

The Role of ODR in Resolving Electronic Commerce Disputes in China

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Abstract

Online dispute resolution (ODR) has been developed in response to the growth of disputes in electronic commerce transactions. It is based on the legal framework of alternative dispute resolution (ADR) by taking into consideration electronic communications and information technology. This article will introduce the current legal framework and practice of ODR in China, find legal issues that affect the development of ODR and, finally, propose suggestions to overcome these barriers.

Keywords: ODR, China, electronic commerce disputes.

1 ODR and Electronic Commerce in China

1.1 *Electronic Commerce Disputes in China*

The development of electronic commerce has become a booming industry for China in the past decade. According to the National Bureau of Statistics on electronic commerce transactions over online trading platforms, the annual trading volume of electronic commerce in China in 2014 was around 16,390 billion RMB (2,246 billion EUR), in which 12,750 billion RMB (1,746 billion EUR) came from business-to-business transactions and 3,640 billion RMB (500 billion EUR) from business-to-consumer transactions.¹ By the end of 2015, the number of Chinese Internet users reached 688 million, approximately 50.3% of the total population.² The increasing development of electronic commerce will inevitably lead to online shopping disputes, intellectual property right disputes, Internet financial disputes, and so on.

1.1.1 *Online Shopping Disputes*

The market share of online shopping has been steadily growing with people's increased usage of and reliance on smartphones and computers in their daily lives. Online shopping disputes have increased rapidly. According to the statistics

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1 National Bureau of Statistics of the PRC, 'National Trading Volume of Electronic Commerce Transaction in 2014 Has Exceeded 16,000 Billion RMB', 8 March 2015, available at: <www.stats.gov.cn/tjsj/zxfb/201508/t20150803_1224544.html> (国家统计局: 2014 年全社会电子商务交易额突破 16 万亿).

2 *Id.*

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with Beijing No. 3 Intermediate People's Court, online shopping disputes have increased by 250% since 2014.³ Similar findings have been recorded by Guangzhou Intermediate People's Court. In 2015, the Commercial Tribunal of Guangzhou Intermediate People's Court handled 98 online shopping cases, representing 80% of all the cases.⁴

1.1.2 Intellectual Property Rights Disputes

A study on Internet Alternative Dispute Resolution was conducted by the Ministry of Industry and Information Technology in association with the Beijing Arbitration Commission. They investigated intellectual property rights disputes among 49 Internet companies from 2011 to 2012: 35% of these Internet companies have over 100 disputes per year, with five of the largest Internet companies each having over 1,000 disputes per year.⁵

1.1.3 Internet Financial Disputes

Many banks and financial enterprises have provided online loan and investment products to their customers. The number of Chinese Internet users who invest in Internet financial products totals 90.26 million.⁶ According to the published statistics of Jiangsu Provincial People's Court, the number of cases in the first instance relevant to Internet financial disputes in 2015 has reached 42,279 with a growth rate of 16.6%.⁷ People are gradually getting used to online payment channels such as Alipay Wallet, WeChat Wallet and Apple Pay to conduct their online shopping. The number of people who use online payment totalled 416 million by 2015, a growth rate of 36.8%.⁸

Despite the growth of electronic commerce in China, legislators and business entities have not yet developed a proper dispute resolution mechanism. When disputes arise from electronic commerce transactions, many still rely on resolution in a traditional court setting, which in most cases can no longer meet the efficiency requirement of electronic transactions. Thus, a well-established online dispute resolution (ODR) mechanism would not only enhance parties' confidence

3 Beijing No. 3 Intermediate People's Court, 'Online Shopping Disputes Increased by 250% in 2015', available at: <<http://news.sohu.com/20160310/n440011490.shtml>> (北京三中院：2015年网购纠纷案较2014年增长250%) .

4 Guangzhou Intermediate Commercial People's Court, 'Online Shopping Disputes Occupying Large Portion of Electronic Commerce Disputes', available at: <<http://news.163.com/16/0315/13/BI6VV79K00014AED.html>> (广州市中院审电子商务案网购消费维权占大头) .

5 W. Zhang, 'Internet Companies with Over Thousands of Disputes Each Year', *Legal Weekly*, 26 August 2014, available at: <www.legalweekly.cn/index.php/Index/article/id/5851> (互联网企业年均纠纷总量超千件) .

6 China Internet Network Information Center, China Internet Development Statistical Report, p. 63, January 2016, available at: <<https://www.cnnic.cn/hlwfzyj/hlwzxbg/201601/P020160122469130059846.pdf>> (中国互联网络发展状况统计报告2016年1月) .

7 'Internet Finance Cases Increased by 16.5% Last Year in Jiangsu Province', 26 January 2016, available at: <<http://jsnews.jschina.com.cn/system/2016/01/26/027762897.shtml>> (去年江苏省涉及互联网金融等新型案件数量增长16.5%) .

8 See China Internet Network Information Center, p. 64.

in electronic transactions but also promote further development of electronic commerce.

1.2 Overview of ODR in China

The concept of ODR is a combination of alternative dispute resolution (ADR) and information technology.⁹ The concept of ADR originated in the United States¹⁰ and spread to China.¹¹ ADR refers to an alternative dispute resolution that is conducted with or without the assistance of a neutral third party outside of the court proceedings. This article focuses on the legal instruments and practice of ODR in China based on two major forms of ADR, namely mediation and arbitration.

1.2.1 Arbitration

China promulgated the Arbitration Law of the People's Republic of China (PRC) in 1994, and since then arbitration has become an important ADR method. It became a signatory state of the New York Convention¹² in 1986. Hence, an international commercial arbitral award is also recognized and can be enforced in China.

In China, arbitration is divided into domestic arbitration and foreign-related arbitration. Domestic arbitration refers to commercial or civil disputes that arise from Chinese parties, while foreign-related arbitration refers to commercial or civil disputes involving 'foreign elements'. These 'foreign elements' include the following possibilities: (i) either one of the parties is a foreign, stateless person or a foreign legal person; or (ii) the subject matter is located in a foreign country; or (iii) the legal fact that the civil rights or obligations are established, changed or terminated is in a foreign country.¹³ Arbitration can also be divided into commercial disputes, labour disputes and rural land disputes according to the nature of the cases.¹⁴ Commercial disputes refer to disputes over economic rights and obligations arising from contracts, torts or other relevant legal provisions.¹⁵ Labour disputes concern disputes between employers and employees. Rural land disputes refer to disputes involving rural land contracts.

- 9 M. Wahab, 'The Global Information Society and Online Dispute Resolution: A New Dawn for Dispute Resolution', *Journal of International Arbitration*, Vol. 21, 2004, p. 146.
- 10 F.E.A. Sander, 'Varieties of Dispute Processing', *Federal Rule Decisions*, Vol. 70, 1976, pp. 111-123; The Alternative Dispute Resolution Act of 1998 of the United States of America authorized parties to use ADR in civil actions.
- 11 Y. Fan, 'Amelioration and Development of Alternative Dispute Resolution Mechanism in Contemporary China', *Xue Hai*, No. 1, 2003. (范愉: 当代中国非诉纠纷解决机制的完善与发展,《学海》2003年第1期)
- 12 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') entered into force on 7 June 1959.
- 13 Judicial Interpretation of the Supreme People's Court on the Application of PRC Applicable Laws to Foreign-Related Civil Relations, *FaShi* [2012] No. 24, Art. 1.
- 14 In China, the labour disputes and rural land disputes are separately regulated and do not belong to commercial arbitration.
- 15 Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China, No. 5 [1987] of the Supreme People's Court, Art. 2.

1.2.2 Mediation

The English words ‘mediation’ or ‘conciliation’ are used interchangeably in China, referring to a process in which a third party assists the parties in disputes to communicate and negotiate a settlement.¹⁶ Although there are differences between ‘mediation’ and ‘conciliation’,¹⁷ there is no major distinction in their Chinese counterpart ‘Tiao Jie’. ‘Tiao Jie’ is composed of two words – ‘Tiao’, which means to harmonize, and ‘Jie’, which means to resolve. Taken together, ‘Tiao Jie’ means to resolve disputes in a harmonized manner.¹⁸ Mediation or conciliation has profound cultural roots in China. Influenced by the Confucian theory of peacefully solving disputes,¹⁹ disputes in ancient times in China were settled out of court by the local community that was closely related to or affected by the disputes.²⁰ In ancient China, people traditionally resolved civil disputes through Tiao Jie instead of resorting to judicial redress. This can be proved by the ancient Chinese legal culture of ‘Xi Song (息讼)’, which means aversion to litigation.

There are two major types of mediation in modern China: judicial mediation and extrajudicial mediation. Judicial mediation refers to the mediation conducted by judges during court proceedings.²¹ Extrajudicial mediation can be further divided into people’s mediation,²² commercial (institutional) mediation,²³ industrial

- 16 See Department of Justice of Hong Kong Special Administrative Region, ‘Report of the Working Group on Mediation’, Vol. 10, 2010, available at: <www.gov.hk/en/residents/government/publication/consultation/docs/2010/Mediation.pdf>; V. lo Lo & X. Tian, *Law for Foreign Business and Investment in China*, Routledge, Oxon, 2009, p. 334.
- 17 ‘Mediation’ and ‘conciliation’ differ substantially in procedures. While the mediator in ‘mediation’ controls the process of the proceedings but refrains from making a proposal on the settlement, the conciliator in ‘conciliation’ may not follow a structured process but may provide parties with a non-binding settlement proposal.
- 18 K.J. Hopt & F. Steffek, *Mediation, Principles and Regulation in Comparative Perspective*, Oxford University Press, Oxford, 2013, p. 965.
- 19 Confucius, a famous ancient Chinese philosopher, stands for the traditional Chinese cultural value that respects the moral duties and holds the view that the disputes should not be resolved in court but by mediation among people. Confucius endeavoured to establish a litigation-free (“无讼”) society. See A.H.Y. Chen, ‘Mediation, Litigation, and Justice: Confucius Reflections in a Modern Liberal Society’, in D.A. Bell & H. Chaibong (Eds.), *Confucianism for the Modern World*, Cambridge, USA, 2003, pp. 259-270.
- 20 The earliest mediation in ancient China can be traced back to the Xi Zhou Dynasty (1046-771 BC), where civil disputes such as family disputes, contract disputes or even small criminal cases can all be handled through mediation.
- 21 See L. Wang, ‘Characteristics of China’s Judicial Mediation System’, *Asia Pacific Law Review*, Vol. 17, 2009, p. 67.
- 22 People’s mediation, as defined in Art. 2 of the People’s Mediation Law of the People’s Republic of China (2010) Order No. 34 of the President of the People’s Republic of China, refers to the activities of people’s mediation committees in promoting parties to voluntarily reach mediation agreements through consultation on the basis of equality by persuasion, guidance and other methods to resolve disputes among people.
- 23 Commercial disputes are conducted by commercial mediation institutions such as the China Council for Promotion of International Trade’s Conciliation Center and Shanghai Commercial Mediation Center.

mediation,²⁴ labour dispute mediation and administrative mediation.²⁵ The diverse types of mediation in China provide more options for the parties to resolve electronic commerce disputes.

Since the end of the feudal system of ancient China and the beginning of the People's Republic of China, mediation has undergone several reforms.²⁶ The Chinese Communist Party created 'people's mediation' to resolve disputes among people. This is based on the practice of people's justice in 'newly liberated areas' during the Yan'An period by Mao Zedong²⁷ (Maoism mediation) before the establishment of the People's Republic of China in 1949. Unlike traditional Chinese mediation, the mediation committee of Maoism mediation was part of the government, and police enforcement was essential to its operation. Post-Maoism mediation rediscovered the traditional cultural value of compromise and integrated it into the people's mediation.

1.2.3 ODR

Online dispute resolution (ODR) refers to "a mechanism for resolving disputes through the use of electronic communications and other information and communication technology".²⁸ Some scholars believe that ODR is not only based on ADR theory but also integrates the unique element of the dispute resolution and human interactions in online communications.²⁹ It is also a rather novel concept that has been recently developed in China.

ODR has been developed in both judicial and extrajudicial dispute resolution in China. In judicial ODR, parties can use online mediation platforms established by the Peoples' Courts to resolve their disputes before initiating court proceedings or during the court proceedings. In extrajudicial ODR, there are online arbitration platforms developed by arbitration institutions, online people's mediation and internal ODR mechanism established by online trading platforms.

- 24 Industrial mediation is conducted by the industrial mediation committee established by industrial associations to resolve disputes between members or between members and non-members that are relevant with the industry. It is now merged into the People's Mediation in practice.
- 25 Administrative mediation is conducted by governmental organizations for specific disputes, such as land disputes by local government, economic contract disputes by the Administration for Industry and Commerce and traffic accidents disputes by the police. See Y. Chang, *Mediation System in China*, Fa Lü Chu Ban She, Beijing, 2013, pp. 151-184 (常怡：《中国调解制度》，法律出版社 2013 年，北京).
- 26 See J.A. Cohen, 'Chinese Mediation on the Eve of Modernization', *California Law Review*, Vol. 54, 1966, p. 1201; S. Lubman, 'Mao and Mediation: Politics and Dispute Resolution in Communist China', *California Law Review*, Vol. 55, 1967, p. 1284; H. Fu, 'Understanding People's Mediation in Post Mao China', *Journal of Chinese Law*, Vol. 16, 1992, p. 211.
- 27 Mao Zedong, the former leader of the Chinese Communist Party, introduced the ideology of mediation to "protect the democratic interests of the great mass of people."
- 28 UNCITRAL Working Group III, 33rd Session, Technical Notes on Online Dispute Resolution, Section V, Para 24, A/CN.9/WG.III/WP.140.
- 29 L. Wing & D. Rainey, 'Online Dispute Resolution and the Development of Theory', in E. Katsh et al. (Eds.), *Online Dispute Resolution: Theory and Practice*, Eleven International Publishing, The Hague, 2013, p. 46.

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1.3 Use of ODR to Resolve Electronic Commerce Disputes in China

1.3.1 Deficiency of Traditional Dispute Resolution and Need for ODR in Electronic Commerce

Traditional dispute resolution is conducted offline with the participation of parties and a third party, the latter being a judge or a third-party neutral. With the evolution of electronic commerce, transactions are conducted more efficiently online, and costs are hence reduced for both parties. Thus, the development of electronic commerce requires a similarly efficient and effective dispute resolution mechanism to accommodate the increasing disputes.

1.3.1.1 Territorial Jurisdiction

Parties to electronic commerce transactions are often located in different jurisdictions. The conflicting interests between buyers and sellers may generate problems if the parties have no agreement on jurisdiction. Even if there is an agreement on jurisdiction, mandatory rules such as consumer protection policy are prioritized over the agreed jurisdiction rules. Traders are subject to any foreign jurisdictions in which their websites can be accessed.³⁰ In ODR, parties do not need to fight for jurisdictions or worry about the fairness of the decisions rendered by foreign courts.

1.3.1.2 Efficiency

The traditional dispute resolution mechanism typically takes longer to resolve disputes than ODR as communication between parties in ODR is more efficient. Parties can participate in ODR anywhere and at any time as long as there is Internet access. The rapid development of electronic commerce needs to be supported by an efficient dispute resolution system like ODR.

1.3.1.3 Cost Effective

ODR has also reduced the cost of dispute resolution by saving on travelling cost, communication cost and even the cost of ODR services. Considering that a large number of business-to-consumer disputes are of low value,³¹ using an ODR service is cost effective.

1.3.1.4 Electronic Evidence and Communication

As disputes arise from electronic commerce, they are closely related to the Internet. The transaction records, the communication between parties, and even for the contracts, are likely to be signed in electronic form, making it easier to submit and exchange electronic evidence via the Internet. Moreover, as parties in electronic commerce are usually from different corners of the world, they can save

30 C. Chen, 'United States and European Union Approaches to Internet Jurisdiction and their Impact on Electronic commerce', *University of Pennsylvania Journal of International Law*, Vol. 25, 2004, p. 423.

31 A.E. Vilalta, 'ODR and Electronic Commerce', in *Online Dispute Resolution Theory and Practice*, Eleven International Publishing, The Hague, 2013, p. 132.

time and cost by having their disputes resolved through ODR without worrying about the jurisdictional rules of a specific country.

1.3.2 ODR Practices in China

1.3.2.1 Online Arbitration

Arbitration institutions have endeavoured to make online arbitration rules to accommodate the need to resolve disputes arising from electronic commercial transactions. The China International Economic and Trade Arbitration Commission (CIETAC) established the Domain Name Dispute Resolution Center (DNDRC)³² in 2010. DNDRC is intended to resolve domain name disputes within the range of 'CN' in accordance with China Internet Network Information Center Dispute Resolution Policy.³³ However, the disputes handled by DNDRC were restricted to domain names that were current then. It was not until 2009 that CIETAC promulgated its Online Arbitration Rules and established the CIETAC Online Dispute Resolution Center to resolve electronic commerce disputes and domain name disputes. Besides CIETAC, another Chinese arbitration institution, Guangzhou Arbitration Commission, also launched its online arbitration services in 2015, and an online platform has been established to facilitate online arbitration.

1.3.2.2 Online Mediation

Online mediation has also been developed in both judicial and extrajudicial frameworks. Judicial mediation refers to mediation that is integrated with the judicial proceedings either before or during the judicial proceedings.³⁴ To facilitate dispute settlement and increase the efficiency of dispute resolution, online mediation has been used by certain peoples' courts.³⁵ Parties to the disputes are invited to participate in online mediation before the start of court proceedings. The majority of cases addressed by online mediation include contract disputes, labour disputes, traffic accident disputes, family disputes and consumer disputes with simple facts and clear legal relationships.

Furthermore, online mediation also occurs in the extrajudicial framework. In the absence of institutional online mediation rules, several people's mediation committees have been established to resolve electronic commerce disputes.³⁶

32 CIETAC has started to use 'CIETAC Online Dispute Resolution Center' in addition to DNDRC from 5 July 2005 to enlarge its dispute resolution scope.

33 The CIETAC and the HKIAC jointly established the Asia Domain Name Dispute Resolution Center, which is one of the five providers of dispute resolution services, appointed by the ICANN on 3 December 2001, available at: <<https://www.icann.org/news/announcement-2001-12-03-en>>.

34 Y. Bu & X. Huo, 'The Revival of ADR in China: The Path to Rule of Law or the Turn Against Law', in C. Esplugues & L. Marquis (Eds.), *New Developments in Civil and Commercial Mediation*, Springer International Publishing, Switzerland, 2015, pp. 196-198.

35 For example, Zhejiang Province Yuhang District People's Court, Shanghai Pudong New District People's Court and Hefei Municipality Shushan District People's court.

36 For example, Shenzhen Futian District Electronic Commerce People's Mediation Committee and Sina People's Mediation Committee.

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These peoples' mediation committees use online platforms to handle disputes submitted by the parties.³⁷

1.3.2.3 Internal ODR System of Online Trading Platform

Taobao.com is one of the largest online trading platforms in China, providing venues for both business-to-consumer (Tmall) and consumer-to-consumer transactions (Taobao). The internal ODR rules of Taobao have been modified over time and are now under the supervision of users.³⁸ At the outset, disputes were handled solely by Taobao customer service. In 2013, Taobao dispute resolution was shifted to 'crowdsourced adjudication' which refers to adjudication by amateurs. The Taobao User Dispute Resolution Center ('the Center') was opened in December 2012 to help parties resolve disagreements between Taobao merchants and Taobao in cases where merchants believed that they had been unfairly penalized for violating Taobao website rules. The Center later expanded its services to dispute settlements between merchants and consumers as well. When a dispute arises, parties can choose to submit the dispute to either Taobao customer service or the Center through the crowdsourced adjudication system. The crowdsourced adjudicators are selected among consumers and merchants with qualifications.³⁹ In 2014 737,204 cases were settled, with the participation of 416,452 assessors who adjudicated the cases.⁴⁰

Although a 'crowdsourced judgment' can ease the pressure of a large volume of disputes and reduce the time to settlement, there are new challenges to justice. For example, most assessors have no expert knowledge of the products and may be biased because of their specific positions as consumers or merchants. The independence and impartiality of the decisions of the assessors may therefore be challenged.

2 Legal Framework of ODR in China

As the development of ODR is subsequent to the advancement of information technology, the legal framework of ODR also needs to keep up with the ever growing requirement of dispute resolution in electronic commerce. As parties have the freedom to choose the type of ODR and procedural rules, legislators tend to give more freedom to the development of ODR than litigation.⁴¹ However, it is

37 For example, <<http://odr.ebs.org.cn/>> is an ODR website to resolve electronic commerce disputes established by Shenzhen Zhongxin Electronic Commerce Disputes People's Mediation Committee.

38 Taobao users can now vote for the amended or newly published rules available at: <rule.taobao.com>.

39 See 'Taobao Crowd-sourced Adjudication Convention', Art. 4, available at: <<http://pan.taobao.com/jury/help.htm?spm=a310u.3036333.0.0.DzH2Kh&type=standard>>.

40 'Taobao Dispute Resolution and Its Value for Judicial System', *Zhe Jiang Shen Pan*, No. 11, 2015, available at: <<http://finance.sina.com.cn/sf/news/2015-12-19/152414073.html>> (淘宝网的纠纷解决经验及其司法借鉴价值《浙江审判》2015年11期).

41 United Nations Conference on Trade and Development, *Electronic Commerce and Development Report 2003*, Chapter 7: Online Dispute Resolution: Electronic Commerce and Beyond, p. 190.

also found that the reliance on market self-regulation is insufficient for the development of the ODR mechanism.⁴² Government intervention is also required in ODR to ensure transparency and fairness of the procedures, so as to help the parties to use ODR with more confidence.

At present there is no direct regulation of ODR in China, where the current legal framework for it is composed of legislative instruments on ADR, institutional online arbitration rules and internal ODR rules established by traders in electronic commerce.

2.1 *Legislative Instruments of ADR in China*

In the absence of regulation of ODR, references can be found only in legal instruments of ADR. In China, legislation concerning ADR is composed of two types of dispute resolution: arbitration and mediation.

2.1.1 *Arbitration*

2.1.1.1 PRC Arbitration Law and Its Judicial Interpretation

The Arbitration Law of the People's Republic of China (PRC Arbitration Law) came into force in 1995 in line with the rules of international commercial arbitration.⁴³ The PRC Arbitration Law has adopted many internationally recognized arbitration principles such as party autonomy, the independence of arbitration commissions and the binding force of the arbitral award.⁴⁴ The scope of arbitration includes contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations.⁴⁵

The Supreme People's Court issued a judicial interpretation to implement the PRC Arbitration Law in 2006.⁴⁶ It provided explanation for and guidance regarding the validity of arbitration agreement, preservation and investigation of evidence, annulment and enforcement of the arbitral award.

42 R. Morek, 'The Regulatory Framework for Online Dispute Resolution: A Critical View', *The University of Toledo Law Review*, Vol. 38, 2006, p. 163; T. Schultz, 'Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust', *North Carolina Journal of Law & Technology*, Vol. 6, 2004, p. 71.

43 The Arbitration Law of the People's Republic of China, (1994) Order No. 31 of the President of the People's Republic of China (PRC Arbitration Law).

44 J. Tao, *Arbitration Law and Practice in China*, Kluwer Law International, The Netherlands, 2012, p. 5.

45 PRC Arbitration Law, Art. 2.

46 Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the PRC, Fa Shi [2006] No. 7.

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2.1.1.2 Civil Procedure Law of the PRC and Its Judicial Interpretation

Besides the PRC Arbitration Law, Civil Procedure Law of the PRC⁴⁷ and its judicial interpretation⁴⁸ also have stipulations on the judicial control over arbitration. The People's Court uses a dual track review system of arbitral awards.⁴⁹ While both procedural and substantive review are carried out by the People's Court over domestic arbitral awards, only procedural review is carried out by the People's Court over foreign-related arbitral awards. The People's Court has a much narrower supervisory jurisdiction over foreign-related arbitral awards than over domestic arbitral awards.

2.1.2 Mediation

2.1.2.1 People's Mediation

Although the term 'people's mediation' came into existence long before the establishment of the PRC, the legal status of the people's mediation was not confirmed in law until the Constitution of 1982.⁵⁰ It only designated the people's mediation committee to resolve disputes among people without laying down detailed rules for people's mediation. The first specialized legal instrument on people's mediation came into effect in 2010 by the promulgation of People's Mediation Law of the PRC,⁵¹ which established three fundamental principles of people's mediation: voluntariness, legality and respect for parties' rights.⁵²

People's mediation is conducted by the people's mediation committee to resolve civil disputes among the general public,⁵³ which includes disputes among citizens and those between citizens and other entities. The members of the people's mediation committee are usually ordinary citizens without special expertise in resolving disputes.⁵⁴ Therefore, the majority of disputes that are resolved by

47 Civil Procedural Law of the People's Republic of China (2012) Order No. 59 of the President of the People's Republic of China, Art. 274; see M. Chi, 'Drinking Poison to Quench Thirst: The Discriminatory Arbitral Award Enforcement Regime under Chinese Arbitration Law', *Hong Kong Law Journal*, Vol. 39, 2009, p. 541.

48 Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, Fa Shi [2015] No. 5.

49 A.J. Van den Berg, *New Horizons in International Commercial Arbitration and Beyond*, Kluwer Law International, The Hague, 2005, pp. 178-179.

50 Lubman, 1967, p. 1306. See also the Constitution Law of the People's Republic of China, 5th National People's Congress No. 5 Meeting, 1982, Art. 111.

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

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

53 J. Liang, 'The Enforcement of Mediation Settlement Agreements in China', *American Review of International Arbitration*, Vol. 19, 2008, pp. 495-496.

54 PML, Arts. 7-9.

people's mediation are simple and small civil disputes such as family disputes or disputes related to the community's interests such as neighbouring disputes.⁵⁵

2.1.2.2 Industrial Mediation

Both Article 8 and Article 34 of People's Mediation Law of the PRC empower social groups or other entities to establish people's mediation committees to mediate specific types of disputes among people. The industrial mediation is therefore integrated into the people's mediation system.⁵⁶ This is also confirmed by the *Opinions of the Ministry of Justice on Strengthening the Building of Industry-based or Profession-based People's Mediation Committee*,⁵⁷ which recognizes industry-based mediation committee or profession-based mediation committee as part of the people's mediation system. Industrial mediation refers to mediation conducted by industrial associations such as consumers' association, bank sector association, insurance sector association, securities sector association, medical services sector association, transportation sector association, Internet sector association, electronic commerce sector association or construction sector association.⁵⁸ The mediators of these industry-based mediation committees have the necessary expertise pertinent to the relevant disputes. The incorporation of industrial mediation into people's mediation enlarges the scope of disputes that people's mediation can handle.

2.1.3 Diversified ADR Mechanism

In view of the large number of disputes that arise each year and the limited capacity of peoples' courts to handle cases, the Supreme Peoples' Court issued *Certain Opinions on the Establishment and Improvement of a Dispute Resolution Mechanism through a Combination of Litigation and Non-litigation* ('the ADR Opinion')⁵⁹ in 2009. The ADR Opinion addresses a wide range of ADR mechanisms and emphasizes the interplay between court proceedings and ADR mechanisms in order to provide greater flexibility and efficiency in dispute resolution. Currently available ADR mechanisms include arbitration (commercial arbitration, rural land arbitration and labour dispute arbitration), mediation (judicial mediation, administrative mediation, commercial mediation, people's mediation and industrial mediation) and other forms of non-litigation dispute resolution mechanisms.⁶⁰

55 W. Wang, 'The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective', *Ohio State Journal on Dispute Resolution*, Vol. 20, No. 2, 2005, p. 427.

56 See D.Y. Hong, 'The New Tendency of People's Mediation – The Rise of Trade Association Mediation', *Fa Xue Yan Jiu*, No. 11, 2015, p. 260 (洪冬英：论人民调解的新趋势：行业协会调解的兴起，《法学研究》2015年第11期)。

57 *Opinions of the Ministry of Justice on Strengthening the Building of Industry-based or Profession-based People's Mediation Committee* [2014] *Si Fa Tong* No. 109.

58 See 'Zhong Guo Shang Shi Tiao Jie Nian Du Guan Cha' [2013 China Commercial Mediation Annual Observation], p. 33 (中国上市调解年度观察 2013)。

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

60 *Id.* The ADR Opinion, Art. 1(2).

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2.2 Private ODR Rules in China

There are no legislative instruments on ODR in general, but private ODR rules (institutional online arbitration rules and internal ODR rules) have already been developed respectively by commercial arbitration institutions and online traders to meet the needs of electronic commerce dispute settlement. These private ODR rules provide practical guidelines for the development of ODR rules in China.

2.2.1 Institutional Online Arbitration Rules: GAC Online Arbitration Rules as an Example

Although CIETAC promulgated its online arbitration rules, they do not deviate much from its offline arbitration rules except in certain stipulations (electronic submission and transmission of documents, electronic evidence admissibility, etc.) with regard to the online arbitration process.

Guangzhou Arbitration Commission (GAC) published its own online arbitration rules on 23 June 2015,⁶¹ becoming the second Chinese arbitration commission to adopt online arbitration rules. The GAC online arbitration rules are more radical than the CIETAC online arbitration rules. GAC established an online arbitration platform (<http://odr.gzac.org>) to handle online arbitration cases. GAC online arbitration rules consist of a general online arbitration rule and three sets of specific online arbitration rules for certain types of disputes (i.e. small-claim online shopping disputes, online loan disputes and credit card disputes). The major terms of GAC online arbitration rules are briefly discussed in what follows to see how online arbitration incorporates information technologies and whether these rules are sufficient to secure a valid and enforceable arbitral award.

2.2.1.1 Forms of Arbitration Agreement

The general online arbitration rule provides a wide scope of forms of the arbitration agreement.⁶² It includes both an arbitration agreement in paper form and in electronic form, an arbitration agreement signed before and after the dispute arises. It also allows parties to conclude an arbitration clause in the terms of service agreement of a website. Moreover, if one party initiated an arbitration application and the other party participated in an online arbitration proceeding without any objections, it is presumed that an arbitration agreement has been reached implicitly.

2.2.1.2 Seat of Arbitration

The place of the arbitration, also known as the 'seat of arbitration', is relevant to arbitration proceedings. It normally determines the nationality of an arbitral award, which affects the extent to which an arbitral award may be challenged.⁶³ During an online arbitration, in the absence of party's choice concerning the seat

61 Guangzhou Arbitration Commission (GAC) Online Arbitration Rule, 23 June, 2015, available at: <http://14.23.88.135:81/WEB_CN/AboutInfo.aspx?AboutType=4&KeyID=100b1ae3-9f15-4bfc-bf59-a90273778fa5>.

62 GAC Online Arbitration Rule, Art. 4.

63 M.S. Abdel Wahab, 'ODR and E-Arbitration', in E. Katsh *et al.* (Eds.), *Online Dispute Resolution: Theory and Practice*, Eleven International Publishing, The Hague, 2013, p. 422.

of arbitration, additional rules are required as there is no physical seat of online arbitration and in most jurisdictions arbitration is not allowed to float without attaching itself to a national jurisdiction.⁶⁴ In the GAC general online arbitration rules, if the parties have not designated the place of arbitration, the location of GAC (Guangzhou) shall become the seat of arbitration.⁶⁵ GAC may also designate other places as the seat of arbitration if necessary. The arbitral award shall be deemed to be made at the place of arbitration.

2.2.1.3 Electronic Documents Delivery and Electronic Evidence Admissibility

Parties shall submit their documents via the online arbitration platform, and parties can refer to these documents at any time. Arbitration documents will be communicated through email address, mobile phone or any other communicative means of the parties that have been recorded in the arbitration agreement. If the parties have not indicated any communication means and no communicative means can be found through the correspondence, GAC will create an email address for the party as his/her designated email address.⁶⁶ After GAC has notified the parties of the designated email address and password by postal delivery, any documents delivered to the designated email address shall be deemed to be delivered to the parties. The rules have incorporated the principles in Electronic Signature Law of the PRC⁶⁷ in regard to the admissibility of electronic evidence and electronic signatures.

2.2.1.4 Composition of Arbitration Tribunal

In GAC Online Arbitration Rule, the composition of arbitrators is determined both by the amount of claim and the type of disputes. A claim not exceeding RMB 500,000 (EUR 68,244) will be handled by one arbitrator, while a claim exceeding this amount will be handled by an arbitration tribunal composed of three arbitrators. For small-claim online shopping contract disputes, online loan disputes and credit card disputes, only one arbitrator will be selected.

2.2.1.5 Proceedings

The online arbitration will be conducted through written proceedings supplemented by online hearings. The arbitral tribunal may issue questionnaires to the parties via an online arbitration platform, and parties shall respond to the relevant questionnaires within five days.⁶⁸

Online arbitration proceedings shall be converted to offline arbitration proceedings in circumstances when the parties have not submitted supporting documents to prove their identities, when the parties agree to convert to offline arbi-

64 H. Yu & M. Nasir, 'Can Online Arbitration Exist Within the Traditional Arbitration Framework?', *Journal of International Arbitration*, Vol. 20, No. 5, 2003, pp. 465-466.

65 GAC Online Arbitration Rule, Art. 6.

66 GAC Online Arbitration Rule, Art. 11.

67 Electronic Signature Law of the PRC (2015) Order No. 24 of the President of the People's Republic of China Laws, Article 5, 8 and 13.

68 GAC Online Arbitration Rule, Art. 24.

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tration or when the arbitral tribunal decides to use offline arbitration considering the complexity of the dispute.⁶⁹

2.2.1.6 Arbitral Awards

The arbitration tribunal shall make an arbitral award within thirty days upon the establishment of the arbitration tribunal. Extension can be made upon the application to the arbitrator and with the approval of the chairman of GAC. Online arbitration saves more than half of the processing time compared with offline arbitration.⁷⁰ In three types of disputes (i.e. small-claim online shopping disputes, online loan disputes and credit card disputes), arbitral awards can be made in an even shorter time.⁷¹

The arbitral awards shall be made by the arbitral tribunal affixed with the electronic signatures of both the arbitrators and GAC. The arbitral awards will be sent to the designated email address of the parties, although awards in paper forms can also be issued upon request.

GAC online arbitration rules have given flexibility to online arbitration proceedings. By providing convenience and efficiency to online arbitration proceedings (such as designation of email addresses in the absence of choice, delivery of electronic documents and waiver of validity challenge based on technology deficiency), GAC online arbitration rules may also run the risk of violating procedural fairness in arbitration. Parties may challenge the validity of arbitral awards, claiming that they were not properly informed by electronic communications and that there is a lack of technology equality between the parties.

2.2.2 Internal ODR System Established by Traders

2.2.2.1 Online Trading Platform Adjudication

Online trading platform is a third-party platform for traders and consumers to conclude electronic transactions. Many Chinese online trading platforms such as Taobao and Ymatou⁷² have established their own dispute resolution rules in order to tackle the large number of disputes in their daily operation. These dispute resolution rules, on the one hand, guide electronic transactions but, on the other hand, play a self-regulatory role to traders. Taobao and Ymatou, as third-party intermediaries, may intervene in the disputes between traders and consumers and make decisions upon the application of the parties to start an internal ODR process. The internal dispute resolution process can be terminated when parties submit their disputes to the court.

69 GAC Online Arbitration Rule, Art. 28.

70 It takes four months to issue an arbitral award in ordinary arbitration proceeding and two months in summary proceeding.

71 For small-claim online shopping disputes, the arbitral awards shall be made within two days after the hearing, and for online loan disputes and credit card disputes, the arbitral awards shall be made within 20 days upon the constitution of arbitral tribunals.

72 Ymatou is an online trading platform for cross-border products, available at: <www.ymatou.com/>.

The internal dispute resolution rules are applicable only to certain type of disputes:⁷³ when consumers have not received the merchandise, when the delivered merchandise is not in conformity with the description of the merchandise, when the delivered merchandise has defects or when the traders have not received payments. Decisions are divided into two major types: (i) order traders to refund consumers completely or partially on the conditions that the transaction has been cancelled, the merchandise has been returned or a refund condition has occurred; (ii) or the consumer's refund request is denied.⁷⁴

2.2.2.2 Crowdsourced Adjudication

Besides the internal dispute resolution that is adjudicated by Taobao, parties can also submit their disputes to 'Taobao Dazhong Pingshen' (meaning 'Taobao Crowdsourced Adjudication'), a process by which representatives of both consumers and traders act as adjudicators. The crowdsourced assessors are required to determine two types of issues: (i) whether traders have breached transaction rules and (ii) transaction disputes concerning the payment or the compensation.⁷⁵ Each dispute will be assigned to a panel consisting of 31 assessors. The party who obtains the majority votes in the first place (over 16 votes) will win the case. From 2016, the voting system has been changed to 13 adjudicators and the party whoever gains 7 votes in the first place will win the case.⁷⁶ The decisions rendered by crowdsourced assessors will be enforced by Taobao in accordance with Taobao Dispute Resolution Rules.⁷⁷

3 Legal Issues of ODR Development in China

ODR has been developed in China as a useful tool to resolve the increasing number of disputes arising from electronic commerce transactions. It is established on the basis of traditional legislative instruments on ADR and the current practices of institutions that provide third-party dispute resolution services and electronic commerce traders that provide internal complaint systems. Several legal issues need to be addressed before a systematic and complete ODR legal framework can be established.

3.1 Lack of Regulation and Legal Principles in ODR

Current ODR rules in China are composed of ODR rules of ADR institutions and internal ODR rules of the internal complaint system of electronic commerce trad-

73 Please refer to 'Ymatou Dispute Resolution Rules' available at: <http://help.ymatou.com/help_16.html> (洋码头纠纷处理规则) Chapter 5, Art. 1 and Taobao Dispute Resolution Rules, Art. 69 <<https://rule.taobao.com/detail-99.htm?spm=a2177.7231193.0.0.BaoA8A&tag=self&cId=114>> (淘宝争议处理规则).

74 *Id.*, see Taobao Dispute Resolution Rules, Art. 73.

75 Taobao Crowd-sourced Convention, Art. 2.

76 This is intended to accelerate the crowdsourced adjudication process.

77 Taobao may make the transfer to the respondent party's account or impose penalties on the merchant who breaches Taobao Dispute Resolution Rules.

ers. These private ODR rules raise legality and fairness issues that may adversely affect the development of ODR.

The legality of the Taobao dispute resolution may be challenged as any party to the disputes can initiate an internal complaint without necessarily obtaining the consent of the other parties.⁷⁸ This is not in compliance with the party autonomy principle of dispute resolution as the other party is forced to participate in the internal dispute resolution adjudicated by Taobao without its consent. Moreover, Taobao can modify its dispute resolution rules at any time by posting new rules on its website.⁷⁹ Taobao, acting as a third-party intermediary in dispute resolution, lacks a supervision system to control the quality of its own decisions. This brings fairness concerns to Taobao decisions. Moreover, Taobao disowns any liabilities arising from its decisions, which may further reduce the credibility of Taobao decisions.⁸⁰

To ensure the operability and convenience of online arbitration, several online arbitration rules have been specifically designed (designation of email addresses in the absence of choice, delivery of electronic documents, waiver of validity challenge based on technology deficiency, etc.). As there is no direct regulation on ODR,⁸¹ the validity and enforceability of these ODR decisions are uncertain.

3.2 *Lack of Public Awareness and Trust in ODR*

ODR is a new type of dispute resolution that can resolve disputes on the Internet efficiently. However, doubts have been cast on the legality of ODR procedures and decisions. Dispute resolution process requiring personal interactions and ODR without face-to-face communications has thus been challenged.⁸² People also distrust the ODR proceedings as decisions are made primarily on the basis of written submissions of parties with just a few hearing sessions, whereas in offline proceedings a final decision is made only after parties have had several hearings.

In China, except for the successful use of the Taobao dispute resolution mechanism⁸³ and the CIETAC domain name dispute resolution mechanism, people are not familiar with other types of ODR services. For example, the China Online Dispute Resolution Center was established in June 2004 as an indepen-

78 J. Zheng, 'Analysis on Online Dispute Resolution in China: Example of Taobao', *Fa Zhi Yu She Hui*, No. 7, 2014, pp. 44-45 (郑军：浅析在线纠纷解决机制(ODR)在中国的发展——以淘宝网争议处理模式为例，法治与社会 2014 年第 7 期)。

79 Taobao Dispute Resolution Rules, Art. 5.

80 Taobao Dispute Resolution Rules 2012, Art. 3: Decisions are made by Taobao in accordance with the Dispute Resolution Rules and judgment of a reasonable person. As Taobao is not a judicial institution, it shall not be liable for any decisions made by it.

81 Both in Arbitration Law of the PRC and People's Mediation Law of the PRC, there are no stipulations with regard to special rules for online arbitration and online mediation.

82 N. Ebner & J. Zeleznikow, 'Fairness, Trust and Security in Online Dispute Resolution', *Hamline University's School of Law's Journal of Public Law and Policy*, Vol. 36, 2015, p. 155.

83 According to the Taobao Consumer Protection White Paper in 2010, Taobao has settled 2 million disputes in 2010, around one-third of civil cases of first instance that people's court managed to settle per year; available at: <http://download.taobaocdn.com/docs/pdf/baozhang_report_vol.2.pdf>.

dent ODR service provider, but there was no activity data after 2005.⁸⁴ With the development of electronic commerce in China, ADR institutions and people's mediation committees started to provide ODR services. It is important to enhance public awareness of these ODR services before parties are able to use them.

3.3 Confidentiality, Security and Technology of ODR

In ODR procedures, parties will inevitably disclose confidential information such as business secrets or intellectual property information. It is required to establish a reliable and safe ODR platform for information exchange and storage. The Internet is an inherently insecure medium, and so protective measures such as encryption technology⁸⁵ are needed to ensure the security of any data messages or documents that are transmitted over the Internet. However, very few ODR mechanisms currently provide for such high standards of protection because of the high expenses.⁸⁶

There are also concerns that with the use of information technology, legal issues of equal treatment may arise in ODR proceedings. For instance, when parties are equipped with different technology facilities, it may put some parties in a more disadvantageous position than others.⁸⁷ It is stipulated in Article 5 of the GAC Online Arbitration Rule that when parties have made an online arbitration agreement, they are presumed to be equipped with the necessary facilities and have ample computer knowledge in online arbitration. They therefore waive their rights to challenge the validity of an online arbitral award based on claims of lacking the necessary facilities or computer knowledge and party inequality. With the development of technology, the party inequality in technology will be reduced. However, it is still uncertain whether such a waiver in GAC Online Arbitration Rules will be supported by judicial review of the arbitral awards.

3.4 Limited Enforcement Mechanisms of ODR Decisions

Enforcement is an important factor that may influence the development of ODR, as parties will not trust a dispute resolution that is not enforceable. If parties need to resort to the courts to enforce ODR decisions, ODR, which is known for its efficiency and lower cost, will lose its advantages over other dispute resolution methods.⁸⁸ Hence, other private enforcement mechanisms aside from court enforcement must therefore be developed.

- 84 Q. He & J. Song, 'A Global Online Dispute Resolution System: Is China Ready to Join?', *The Asian Business Lawyer*, Vol. 7, 2011, pp. 80-81.
- 85 M.E. Schneider & C. Kuner, 'Dispute Resolution in International Electronic Commerce', *Journal of International Arbitration*, Vol. 14, 1997, p. 16.
- 86 A.E. Vilalta, 'ODR and Electronic Commerce', in E. Katsh et al. (Eds.), *Online Dispute Resolution: Theory and Practice*, Eleven International Publishing, The Hague, 2013, p. 140.
- 87 T. Schultz, *Information and Technology and Arbitration: A Practitioner's Guide*, Kluwer Law International, The Netherlands, 2006, p. 116.
- 88 G. Kaufmann-Kohler & T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice*, Kluwer Law International, The Netherlands, 2004, p. 210.

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The private enforcement mechanism can be divided between incentive systems based on reputation of traders (trustmark system, blacklist system, exclusion of participation, etc.) and automatic execution systems that are executed by third parties (escrow agent, payment intermediaries, domain name company as ICANN,⁸⁹ etc.). In China, the currently available private enforcement mechanisms are limited to escrow account system such as Alipay and domain name execution by Asian Domain Name Dispute Resolution Centre. These enforcement mechanisms are limited to only certain types of disputes (online sales disputes and domain name disputes) with conditions.⁹⁰ More enforcement mechanisms need to be explored so as to handle various kinds of electronic commerce disputes.

4 Suggestions for the Future Development of ODR in China

With the development of electronic commerce, both traders and consumers are seeking an alternative dispute resolution method that is both inexpensive and effective. The Chinese legislators have encouraged the development of a diversified dispute resolution mechanism to reduce the burden on the judicial system. Several suggestions are proposed here to overcome barriers to the development of ODR, including forming general principles to guide ODR, enhancing public awareness and trust of ODR and developing diversified legal enforcement mechanisms.

4.1 Establishment of ODR General Principles

As the current ODR rules in China are made mainly by third-party institutions or traders, a set of fundamental principles are needed to assess the legality of these private ODR rules and supervise the quality of ODR service providers. The EU Directive on Consumer ADR⁹¹ has provided guidelines to ADR procedures and can therefore be used as a reference to ODR principles.

The European Union (EU) has been interested in developing an out-of-court mechanism to resolve disputes between traders and consumers.⁹² It has just established an ODR online platform for traders and consumers to resolve their

89 ICANN (Internet Corporation for Assigned Names and Numbers) may enforce a UDRP (Uniform Domain Name Dispute Resolution Process) decision and transfer the domain name to the rightful owner if the losing party does not seek to litigate after a decision has been made in accordance with the UDRP policy.

90 For example, Taobao dispute resolution only deals with online sales disputes between traders and consumers and does not resolve disputes that are caused by a third party other than traders and consumers (such as logistic company). Consumers need to submit a refund application for the goods they purchased within the indicated time as a precondition to initiate the dispute resolution process.

91 Commission Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, OJ L 165/63 ('Directive on Consumer ADR').

92 EC Recommendation 98/257/EC sets out quality standards on third parties who propose or impose solutions, while EC Recommendation 2001/310/EC sets quality standards on third parties who attempt to resolve a dispute by bringing the parties together to convince them to find a solution based on consent.

cross-border disputes arising from online transactions in accordance with the Regulation on ODR for Consumer Disputes.⁹³ Around 117 ADR entities from 17 EU Member States are connected to the ODR platform.⁹⁴ These ADR entities provide qualified ADR services in accordance with the Directive on Consumer ADR Disputes.

4.1.1 *Expertise, Independence, Impartiality*

The ADR body shall consist of persons with necessary expertise, and these persons shall be independent and impartial.⁹⁵

In the internal ODR mechanism, such as Taobao Crowdsourced Adjudication, the adjudicators are composed of representatives from both traders and consumers. Although there are some requirements⁹⁶ on the selection of adjudicators, there are no requirements on the expertise of adjudicators. Although the crowdsourced adjudicators do not necessarily need profound knowledge for small-claim online shopping disputes, they should at least be familiar with Taobao Dispute Resolution Rules and some basic knowledge of contract law and consumer protection law. Taobao shall enhance the knowledge of crowdsourced adjudicators to be able to make more fair and objective decisions.

4.1.2 *Transparency*

The parties are committed to ADR only after they are given sufficient information about the nature and performance of a particular dispute resolution method.⁹⁷ ADR entities are required to inform parties via their websites about the type of ADR processes they offer.

For binding ADR such as online arbitration, parties shall be informed that they cannot resort to court proceedings after they have chosen to resolve disputes by arbitration. The ODR rules shall be published on the website and provide parties with easy access to them.

The Taobao rules have enhanced transparency by the introduction of 'rules for voting' from 23 June 2015.⁹⁸ According to the 'rules for voting', new drafts or amendments of the Taobao rules will be published on its website, and users can participate in voting and decide whether the new rules can be implemented. The democratic voting process provides users with opportunities to participate in the rule-making process and provides a new channel for users to learn the Taobao rules.

93 Council Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC ('Regulation on ODR for Consumer Disputes'); European Commissions Press Release, Solving disputes online: New platform for consumers and traders effective from 15 February 2016, available at: <http://europa.eu/rapid/press-release_IP-16-297_en.htm>.

94 *Id.*

95 Directive on Consumer ADR, Art. 6.

96 See note 39, both traders and consumers shall have a good credit and reputation according to the rating system of Taobao.

97 Directive on Consumer ADR, Art. 7.

98 Making Taobao Rules, Giving You Powers to Vote, available at: <<http://shlx.chinalawinfo.com/index.asp>> (规则众议院——规则制度，你有话语权).

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4.1.3 Effectiveness

Parties shall have easy access to ADR procedures without being charged heavily or being required to retain a legal representative during the process. The ADR decision should be made within a short period (90 days from the date on which the ADR entity has received complaints), although in complex disputes ADR entities will be able to extend this period.⁹⁹

Although online arbitration is cheaper than offline arbitration, it is still in general more expensive than court proceedings in China.¹⁰⁰ Especially for small-claim business-to-consumer disputes, online arbitration is still too expensive.¹⁰¹ Online trading platforms such as Taobao provides internal ODR mechanism for free.

4.1.4 Fairness

Parties shall be informed that they have refusal rights to participate in the ADR process and may withdraw from the process at any time. They can resort to civil actions or any other ADR mechanism if they are dissatisfied with the performance or operation of the agreed procedure.¹⁰²

In the Taobao Dispute Resolution Rule, parties have limited options¹⁰³ to cease the dispute resolution process. Moreover, the internal dispute resolution process will be resumed if the parties have not reached an agreement by negotiation within 30 days, if the party cannot provide evidence to prove the court has accepted the case or if the court has not given any instructions requiring Taobao to freeze the account or transfer the disputed amount within six months after the court starts to handle the case.¹⁰⁴ In accordance with the fairness principle, any parties to the dispute shall have the freedom to withdraw the dispute resolution application at any time. The Taobao Dispute Resolution Rule has imposed restrictions on the parties to withdraw from the internal dispute resolution process.

4.1.5 Liberty

The ADR proceedings cannot legitimately prevent parties from bringing their cases in national courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialized.¹⁰⁵

99 Directive on Consumer ADR, Art. 8.

100 Guangzhou Arbitration Commission provides online dispute resolution for small-claim online disputes (no more than 10,000 RMB) with 100 RMB per case, and the litigation handling fee for similar disputes is 50 RMB per case.

101 According to the 2014 Report of Chinese Electronic Commerce Market by China Electronic Commerce Research Center, consumers' claims worth over 5,000 RMB (around 700 EUR) constituting only 6.64% of all online consumer disputes, while the rest of the claims from consumers are worth under 5,000 RMB; available at: <www.100ec.cn/zt/upload_data/20150408.pdf> (2014 年度中国电子商务市场数据监测报告).

102 Directive on Consumer ADR, Art. 9.

103 According to Art. 74 of the Taobao Dispute Resolution Rule, unless both parties agree to negotiate among themselves or when one party brings the dispute to the court, the dispute resolution process will be ceased.

104 Taobao Dispute Resolution Rule, Art. 75.

105 Directive on Consumer ADR, Art. 10.

In Taobao dispute resolution, cases are submitted after the dispute has materialized. In online arbitration rules, arbitration agreements can be concluded before or after disputes have materialized. Chinese legislation does ban pre-dispute resolution clause in business-to-consumer contracts as a whole, but such clause is subject to judicial review of the court in accordance with contractual rules of standard terms.¹⁰⁶

4.1.6 Legality

The ADR decision shall not deprive consumers of the legal protection that is embodied in their national laws.¹⁰⁷ As business-to-consumer disputes in electronic commerce are usually in a cross-border context and considering that consumers are in weaker positions than traders, the legality principle ensures that any ADR decisions shall not affect consumer rights that are ensured by their mandatory laws.

4.2 Enhancement of Public Awareness and Trust in ODR

Since ODR is relatively new to the parties, it is important to enhance public awareness and trust in ODR. Several suggestions are proposed in the light of the current development of ODR in China. In order to enhance public awareness of ODR, there should be more channels to provide the public with information on ODR services and access to more diversified ODR services. In order to increase parties' trust in ODR, a more supportive legal framework is to be established, and certain supervision over ODR services is needed.

4.2.1 Establish a Nation-Wide ODR Platform

Although there exist different types of ODR services, people do not have sufficient information about them. An ODR platform can be established to provide the public with information about these ODR service providers. Lessons can be learnt from the EU ODR platform, which provides consumers access to different ADR services in the EU.

In the EU, the ODR platform¹⁰⁸ for consumer disputes has been recently established. It provides consumers with information about ADR service providers of different member states to resolve disputes arising from online transactions.¹⁰⁹ The consumer files an online complaint, and the complaint is sent to the relevant trader, who then proposes an ADR entity to the consumer.

106 Contract Law of the People's Republic of China (1999) Order of the President No. 15, Art. 39: the party that provides standard clauses shall determine the rights and obligations between the parties in accordance with the principle of fairness and shall draw attention to the non-drafting party in a reasonable manner to the exemption clauses and give explanations of such clauses at the request of the other party.

107 Directive on Consumer ADR, Art. 11.

108 EU ODR platform website, available at: <<https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.chooseLanguage>>.

109 Although there are certain member states (Belgium, Germany, Luxembourg, Finland) that provide access for traders to file complaints as well, most of the EU member states allow only consumers to file complaints on the ODR platform.

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Once consumer and trader agree on an ADR entity to handle their dispute, the ODR platform automatically transfers the complaint to the ADR entity. Moreover, the Regulation on ODR for Consumer Disputes also requires traders engaging in electronic commerce established in the EU to provide an electronic link to the ODR platform.¹¹⁰

In China, Beijing Mediation Association has established a website called 'ADR online',¹¹¹ which provides parties with a list of cooperating mediation institutions to resolve all types of disputes. The list of cooperating mediation institutions includes different types of mediation: people's mediation committee such as Pudong New District People's Mediation Center, industrial mediation entity such as Internet Association Mediation Center and Securities Dispute Mediation Center, and commercial (institutional) mediation commission such as Beijing Arbitration Commission Mediation Center and Shanghai Commercial Mediation Center. Parties can submit a mediation application on the website, and the application will then be forwarded to the selected mediation institution. The establishment of 'ADR online' provides parties with better access to different types of mediation services on a website and provides convenience to initiate a mediation application.

"ADR online" is an exploration to the establishment of a nation-wide ODR platform. An ODR platform shall be equipped with transparent rules and secured technology to ensure private information is well protected. The ODR services can be classified on the website in accordance with the substance of different types of disputes. Under each category, a selected list of ODR service providers will be provided.

4.2.2 *Encourage Diversified ODR Services*

The development of diversified ODR devices is an effective solution to electronic commerce disputes. ODR can be designed on the basis of currently available ADR devices such as commercial arbitration and industrial mediation.

ADR institutions such as CIETAC and GAC have developed their online arbitration rules to accommodate the increasing need for efficient dispute resolution in electronic commerce. However, except for domain name disputes that have been regularly handled by the CIETAC Online Dispute Resolution Center, other types of electronic commerce disputes have not been widely handled via online arbitration. Apart from the lack of public awareness and trust in online arbitration, cost is another factor that affects the development of online arbitration. In order to ensure the confidentiality and provide parties with a secure system to exchange documents and evidence, an online platform needs to be established and maintained by institutions. The operation of such an expensive online platform increases the financial burden of institutions and makes it even less attractive to parties than litigation. In order to promote institutional ODR services, institutions may work together to develop an online platform and share the cost

110 Regulation on ODR for Consumer Disputes, Art. 14 para. 1.

111 ADR online available at: <www.adr101.com/index.htm>.

of research and development so that they can provide qualified ODR services at a reasonable price.

Industrial mediation has a great potential for the development of ODR services in China. There are several industrial associations that can provide mediation services to electronic commerce disputes such as Consumer Association for business-to-consumer disputes, Electronic Commerce Association for business-to-business disputes, Internet Association for intellectual property rights disputes and Securities Association for financial disputes. These industrial associations can develop online mediation services to resolve disputes between their members or disputes between their members and other parties. Securities Association of China has developed its own mediation centre¹¹² and provides online mediation services. Although similar practices can be initiated in other industrial associations, there are challenges to the impartiality of these industrial mediation committees.¹¹³ For example, traders may suspect whether Consumer Association has a conflict of interest in mediation as the aim of this association is to protect consumers. However, this can be avoided by a set of transparent codes of conduct and internal review procedures.

Private ODR services such as internal complaint system designed by Taobao or other independent ODR services should be further developed in a diversified ODR mechanism. These ODR services are provided by private parties and are therefore challenged by their credibility. A possible solution to improve ODR services' credibility is to integrate these private ODR service providers into people's mediation system,¹¹⁴ which is regulated by the People's Mediation Law.

4.2.3 Provide Legal Framework to Support ODR

In China, as ODR is still a new dispute resolution mechanism, the legislative framework of ODR has not been accomplished. Instead, currently available ODR rules are developed by private ODR service providers. In order to enhance the validity and enforceability of ODR decisions, legislation in ODR is urgently needed.

The amendment of the Civil Procedural Law of the People's Republic of China in 2012 has added electronic evidence as a valid form of evidence. However, detailed substantive rules on the admissibility, the burden of proof, the assessment of electronic evidence, etc. have not been formulated yet. Moreover, there are no laws or guiding rules on online arbitration or online mediation. The amendments to the PRC Arbitration Law and the People's Mediation Law of the PRC or guidelines on ODR dispute resolution procedure may help to assess the

112 China's Securities Association Mediation Center, available at: <www.sac.net.cn/hyfw/zqjftj/zxsq/>.

113 J. Hou, 'Study on Commercial Mediation in China', *Graduate Law Review*, Vol. 25, No. 1, 2010, p. 60 (候金剑: 论我国的商事调解, 《研究生法学》2010年第25卷第1期).

114 Shenzhen Zhongxin (available at: <<http://odr.ebs.org.cn/>>), an ODR service provider registered as Zhongxin Electronic Commerce Dispute People's Mediation Committee, provides online mediation services to resolve electronic commerce disputes; Shenzhen established Zhongxin Electronic Commerce Dispute People's Mediation Committee, 22 July 2013 available at: <<http://odr.ebs.org.cn/news/detail/bebd300a-7ab7-42ae-ab03-9cd0e9b76f7a>> (深圳市众信电子商务纠纷人民调解委员会正式挂牌成立).

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legality and fairness of ODR decisions. The preliminary legislative draft of Electronic Commerce Law of the PRC has been finalized and is to be submitted to the legislature for approval.¹¹⁵ There will also be special regulations on the dispute resolution of electronic commerce transactions.

4.2.4 Supervise ODR Service Providers

In addition to the establishment of a legal framework for ODR, governmental supervision on the quality of ODR service is also required. On the one hand, the development of ODR is a spontaneous process that is developed by electronic merchants such as eBay and Amazon.¹¹⁶ On the other hand, there ought to be supervision on the quality of ODR services to ensure transparent and fair decisions are made. Some scholars believe the governmental involvement may improve the effectiveness and recognition of ODR.¹¹⁷ The government shall give the ODR mechanism freedom to grow while exerting certain supervision over its quality.

In practice, an accreditation system shall be established on the ODR platform. First, only those ODR service providers that meet quality standards can be admitted to the ODR platform. Second, parties that have used ODR services can make reviews on the quality of ODR services. Third, the administrative body (such as Administration for Industry and Commerce or Bureau of Justice) may make annual evaluations on ODR service providers based on the activities of these ODR service providers and the feedback from the users. Finally, an internal review system may allow parties to file complaints with the ODR decisions, and such complaints will be reviewed by the appellate body established on the ODR platform.

4.3 Diversified Legal Enforcement Mechanism

After a decision has been made in ODR, if the losing party is not willing to execute the decision, an enforcement mechanism is required. The enforcement mechanism is especially important for dispute resolution as parties will not choose one without an effective enforcement mechanism. Depending on whether enforcement entities of ODR decisions are judicial or not, there are public enforcement, which is executed by courts, and private enforcement, which is executed by third parties or by parties themselves voluntarily.

115 'Electronic Commerce Legislative Draft Has Been Accomplished', *Beijing Shang Bao*, 11 March 2016, available at: <http://news.xinhuanet.com/tech/2016-03/11/c_128791260.htm> (北京商报：电子商务法草案已形成).

116 E. Katsh, 'ODR: A Look at History', in E. Katsh *et al.* (Eds.), *Online Dispute Resolution: Theory and Practice*, Eleven International Publishing, The Hague, 2013, pp. 26-27.

117 Z. Liu, 'Government Intervention: The New Approach to Build Online Dispute Resolution in China', *Internet Law Review*, Vol. 1, 2009, pp. 138-139 (刘哲玮：国家介入：我国 ODR 建设的新思路，网络法律评论); T. Schultz, 'Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust', *North Carolina Journal of Law & Technology*, Vol. 6, 2004, p. 71.

4.3.1 Public Enforcement

4.3.1.1 Online Arbitral Awards

Article IV of the New York Convention requires parties to submit a duly authenticated original arbitral award or a duly certified copy in order to apply for the recognition and enforcement of arbitral award. In online arbitration, an arbitral award is usually issued in electronic form with electronic signatures of arbitrators. In Electronic Signature Law of the PRC, the originality of an electronic document is met if the content of the document is complete and unaltered from the time it was created.¹¹⁸ An online arbitral award with electronic signatures of arbitrators is thus 'original' as electronic signature ensures both authenticity and integrity.¹¹⁹

As the Arbitration Law of the PRC has not stipulated any detailed rules for online arbitration, it creates uncertainty to the enforceability of online arbitral awards. For instance, in cases of electronic delivery of online arbitral awards, parties may challenge the enforcement of arbitral awards by arguing that they have not received the awards. The legislators should therefore provide for detailed rules or judicial interpretations on the enforcement of online arbitral awards.

4.3.1.2 Judicial Ratification of Mediation Settlement Agreement

The earliest judicial interpretation on the legal status of settlement agreement from mediation was issued by the Supreme People's Court in 2002, which stated that a settlement agreement mediated by the people's mediation committee is a contract.¹²⁰ It only gives a settlement agreement legal effect as a contract, and the enforcement of the settlement agreement is uncertain. After the promulgation of *People's Mediation Law of the PRC*, an extrajudicial mediation settlement agreement is granted with enforceability after a judicial ratification procedure.

There are differences between a settlement agreement from judicial mediation¹²¹ and extrajudicial mediation. For a settlement agreement that is made through judicial mediation, the settlement agreement is enforceable when the People's Court has drawn up the settlement agreement and when the parties have signed the settlement agreement.¹²² The judicial mediated settlement agreement is directly enforceable while an extrajudicial mediation settlement agreement is not enforceable until a judicial ratification has been made.

The extrajudicial mediation settlement agreement is a contract. Pursuant to Article 33 of *People's Mediation Law of the PRC*, parties may jointly apply to the court for judicial ratification of the settlement agreement within thirty days after the settlement agreement takes effect. The settlement agreement ratified by Peo-

118 Electronic Signature Law of the PRC, Art. 5.

119 Kaufmann-Kohler & Schultz, 2004, p. 221.

120 Provisions of the Supreme People's Court Concerning Trial of Civil Cases involving People's Mediation Agreements, Fa Shi [2002] No. 29.

121 The judicial mediation refers to the mediation that is conducted during the court proceedings. The court will draw up a mediation agreement detailing the facts of the dispute and the outcome of the mediation.

122 Civil Procedure Law of the PRC, Art. 97.

ple's Court is enforceable. The People's Court will take a substantial review of the settlement agreement in the judicial ratification proceedings to ensure its compliance with voluntariness of the parties, mandatory statutory provisions, interests of the state, the public and other third parties' rights, public policy and social order.¹²³ Procedural rules for judicial ratification of settlement agreements are stipulated in the *Provisions of the Supreme People's Court on Issues Concerning the Process of Judicial Confirmation of People's Mediation Agreements*.¹²⁴

Although *People's Mediation Law of the PRC* provides venues for the legalization and enforceability of mediation settlement agreement, there are requirements on time limit and parties' consent. Parties who have reached an online mediation settlement agreement need to shift to the offline judicial ratification procedure if they want to have an enforceable settlement agreement. It would better serve parties' interests if the court has an online system that parties can apply for the judicial ratification procedure after an online mediation settlement agreement has been made.

4.3.2 Private Enforcement

ODR is known for its efficiency and lower cost, and therefore private enforcement should be the common enforcement of ODR decisions. The common feature of private enforcement relies on the control of resources (i.e. money control of the parties, reputation or domain names).¹²⁵ The United Nations Commission on International Trade Law (UNCITRAL) Working Group III of Online Dispute Resolution worked on private enforcement mechanisms and issued an overview of two main types of enforcement mechanisms: one type of mechanism creates incentives for parties to execute ODR decisions voluntarily, and the other type provides for an automatic execution of ODR decisions.¹²⁶ Private enforcement mechanisms that create incentives for parties to use ODR are, for example, trustmark system and blacklist system. Other private enforcement mechanisms that provide an automatic execution of ODR decisions are more robust mechanisms such as the chargebacks and escrow accounts system.

Current practices in China demonstrate that the automatic execution mechanism (such as CIETAC Online Dispute Resolution Center for domain name disputes) is more often used than the incentive mechanism to enforce ODR decisions. This is partly because the ODR services have not obtained public awareness in the market. The UNCITRAL Working Group III has observed that a combina-

123 Certain Provisions on Procedures for Judicial Ratification of People's Mediation Agreements, Art. 7; Judicial Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law, Art. 360.

124 Provisions of the Supreme People's Court on Issues Concerning the Process of Judicial Confirmation of People's Mediation Agreements, Fa Shi [2011] No. 5.

125 T. Schultz, 'Online Arbitration: Binding or Non-binding?', *ADR Online Monthly*, 2002, p. 8, available at: <www.ombuds.org/center/adr2002-11-schultz.html>.

126 Report of UNCITRAL Working Group III (Online Dispute Resolution) Twenty-eighth session (18-22 November 2013), A/CN.9/WG.III/WP. 124.

tion of the automatic enforcement mechanism and the incentive-driven mechanism would create more incentives for traders to comply with ODR decisions.¹²⁷

4.3.2.1 Trustmark or Blacklist System

A trustmark is a logo displayed on the website of the merchant. Where a trader is certified by an ODR service provider, the trustmark can inform the customer that the trader has committed to utilizing the ODR mechanism and complying with the decisions and recommendations reached in ODR proceedings.¹²⁸ The trustmark mechanism can be used in combination with the ODR platform. Qualified ODR service providers on the ODR platform may grant their users (traders) trustmarks so that customers will have better access to the accredited ODR service providers.

There are other incentive systems based on reputation such as the blacklist system. The industrial associations of traders or government authorities may periodically publish a list of traders who failed to execute the ODR decisions. The State Administration for Industry and Commerce (SAIC) has established a blacklist system for enterprises with serious illegal and dishonest acts.¹²⁹ SAIC will publish the list of enterprises with serious illegal and dishonest acts to the public through enterprise credit information publication system. Failure to observe ODR decisions can also be listed as dishonest acts to be sanctioned by SAIC. Traders, for the sake of their reputations, have the incentive to comply with the ODR decisions.

4.3.2.2 Chargeback or Escrow Account System

Chargeback is a process whereby a buyer disputes a charge and requests the reimbursement from a payment intermediary (such as credit card companies) when the payment has already been transferred to the seller. The payment intermediary will adjudicate on whether the buyer has a right to a chargeback. In the ODR enforcement mechanism, however, the third-party payment intermediaries are no longer adjudicators but simply private enforcement entities that enforce decisions of ODR service providers. Hence, cooperation between the ODR service providers and third-party payment intermediaries is imperative in a chargeback system.

The escrow account has already been used in major online trading platforms such as Taobao. In online transactions, the buyers pay the price into the escrow account held by the escrow agent (such as Taobao) instead of the seller. Once the payment is made into the escrow account, the escrow agent gives notice to the seller. If the buyer confirms the receipt of goods without bringing complaints within a stipulated period, the escrow agent will then release the money to the seller. In the event of a dispute, the agent freezes the account and waits for the

127 *Id.*, p. 7.

128 *Id.*, p. 6.

129 State Administration for Industry and Commerce, Interim Measures for the Administration of List of Enterprises with Serious Illegal and Dishonest Acts, (2015) Order No. 83 of the State Administration for Industry and Commerce.

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dispute settlement. In the ODR mechanism, the ODR service providers may either act as escrow agents themselves or cooperate with online traders holding escrow accounts. The escrow account system has a broader scope of application and provides for more transaction security than the chargeback system as the chargeback system only applies to credit card payment. ODR with more fair procedural rules and a diversified enforcement mechanism is the future trend of dispute resolution to electronic commerce transactions.