btobonline.com/apps/pbcs.dll/article?AID=/20060612/FREE/606120728), June 12, 2006, <http://www.btobonline.com/apps/pbcs.dll/article?AID=/20060612/FREE/606120728>.

comprehensive than others.¹⁵¹ The underlying factors in most definitions of “culture” include: “(1) a patterned way of thought or behavior of (2) a group (3) based on certain values.”¹⁵² One definition states that culture can be understood “in terms of a set of tradition, laws, attitudes, beliefs, and values.”¹⁵³ Various factors that influence these beliefs include education, religion, gender, and political and social values.¹⁵⁴ A broad notion of “culture” often encompasses collective ideology,¹⁵⁵ constituting the political culture, climate, or notions of a group or institution.¹⁵⁶

Culture can affect the way people perceive events, in that people often make judgments regarding what they find to be socially acceptable based on the standards of their culture.¹⁵⁷ This includes how people ideologically feel about levels of privacy, competition, and morality.¹⁵⁸ This is particularly significant for a country like China, where the political ideology is an amalgam of communist and capitalistic ideas,¹⁵⁹ in contrast to the democratic ideals of the U.S.¹⁶⁰

Moreover, other aspects of culture (such as behavioral patterns), in addition to beliefs shaped by collective political ideology, affect dispute resolution across borders. For example, the differ-

¹⁵¹ See Sharanya Rao, *The Cultural Vacuum in Online Dispute Resolution*, THE NATIONAL CENTER FOR TECHNOLOGY AND DISPUTE RESOLUTION, <http://www.odr.info/unforum2004/rao.htm> (last visited Jan. 31, 2010); see also Pat K. Chew, *The Pervasiveness of Culture in Conflict*, 54 J. LEGAL EDUC. 60, 69 (2004) (stating that defining “culture” is a challenge).

¹⁵² *Id.*

¹⁵³ BC. GOH, *Cross Cultural Perspectives on Sino-Western Negotiation*, in NEGOTIATING WITH THE CHINESE 269, 270 (1996).

¹⁵⁴ See SARAH C. HILMER, *MEDIATION IN THE PEOPLE’S REPUBLIC OF CHINA AND HONG KONG (SAR)* 77 (Eleven International Publishing 2009).

¹⁵⁵ See Encyclopedia.com, *A Dictionary of Sociology*, <http://www.encyclopedia.com/doc/1O88-ideology.html> (last visited Feb. 1, 2010).

¹⁵⁶ See Dictionary.com, <http://dictionary.reference.com/browse/ideology> (last visited Nov. 2, 2010) (“Ideology” has been defined by Dictionary.com as “the body of doctrine, myth, belief, etc. that guides an individual, social movement, institution, class, or large group” or “a body of doctrine, myth, etc., with reference to some political and social plan.”).

¹⁵⁷ See Rao, *supra* note 151.

¹⁵⁸ See *id.*

¹⁵⁹ The Communist Party of China (CCP) has control in the P.R.C. While generally moving toward a more capitalist economy, the government has been know to aid in the success of state-owned enterprises, to the detriment of private businesses and entrepreneurs. See Liang, *supra* note 26.

¹⁶⁰ For example, where China is especially stringent regarding content placed on the Internet that is critical of the CCP (as is mentioned later in this note), the United States believes in “single Internet” where all have equal access to knowledge and ideas. See Erick Schonfeld, *Hillary Clinton Extends Foreign Policy to the Internet and Wants Your Help*, WASHINGTONPOST.COM, Jan. 21, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012103441.html?sub=ar>.

ences that exist among different cultures in negotiation are generally “the relative distribution of different negotiation styles.”¹⁶¹ Cultural differences influence these “relative distributions.” While different languages and dialects certainly present a problem,¹⁶² it is very important that individuals and companies understand localizations.¹⁶³ Other aspects to consider include: the degree of formality that a specific culture tends to exert in various interactions (business and social),¹⁶⁴ the “directness of communication” (candor and the handling of emotions),¹⁶⁵ and the amount of eye contact and other non-verbal communication.¹⁶⁶

The importance of understanding culture is illustrated by the fact that countries have been prone to using international arbitration and other dispute resolution processes in order to resolve commercial dispute settlements.¹⁶⁷ In terms of international arbitration, multiple arbitration conventions are currently dispersed throughout the world.¹⁶⁸ These conventions have been formed as a result of arbitration clauses in international commercial contracts, since parties are reluctant to travel to the courts of foreign countries to litigate.¹⁶⁹

While conducting business in China, foreign companies frequently become involved in commercial disputes with Chinese nationals, companies, or the Chinese government.¹⁷⁰ As mentioned above, the commercial contracts usually contain a clause advocating alternative dispute resolution, should a dispute arise.¹⁷¹ It is important to keep these cultural differences and concepts in mind when attempting to resolve any disputes that arise, and to tailor the

¹⁶¹ Jonathan Hughes, Jeff Weiss, Stuart Kliman & David Chapnick, Chapter 26. Contract Negotiations—Systems and Strategies, 1 Int’l. Contract Manual § 26:43: Cross-Cultural and International Negotiations.

¹⁶² See Bannan, *supra* note 150.

¹⁶³ See *id.* (In defining “localization,” the author states that localization “takes into account slang . . . customs and social mores . . .”).

¹⁶⁴ See Hughes, *supra* note 161.

¹⁶⁵ *Id.*

¹⁶⁶ See Marcelle E. DuPraw & Marya Axner, *Working on Common Cross-Cultural Communication Challenges*, PBS, <http://www.pbs.org/ampu/crosscult.html> (last visited Feb. 2, 2010) (noting that non-verbal communication varies among countries).

¹⁶⁷ See GEMMELL, *supra* note 4, at viii.

¹⁶⁸ See *id.*

¹⁶⁹ In addition to the travel expense, people feel this way because of unfamiliarity of foreign countries’ procedural rules, as well as the prospect of having to litigate in a hostile country where the foreign courts may be prejudicial. See GEMMELL, *supra* note 4, at 4–5.

¹⁷⁰ See U.S. Department of Commerce, *Dispute Avoidance and Dispute Resolution in China*, FINDLAW.COM, <http://library.findlaw.com/2002/Nov/1/132533.html> (last visited Sept. 22, 2009).

¹⁷¹ See *id.*

specific dispute resolution method to Chinese culture in order to achieve successful resolution. The problem, therefore, with the U.S. and P.R.C. cross-cultural dispute resolution is two-fold. First, Chinese and American cultural characteristics and demeanor differ from one another. The difficulty lies in the parties' understanding those differences and being able to set them aside and communicate online in a manner that is productive toward a peaceful, satisfying, and just result. Second, the "political culture" of China (the rigid governmental practices, in particular, the government's censorship of the Internet) has the potential to pose a huge stumbling block in the course of ODR of online transactional disputes between the U.S. and the P.R.C. The latter—the problem of political culture's impact on the development of ODR in China—is discussed later in this Note.

IV. POSSIBILITY OF THE DEVELOPMENT OF ODR IN CHINA

A. Chinese Cultural Disposition Toward Forms of Alternative Dispute Resolution

While one might argue that China is relatively backward with respect to its rigid political system and, often, egregious human rights issues,¹⁷² leading to the conclusion that China has a long "way to go"¹⁷³ (at least in the eyes of the West), China has historically been at the forefront of ADR's development. This is illustrated by ADR's early use into Chinese culture. In fact, the use of the word "alternative" to describe dispute resolution in China is a misnomer, as dispute resolution is considerably the norm in China,¹⁷⁴ and has been for years.¹⁷⁵

¹⁷² See Tony Blair, *China's New Cultural Revolution*, WALL ST. J., Oct. 9, 2009, at A10; see also Amnesty International, 2008 Annual Report for China <http://www.amnestyusa.org/annualreport.php?id=ar&yr=2008&c=CHN> (last visited Feb. 2, 2010) (for various alarming statistics concerning the use of the death penalty in 2007, the restrictions on freedom of expression, instances of violence and discrimination against women).

¹⁷³ Blair, *supra* note 172.

¹⁷⁴ See Laeuchli, *supra* note 147 (stating that ADR is not considered "alternative" in China but is rather considered "mainstream").

¹⁷⁵ See TAO, *supra* note 26, at 1 (discussing how the origins of arbitration in China can be traced to the early 1900s).

Amidst major changes in the government, Chinese culture has remained resilient.¹⁷⁶ When the P.R.C. was established in 1949, “the past was officially denounced,” with the result that “generations born after 1949 received no formal education in traditional culture.”¹⁷⁷ Nevertheless, tradition played a role in managing personal and commercial disputes during the period of “lawlessness” of the Cultural Revolution.¹⁷⁸ Thus, it is worthwhile to study a culture that has maintained its dispute resolution system for years throughout various terms of political and social upheaval.¹⁷⁹

In the P.R.C., traditional ADR, like in the U.S., consists of negotiation, mediation, arbitration, and the combination of these processes.¹⁸⁰ The U.S. Chamber of Commerce has recommended that when U.S. individuals or businesses engage in commercial transactions with Chinese individuals, businesses, or government, it is best first to attempt to negotiate the dispute.¹⁸¹ If negotiation proves to be futile, the next best approach is to arbitrate.¹⁸² If arbitration does not work, litigation will ensue. However, if dispute resolution is perceived as a continuum,¹⁸³ mediation serves as a reasonable medium between negotiation and arbitration. Therefore, mediation should be, and most likely will be, attempted before reaching the arbitration and litigation stages.

An additional and unique aspect to China’s ADR is the “med/arb,” hybrid arbitration, a process advocated for by China dispute resolution practitioners at the China International Economic and Trade Arbitration Commission (CIETAC).¹⁸⁴ Under the med/arb procedure, if mediation is attempted and fails to produce a “negotiated” result, arbitration will follow and will be conducted by the

¹⁷⁶ See Bobby K. Y. Wong, *Traditional Chinese Philosophy and Dispute Resolution*, 30 H.K.L.J. 304, 306 (2000).

¹⁷⁷ *Id.*

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *See* Hong, *supra* note 6, at 381.

¹⁸¹ *See* U.S. Department of Commerce, *Dispute Avoidance and Dispute Resolution in China*, FINDLAW.COM, <http://library.findlaw.com/2002/Nov/1/132533.html> (last visited Feb. 4, 2010).

¹⁸² *See id.*

¹⁸³ *See* HILMER, *supra* note 154, at 7.

¹⁸⁴ A F M Maniruzzaman, *Arbitration of International Oil, Gas and Energy Disputes in Asia: Problems and Prospects*, available at http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_52.htm; *see* China International Economic and Trade Arbitration Commission Introduction, CIETAC, http://cn.cietac.org/english/introduction/intro_1.htm (last visited Feb. 2, 2009) (describing what the CIETAC primarily does. The CIETAC is an arbitration institution in China, that “independently resolves economic and trade disputes by means of arbitration and conciliation (mediation).”).

former mediator.¹⁸⁵ The next two subsections focus on Chinese mediation and arbitration, corresponding to the advice from the CIETAC.

1. Chinese Mediation

One factor that distinguishes mediation from negotiation is that mediation is generally “a more structured negotiation process.”¹⁸⁶ An independent third party facilitates communication, such that the likelihood of the parties reaching a mutually agreeable conclusion increases.¹⁸⁷ In China, mediation has traditionally been considered the dominant method of resolving conflicts between disputing parties.¹⁸⁸ Early signs of Chinese mediation can be found in Chinese folk legends¹⁸⁹ and throughout the various dynasties of ancient China.¹⁹⁰ In fact, Chinese mediation is grounded in Confucianism¹⁹¹ and, like mediation around the rest of the world, is largely influenced by culture.¹⁹²

Because both China and modern Western nations (such as the U.S.) exhibit a propensity toward resolving disputes using mediation,¹⁹³ “there are similarities between traditional Chinese and modern Western concepts of dispute resolution.”¹⁹⁴ However, mediation has been most commonly used to settle matrimonial disputes in modern Western societies, leaving tortious, contractual, and commercial disputes to be resolved in the litigation realm.¹⁹⁵ This underscores the view that, in mediation, compromises inevitably have to be made, yet justice should not be one of them; certain wrongs demand legal remedies.¹⁹⁶

¹⁸⁵ See HILMER, *supra* note 154, at 6–7.

¹⁸⁶ *Id.* at 5.

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See id.* at 8; *see also* Wong, *supra* note 176, at 306 (“It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit . . . Those who live do not want to go to the court; those who are dead do not want to go to hell.”); *see also* Justice Robert F. Utter, *Dispute Resolution in China*, 62 WASH. L. REV. 383 (1987).

¹⁹⁰ *See* HILMER, *supra* note 154, at 8–10 (traces the progression of mediation from the Qin Dynasty in 221 BC–207 BC through the Tang Dynasty in 618 AD–907AD).

¹⁹¹ *See* Laeuchli, *supra* note 147.

¹⁹² *See* HILMER, *supra* note 154, at 3.

¹⁹³ *See* Wong, *supra* note 176, at 305.

¹⁹⁴ *Id.*

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

In contrast, the same approach is used for various and almost all types of disputes in China.¹⁹⁷ Skepticism of litigation was an impetus for the growth of China's dispute resolution system.¹⁹⁸ There are a few reasons as to why China has been reluctant to use litigation. One reason, in particular, is that Chinese culture values a "harmonious social order" where disputes are avoided.¹⁹⁹ Taoism, Legalism, Buddhism, Mohism, and Confucianism played influential roles in enforcing this idea of harmony,²⁰⁰ which is an enduring and dominant concept in Chinese culture.²⁰¹

Confucians believed that in order to be successful in dispute resolution, the disputants should be educated about "moral precepts" and moderation.²⁰² The goal of the judicial system was to make China a more secure society with less crime. Chinese judges, strongly influenced by Confucianism, believed their responsibilities included teaching people to behave.²⁰³ Moderation was valued, as it was thought that if a person is prevented from acting aggressively, confrontational behavior could be avoided.²⁰⁴ Under Confucian thought, the universe is at peace, with individuals having the ability to disrupt that peace,²⁰⁵ and an individual's needs are sacrificed for the greater good.²⁰⁶ In alignment with these views, mediation in China is often public so that others can learn from a successful mediation process.²⁰⁷ However, with Western influence, China has recently made mediation a more private process.²⁰⁸

An example of a mediation institution in China is the Conciliation Department of the China Council for the Promotion of International Trade (CCPIT) and China Chamber of International Commerce (CCOIC).²⁰⁹ The CCPIT/CCOIC has set up multiple

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*

¹⁹⁹ *See* Wong, *supra* note 176, at 306.

²⁰⁰ *See id.* at 307 (mentioning that all of these movements—except for Buddhism—originated in the Chinese philosophical text, *The Book of Changes*).

²⁰¹ *See id.*

²⁰² *See id.* at 309–10.

²⁰³ *See id.* at 307–08.

²⁰⁴ *See id.* at 310.

²⁰⁵ *See* Wong, *supra* note 176, at 309.

²⁰⁶ *See id.*

²⁰⁷ *See* Hong, *supra* note 6, at 395.

²⁰⁸ *See id.*

²⁰⁹ China Council for the Promotion of International Trade explaining its Legal Affairs Department, http://english.ccpit.org/Contents/Channel_1914/2007/1011/70356/content_70356.htm (last visited Feb. 2, 2010). (The CCPIT is a Chinese institution that promotes foreign trade. It promotes the use of foreign investment and technology, and advocates for a respectful and peaceful relation between China and foreign economic entities).

conciliation centers throughout various geographic locations—provinces, municipalities and major cities—in China. The CCPIT Conciliation Center retains primary control over the local conciliation centers that operate using uniform conciliation rules.²¹⁰

Although the concepts of harmony and Confucianism were highly influential in traditional Chinese mediation, conditions have changed²¹¹ so that Confucian notions of harmony were replaced by stricter versions of the rule of law.²¹² When the P.R.C. began its series of economic reforms, the country simultaneously began to move away from its traditional, informal and less confrontational dispute settlement process, with a move toward the more formal, rigid, and confrontational Western approach—arbitration.²¹³

2. Chinese Arbitration

If negotiation and mediation fail, arbitration is the next preferred method to resolve foreign disputes in China.²¹⁴ While various arbitral provisions and regulations were enacted in China throughout the twentieth century,²¹⁵ until the Communist Party of China (CCP) came into power, the legal system was a mere codification or history of laws (without any actual rule of law).²¹⁶ Arbitration became more commonly used to resolve commercial disputes during economic reforms in the 1970s,²¹⁷ as the country

²¹⁰ See Hong, *supra* note 6, at n.46.

²¹¹ Specifically, during later dynasties and as a result of economic reform movements. See Wong, *supra* note 177, at 307–08.

²¹² See *id.*

²¹³ See Maniruzzaman, *supra* note 184.

²¹⁴ See Posting of Adrian Hughes to E-Arbitration-T Project—Online Dispute Resolution, <http://www.e-arbitration-t.com/2008/07/05/dispute-resolution-doing-business-in-china/#more-61> (July 5, 2008, 7:30 in Spain). See also Maniruzzaman, *supra* note 184.

²¹⁵ TAO, *supra* note 26, at 1 (The author discusses measures taken by the Chinese government that demonstrate the early developments of arbitration in China. In 1912, the Chinese government set forth the Constitution for Business Arbitration Office. Subsequently, in 1913, the Chinese government released the Working Rules for Business Arbitration Office, which compiled “provisions for the parties to a business dispute to submit their dispute to the Business Arbitration office for settlement.” In 1930, the Chinese government released the Law for Settling Disputes Between Labor and Management, which established guidelines by which to resolve disputes in a conciliatory manner “between employers and employees.” In 1949, the Tianjin municipal government established the Tianjin Municipality Interim Rules of Organization for Mediation and Arbitration Commission, which “set forth the formation, authority and working principles for the mediation and arbitration of disputes. In the same year, the People’s Republic of China (P.R.C.) was formed, and China began to establish “both domestic and foreign-related” arbitration systems in various substantive legal fields.).

²¹⁶ GEMMELL, *supra* note 4, at 120.

²¹⁷ Hong, *supra* note 6, at 382.

sought to become more “open” and to reform itself.²¹⁸ Subsequently, the State Council implemented various codes and regulations to designate a plan of action if disputes arose in the course of dealing with foreign investors.²¹⁹ The objective behind most regulatory codes was to encourage foreign investment and, thus, attempt conciliation and arbitration to resolve contractual or commercial disputes.²²⁰

In the 1980s, numerous arbitral bodies and institutions were established.²²¹ While these arbitral bodies lacked uniform arbitration law, resulting in confusion and inconsistency among different arbitral institutions,²²² China eventually enacted its Arbitration Law in 1994. This resulted in a clarification of arbitration’s dominant position in the Chinese legal world.²²³

Although an in-depth analysis of Chinese arbitration law is beyond the scope of this Note, it is worth discussing briefly the basic principles and logistics behind the P.R.C.’s Arbitration Law (albeit at the risk of extreme oversimplification). The Arbitration Law combines elements of the P.R.C.’s Civil Law and Contract Law, and applies to both domestic and foreign disputes.²²⁴ Arbitration is most commonly used in contractual and property disputes.²²⁵ If contracting parties insert a precautionary agreement to arbitrate in the contract, the agreement must be in writing, expressing the parties’ intention that the designated matters should be arbitrated, and designating a specific arbitration commission where the matters are to be handled.²²⁶ If the contract involves a foreign party, the parties can choose which substantive law should govern disputes that may arise from the contract, and they can choose which arbitral institution (foreign or Chinese) will preside over the matters.²²⁷

²¹⁸ TAO, *supra* note 26, at 8.

²¹⁹ The regulations include the Sino-Foreign Equity Joint Venture Law, Regulations of the People’s Republic of China on the Exploration of Offshore Petroleum Resources in Cooperation with Foreign Enterprises, Foreign Economic Contract Law of the People’s Republic of China. *See id.* at 8–10.

²²⁰ *Id.* at 10.

²²¹ *Id.* at 8 (discussing the different codes and regulations relating to arbitration that were enacted by the State Council in China).

²²² Hong, *supra* note 6, at 382.

²²³ *Id.* (describing how the Arbitration Law in China, among other things, details the nature of disputes which comprise ripe candidates for arbitration, and the relationship between arbitration and the courts).

²²⁴ GEMMELL, *supra* note 4, at 143 (mentioning that any ambiguous provisions should be interpreted as being equally applicable to both foreign and domestic arbitration proceedings).

²²⁵ *Id.* at 142.

²²⁶ *Id.* at 144.

²²⁷ *Id.* at 146.

However, the parties' discretion is subject to limitations, one of which is that the law chosen by the parties cannot be a legal system the P.R.C. finds unfavorable or injurious to its interests.²²⁸

B. The Online Dispute Resolution System Currently in Place in the P.R.C.

China, like the U.S., holds the view that it is natural to resolve disputes online that originate as a result of online transactions.²²⁹ A few examples of legal problems that often arise as a result of online activity include domain name disputes, online security and confidentiality problems, payment and delivery problems arising from B-to-B and B-to-C activities, and jurisdiction and applicable substantive law issues relating to the resolution of disputes that arise from e-commerce.²³⁰

Experimental online mediation programs have been attempted in China. Eachnet, "[t]he eBay of China,"²³¹ is an eBay-owned, Chinese online auction site with a rating system strikingly similar to eBay's dispute resolution center, where a dissatisfied consumer or seller from the online transaction can file a claim online.²³² If the claimant is found to have suffered, she can receive damages of up to 1,000 Yuan.²³³ The CNNIC Domain Name Dispute Resolution Procedure (CNDRP) is another ODR method advanced in China, which mainly deals with resolving domain name disputes.

Preparations have also been made for online arbitration as well. The New York Convention requires that, if parties are to settle a dispute by arbitration, there must be an "agreement in writing," which documents the agreement.²³⁴ While an exchange of emails does not constitute a "writing" necessary to fulfill the New York Convention's requirement in all countries, China accepts con-

²²⁸ *Id.* at 147; see also TAO, *supra* note 26, at 83.

²²⁹ Hong, *supra* note 6, at 381.

²³⁰ TAO, *supra* note 26, at 183.

²³¹ Rebecca Fannin, *The eBay of China: Eachnet: A Shanghai Online Auction Firm Set Out to Imitate eBay*. In *June, eBay Bought It - Regional Report*, THE CHIEF EXECUTIVE, Aug. 1, 2003, available at http://findarticles.com/p/articles/mi_m4070/is_191/ai_109669776/.

²³² Hong, *supra* note 6, at 396.

²³³ *Id.*

²³⁴ TAO, *supra* note 26, at 186.

tracts executed by emails for the purposes of a valid, arbitration agreement in “writing.”²³⁵

If a party in China wishes to engage in online arbitration, she must be sure to comply with the conventional Arbitration Law (AL), choosing carefully the headquarters of the arbitration commission, gaining approval from local government, and joining the Chinese Arbitration Association.²³⁶ The CNDRP also conducts online arbitration, and is one example of a facility where online users can engage in online arbitration.

V. INFLUENCES OF CULTURE, AND SPECIFICALLY, THE POLITICAL ENVIRONMENT OF CHINA ON THE ODR PROCESS

So it should seem simple enough. Both countries have cultural dispositions towards ADR, and have established ODR mechanisms and websites to facilitate the continuation of e-commerce transactions. Those mechanisms seem to alleviate concerns associated with the transactions and further the success of ODR. Moreover, the P.R.C. has increasingly used arbitration in recognition of the fact that Western countries entangled in international commercial disputes prefer arbitration.²³⁷ Unfortunately, political influences have significant pull on the dispute resolution process in China.

A. The Power Struggle: When a Country Insists on the Impositions of Its Social and Political Values

When the Internet took off in 1996, legal scholars worldwide wondered what impact the Internet would have on the legitimacy of laws imposed by territorial states within their physical boundaries.²³⁸ That cyberspace has no boundaries and information can be accessed by almost anyone, anywhere prompted certain legal scholars to say, “[e]fforts to control the flow of electronic information across physical borders—to map local regulation and physical

²³⁵ *Id.*

²³⁶ Hong, *supra* note 6, at 384 (explaining the Chinese Arbitration Association to be 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.”).

²³⁷ Maniruzzaman, *supra* note 184.

²³⁸ Johnson & Post, *supra* note 111, at 1368.

boundaries onto cyberspace—are likely to prove futile, at least in countries that hope to participate in global commerce.”²³⁹ The authors of that statement sparked a controversial debate, arguing that a distinct, possibly self-regulating law would develop and govern the new “place” of cyberspace.²⁴⁰ They analogized the new phenomenon of the virtual world of the Internet to the Law Merchant of the Middle Ages, where new laws were created to govern merchant disputes because local legal systems were incapable of handling the disputes.²⁴¹ Furthermore, the laws implemented to govern merchants never overstepped territorial boundaries, nor imposed on the laws of sovereigns governing the territorial states.²⁴² So, too, the argument was, the laws of cyberspace would stay within the cyber “place.”

Fourteen years later, ODR scholars, in large part, have agreed with that argument and maintain that a self-regulating ODR system has evolved. These scholars point to the privatization of ODR and the creations of ICANN and eBay (to name a few).²⁴³ However, a closer look at the attempts of Internet and information regulation by China illustrates the superficial achievements of those ODR, Internet-regulating institutions.

B. Regulation of Internet Content in China

In recent years, the U.S. has expressed concern regarding its companies’ operations in China, due to the fact that Chinese residents are subject to many severe restrictions and regulations.²⁴⁴ One such area in China in which regulations can be felt is the Internet. Despite Chinese government officials’ contentions that international criticism of its Internet restrictions (primarily by the West) is “unfair,”²⁴⁵ access to websites (for example, YouTube) has often been disabled,²⁴⁶ residents have been jailed,²⁴⁷ and Internet

²³⁹ *Id.* at 1372.

²⁴⁰ Katsh, *supra* note 55.

²⁴¹ Johnson & Post, *supra* note 111, at 1389–90.

²⁴² *Id.*

²⁴³ Katsh, *supra* note 55.

²⁴⁴ *China Defends Internet Regulation*, BBC NEWS, Feb. 15, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/4715044.stm>.

²⁴⁵ *Id.* (Deputy chief of the Internet Affairs Bureau of the State Council Information Office, Mr. Liu Zehngrong, has stated that China and the West “basically have identical legislative objectives and principles.”).

²⁴⁶ *Id.* At the time this article was posted in 2006, BBC News was blocked. BBC News is currently not blocked in China); see Spencer & Delaney, *supra* note 6 (In March 2008, Google’s

companies face pressure to censor the content of their sites in order to comply with local regulations.²⁴⁸ The beginning of 2010 saw tensions rise considerably between the U.S. and China over China's Internet policy. Google announced that it intended to stop complying with China's Internet censorship, as it claimed that it, along with other American companies, experienced attacks attributed to China and that many human rights activists' Gmail accounts were hacked into.²⁴⁹ In March 2010, Google disabled its Internet search service and rerouted users to its uncensored search engine in Hong Kong.²⁵⁰

Furthermore, until recently, China has been adamant about enacting laws that require Internet censorship software to be pre-installed on all computers sold in China.²⁵¹ The city of Beijing has also expressed its interest in "recruiting 10,000 volunteers to monitor online content."²⁵² While YouTube has been unblocked since China's last blocking of the site,²⁵³ and Beijing renewed Google's

YouTube was blocked in China after "graphic images from Tibet, including videos of burning trucks and monks being dragged through the streets by Chinese soldiers" were posted. This followed prior blockings of the site—one of which was particularly long—in October of 2007.); see also *Internet Censorship in China*, NYTIMES.COM, June 30, 2009, http://topics.nytimes.com/topics/news/international/countriesandterritories/china/internet_censorship/index.html (discussing how websites that post news or information about the Dalai Lama, the 1989 Tiananmen Square protest and subsequent government response, and Falun Gong—a banned spiritual movement—are blocked).

²⁴⁷ *China Defends Internet Regulation*, BBC NEWS, Feb. 15, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/4715044.stm> (Arrests have occurred primarily when the Chinese government finds the information posted on a website to be "subversive." Chinese journalist, Shi Tao, was sentenced in 2005 to ten years in jail after "sending foreign-based websites the text of an internal Communist Party message." Li Zhi was sentenced to eight years imprisonment in 2003 for "subversion." Human rights groups have declared that Mr Li and four others jailed around the same time "were posting opinions on the internet and calling for political change.").

²⁴⁸ Spencer & Delaney, *supra* note 6 (YouTube spokesman, Ricardo Reyes, has stated that the company has to conduct a balancing between advocating freedom of expression, yet also "obeying local laws.").

²⁴⁹ Edward Wong, *China Paints Google Issue as Not Political*, NYTIMES.COM, Jan. 20, 2010, <http://www.nytimes.com/2010/01/21/world/asia/21china.html> [hereinafter *China Paints Google Issue as Not Political*].

²⁵⁰ Miguel Helft & David Barboza, *Google Shuts China Site in Dispute over Censorship*, NYTIMES.COM, Mar. 22, 2010, http://www.nytimes.com/2010/03/23/technology/23google.html?_r=1.

²⁵¹ Michael Wines, *China Warms to New Credo: Business First*, NYTIMES.COM, Aug. 13, 2009, <http://www.nytimes.com/2009/08/14/world/asia/14china.html>; see also Edward Wong & Ashlee Vance, *China Intent on Requiring Internet Censor Software*, NYTIMES.COM, June 18, 2009, <http://www.nytimes.com/2009/06/19/business/global/19censor.html>.

²⁵² Wong & Vance, *supra* note 251.

²⁵³ Posting of Oiwan Lam to Global Voices Online, (Apr. 1, 2009) <http://advocacy.globalvoicesonline.org/2009/04/01/china-tightening-control-over-internet-audio-visual-content/>.

license in July 2010,²⁵⁴ the Google incident exemplifies the challenges of China's continuous Internet censorship. This has led some to believe that, "[n]owhere is the issue [of Internet regulation and censorship] more pressing than in China,"²⁵⁵ since companies must agree to government censorship in order to conduct business in China.²⁵⁶

Internet regulation has been commonplace in China since 1996.²⁵⁷ In 2000, the Chinese Communist Party (CCP) instituted economic and informational regulations.²⁵⁸ The economic regulations made doing business online contingent upon the fulfillment of certain requirements, and revealed its favoritism toward state-owned business enterprises.²⁵⁹ Meanwhile, the informational regulations restricted the information that can be transmitted by companies to their users and vice versa.²⁶⁰ As evidenced by these regulations, in addition to the five-year development plan that the Chinese government created for the development of e-commerce,²⁶¹ the CCP has acknowledged (and seems to be "embracing") the existence of the Internet and its possible economic and social uses. However, the CCP aims to maintain its control over the Internet and the information Chinese citizens receive.²⁶²

The imposition of regulations has continued into the twenty-first century, although the Chinese government has delegated a self-regulating role to businesses.²⁶³ In March 2010, the State Administration of Radio Film and Television (SART) released an "administrative notice" to provincial legal administrative governments, hoping to restrict further Internet audio and visual content, and providing guidelines for the ways to do so.²⁶⁴ Internet Service Providers (ISPs) have to sign a pledge, agreeing to self-censorship.²⁶⁵ Legal scholars have surmised that these self-regulating

²⁵⁴ David Barboza & Miguel Helft, *China Renews Google's License*, NYTIMES.COM, July 10, 2010, http://www.nytimes.com/2010/07/10/technology/10google.html?ref=internet_censorship.

²⁵⁵ Spencer & Delaney, *supra* note 6.

²⁵⁶ *Id.*

²⁵⁷ Anne S.Y. Cheung, *The Business of Governance: China's Legislation on Content Regulation in Cyberspace*, 38 N.Y.U. J. INT'L L. & POL'Y 1, 2-3 (2005-2006).

²⁵⁸ Liang, *supra* note 26, at 1418.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1418-19.

²⁶¹ See Part I *supra*, at 2-3 (stating information obtained from Woudhuysen, *supra* note 28).

²⁶² Liang, *supra* note 26, at 1419.

²⁶³ Cheung, *supra* note 258, at 5-6.

²⁶⁴ Lam, *supra* note 254.

²⁶⁵ Jill R. Newbold, *Aiding the Enemy: Imposing Liability on U.S. Corporations for Selling China Internet Tools to Restrict Human Rights*, 2003 U. ILL. J.L. TECH. & POL'Y 503, 510 (2003).

laws could prove to be an effective mechanism of “surveillance” for the CCP.²⁶⁶ Additionally, it appears to be a way for the government to acknowledge globalization and twist it into a position favorable to China. In this way, economic benefits can be derived from the process, but the Chinese government’s preferred political and social stability would be maintained.²⁶⁷

C. Is China’s Strict Control over Content Placed on the Internet Likely to Detract from the ODR Process?

The recent Google fiasco has generated a stream of discussions between the U.S. and Chinese government as to whether this is a purely commercial and non-political dispute.²⁶⁸ In the days immediately following the initial outbreak of tension in the beginning of 2010, Secretary of State Hilary Clinton delivered a speech where she sharply criticized the P.R.C. for its Internet censorship, and claimed that the censorship infringed upon fundamental liberties.²⁶⁹

Because of the P.R.C.’s strong censorship of the Internet and greater willingness to help state-enterprises (to the detriment of privately-owned companies), American businesses and individual consumers investing in China are assuming a great risk when doing business with Chinese companies. China has stated numerous times that when Americans conduct business with China, they must accede to China’s laws. While Americans are used to expansive freedom of expression and speech, Chinese citizens are not.²⁷⁰ The U.S. employs a more liberal approach to the Internet, whereas the CCP has imprisoned journalists for anything it finds to be politically hostile to its party’s line.

On its website, ICANN compiles a list of principles, originally set forth by the Advisory Committee of the National Centre for Technology and Dispute, by which to conduct ODR.²⁷¹ Among the

²⁶⁶ Cheung, *supra* note 258, at 6.

²⁶⁷ *Id.* at 6.

²⁶⁸ Wong, *supra* note 250.

²⁶⁹ Mark Landler & Edward Wong, *China Rebuffs Clinton on Internet Warning*, NYTIMES.COM, Jan. 22, 2010, <http://www.nytimes.com/2010/01/23/world/asia/23china.html>.

²⁷⁰ AMNESTY INTERNATIONAL REPORT 2009, CHINA, available at <http://report2009.amnesty.org/en/regions/asia-pacific/china> (discussing how, in 2009, the Chinese government continued to enforce strict restrictions on freedom of expression. Both Internet users and journalists risked imprisonment or other penalties if they chose to write about “politically sensitive topics.”).

²⁷¹ ICANN, *supra* note 132.

conditions that the website claims are ideal for the success of the spectrum of ODR are that the ODR process (whichever type used) has both transparency—the parties know with whom they are dealing and the values of that particular Chinese company or consumer—and confidentiality—the parties feel secure in expressing their views to reach an ultimately successful conclusion.²⁷² As previously mentioned, a drawback of ODR is a lack of trust between parties due to the ability to hide behind the technology. There is often no face-to-face or voice exposure. The lack of trust issue associated with ODR is exacerbated when dealing with different cultures. Americans should be aware of cultural differences when resolving disputes online with the Chinese, due to the differences in political ideology (or political culture) that permeate the online environment.

Whether ODR with businesses and consumers in China will succeed depends on the Chinese government balancing its goal of strong censorship of anti-government sentiment against the goal of attaining greater worldwide economic success, and seeing that ODR is increasingly being used by strong economic powers. Arguments have been made that China could build a system of cyberethics based on its strong sense of Confucianism.²⁷³ Moreover, China has made significant improvements in the past, giving into the more preferred method of dispute resolution by the West (arbitration), and conceding that, despite its despair, use of the Internet, globalization, and e-commerce is on the rise. Thus, it can be argued that the country is in the midst of a transformation.

However, in the aftershock of the explosion of Chinese Internet censorship issues, it remains highly questionable as to whether ODR can succeed between privately-owned Chinese enterprises and U.S. businesses if censorship persists. This conclusion, however, could be very different if the enterprises are state-owned. Even then, there is transparency, but not necessarily confidentiality.

Some observers might criticize the arguments posed by this Note, thinking instead that there is no way a government can effectively wield power over all of the Internet use in the country. That point is acknowledged and has been made continuously throughout

²⁷² *Id.*

²⁷³ Fort & Junhai, *supra* note 131, at 1561–62.

the growth and development of cyberspace.²⁷⁴ This Note recognizes that cunning Chinese citizens have found technological ways to circumvent the rigid Chinese Internet regime and government filters.²⁷⁵ Yet, it is still unappealing to be interacting with citizens who could, at any time, be shut down by the MII or another regulatory Internet body. Imagine buying a product online or transacting with a company for a service that the Government thinks is inadequately self-censoring itself, or that it thinks has values insulting and hostile to the P.R.C. What if a dispute arose and an American consumer wants to “click and settle,” only to find the site blocked? With the large amount of uncertainty and violations of fundamental liberties associated with the Internet in China, interacting with China both online and offline might become increasingly unattractive. This all comes at a time when China is walking a tight rope, and President Obama has considered imposing tariffs on Chinese imports.²⁷⁶ The Google scandal has the potential to affect China in the physical, non-cyberspace realm. One wonders how far China will go in insisting that it retain control over the free flow of information and economic processes of the Internet.

CONCLUSION

Chinese economic planner, Chen Yun’s, “bird-cage” theory²⁷⁷ aptly describes the state of the country.²⁷⁸ The metaphor seems to be saying that the State is the “cage,” controlling and limiting the “birds”/economy. One can only hope that when it comes to Internet regulations and the conduction of e-commerce transactions, the birds can escape from the cold and migrate to the warmth of cyberspace, where the implementation of laws are less extreme and more conducive to the successful continuation of online transactions and ODR.

²⁷⁴ Johnson & Post, *supra* note 111 (providing insight into the intricacies of the technology and the ways in which people can fool the system into thinking they are somewhere geographically different than where they actually are).

²⁷⁵ Brad Stone & David Barboza, *Scaling the Digital Wall*, N.Y. TIMES, Jan. 16, 2010, at B1.

²⁷⁶ Peter Whoriskey & Anne Kornblut, WASHINGTON POST, Sept. 9, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/09/11/AR2009091103957.html>

²⁷⁷ Christian Ploberger, *China’s Reform and Opening Process—A Fundamental Political Project*, 6 ASIAN SOC. SCI. 11, n.3 (Nov. 2010), available at <http://www.ccsenet.org/journal/index.php/ass/article/viewFile/7896/5977> (explaining that Chen Yun’s bird-cage approach describes a system “in which economic activities (the bird) would be allowed more freedom to respond to economic signals, but only within the planned economy (the cage).”).

²⁷⁸ GEMMELL, *supra* note 4, at 142.

