

CHAPTER - 10

ON CHINA CROSS-BORDER ONLINE DISPUTE SETTLEMENT MECHANISM-FOLLOWING UNCITRAL TNODR AND ALIBABA EXPERIENCE

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I INTRODUCTION

The world's largest one-day online sale, 11.11 Global Shopping Festival of 2016, has generated RMB 120.7 billion (\$17.79 billion) in gross merchandise volume in just 24 hours over Alibaba's e-commerce platforms - mostly on B2C site Tmall.com and C2C site Taobao Marketplace. It has generated 657 million delivery orders and covered 235 countries and regions.¹ With the economic globalization and construction of "One belt, one road", the development of Chinese internet and e-commerce has shown a vigorous trend. According to iResearch Global, in 2014, Chinese e-commerce market transaction amount totally amounted to RMB12.3 trillion, which has surpassed USA to be the biggest global internet retailing market. In 2015, the amount has been up to RMB16.4 trillion.²

The increasing of the transaction amount will inevitably lead to the increase of disputes. From 10 days after 11.11 of 2016, government department of Hangzhou,

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1 "11.11 Mega-Sale Breaks Rmb 120 Billion Gmv" <www.alizila.com/2016-11-11-global-shopping-festival-wrap-up/> accessed 15 November 2016.

2 "2015 Development Condition of Different Sub-sector of E-commerce in China" <<http://news.iresearch.cn/zt/260791.shtml>> accessed 15 November 2016.

Shenzhen and Shanghai has respectively received the 1561,³ 568⁴ and 221⁵ claims concerning 11.11 activity, which are only about complains in 11.11 and in several cities. Statistics of China E-Commerce Research Centre (CECRC) showed, in 2015, totally, China e-commerce complaint and right protection public service platform⁶ has received more than 100,000 complains, among which online purchase accounted for 43.74%, cross-border online purchase accounted for 7.53%.⁷ (Figure 1).

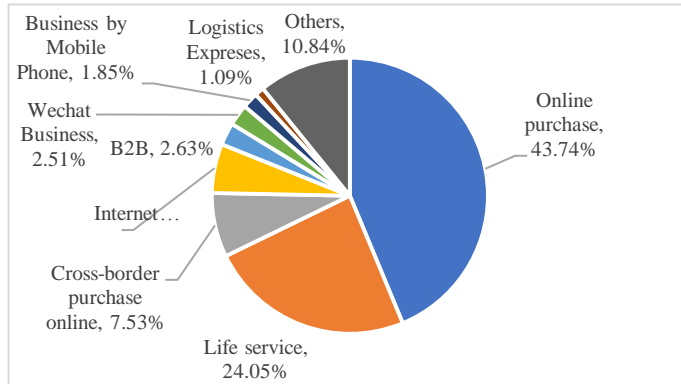


Figure 1 Distribution Condition of Complaints from Different Platform in 2015

Sources from: CECRC, 2015 Annual Report on Consumer's Experience and Complaints Monitoring of China E-commerce, 10 March 2016; available at: <www.100ec.cn/zt/upload_data/2016315/images/2015bg.pdf>.

In this e-commerce booming times, the traditional disputes settlement mechanism is not suitable because of the far distance and great amounts of internet disputes, aspects of manpower, material resources and financial capacity. Accordingly, in the field of international law, online dispute settlement (ODS) mechanism emerged, combining with the information technology and traditional

3 "Complaints Statistics Concerning 11.11" <www.hangzhou.gov.cn/art/2016/11/23/art_812268_3467419.html> accessed 15 November 2016.

4 "Complaints Concerning 11.11 in Shenzhen is 48% Plus than the Last Year" <<http://news.takungpao.com/society/topnews/2016-11/3397313.html>> accessed 15 November 2016.

5 "The False Advertisement of 11.11 is Concentrated in Shanghai" <<http://finance.people.com.cn/n1/2016/1123/c1004-28891360.html>> accessed 15 November 2016.

6 <www.100ec.cn/zt/315/> accessed 15 November 2016.

7 CECRC "2015 Annual Report on Consumer's Experience and Complaints Monitoring of China E-commerce" (10 March 2016) <www.100ec.cn/zt/upload_data/2016315/images/2015bg.pdf> accessed 15 November 2016.

Alternative Dispute Resolution (ADR),⁸ to adapt to the development of the big-amount and low-value cross-border e-commerce. Under this circumstance, how to establish a reasonable, convenient and efficient ODS mechanism is significant. Currently, there are three channels in China: e-commerce internal platform, online court and Online Dispute Resolution (ODR), among which, e-commerce internal platform operates well, while ODR has met many challenges. Some experiences from e-commerce internal platform could be a reference when developing ODR in China.

In response to the sharp increase of online cross-border transactions worldwide, UNCITRAL has also made some contributions for resolving disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. On Forty-ninth session (27 June-15 July 2016) of UNCITRAL, Online dispute resolution for cross-border electronic commerce transactions: Technical Notes on Online Dispute Resolution (TNODR) published, which also has been adopted by the General Assembly of UN on 13 December 2016.⁹ It concentrates on ODR and could also supply a reference to China to create ODR mechanism.

The paper will briefly examine the 3 channels of China on ODS system. Through some quantitative and qualitative analysis, as well as the cases study, to evaluate the current situation of cross-border ODS mechanism in China. The paper intends to make the reader better understand the Chinese style online dispute settlement modes, evaluate the performance of different ODS methods in China, point out the obstacles and challenges of ODR in China, and to find some directions with the reference of UNCITRAL TNODR and Alibaba experience in context of Electronic World Trade Platform (eWTP).

8 ADR supplies the theoretical bases of ODR, computer technology provides an online environment affecting. See Douglas Walton and David M Godden "Persuasion dialogue in online dispute resolution" (2005) 13 Artificial Intelligence and Law 273-295, 274.

9 General Assembly of UN, 'Resolution adopted by the General Assembly on 13 December 2016' UN Doc A/RES/71/138 (19 December 2016) <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/138> assessed 15 January 2017.

II *EXISTING CHANNELS AND STANDARD RULES OF ODS MECHANISM OF CHINA*

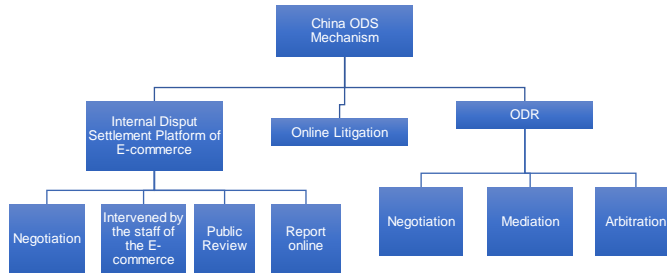


Figure 2 Existing channels and standard rules of online dispute settlement mechanism of China

The three channels of ODS in China respectively are: e-commerce internal platform, online court and ODR with the interference of the third party. (Figure 2).

2.1 E-Commerce Internal ODS Platform: Taking Alibaba as the Example

E-commerce internal ODS mechanism is called "dispute settlement system with the intervening of the civil third party in connection with the parties".¹⁰ Some e-commerce platform itself supplied the civil settlement system when the transaction dispute happened internal of the platform. It conforms to the characteristics and needs of the transaction online, digests many online transaction dispute of low-value, which not only maintain the stability and credibility of their own platform, but also are helpful to protect the legitimate interests of the parties. Alibaba,¹¹ being the most excellent and biggest e-commerce platform, has established a well operated ODS mechanism. Among Alibaba Group, Taobao and Tmall respectively concentrate on C2C and B2C market. The following will take them as the example to analyse the category of the concrete dispute settlement methods and its characteristics.

10 Luo Xiulan "A Study on the Disputes Settlement Mechanism in Online Transactions – Based on the Visual Angle of Complementation between Folk Law and State Law" (2010) 8 Hebei Law Science 57-64, 60.

11 Alibaba is the well-known pioneer of e-commerce, which has the world biggest B2B market – Alibaba, world biggest C2C market – Taobao, biggest domestic B2C market – Tmall, and the most excellent pay instrument – Alipay. It is the most advanced internet comprehensive market in the world. Through the development of many years, it has established its comparatively perfect legal system.

In order to solve online disputes, Alibaba has published a series of regulations, including: Taobao Rules,¹² Taobao Rules of Dispute Settlement,¹³ Tmall International Dispute Resolution Rules,¹⁴ Trade Dispute Rules,¹⁵ and Convention on Taobao Public Review (Trial Implementation),¹⁶ etc. Besides, Alibaba has set up various online platforms¹⁷ to solve disputes. All those rules have no application restriction on where the parties are located. In fact, in the Big Data times, sometimes, it's difficult to tell the pure domestic transaction or cross-border one, and most of the rules could be applicable to all transactions.

Basically, there are 4 ways to solve the online dispute according to Taobao rules. Tmall has the same procedure: negotiation between the parties; Custom service intervention; Public Review system; and Report online.

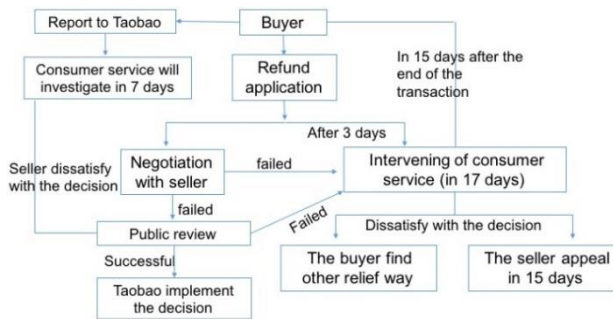


Figure 3 The procedure of Taobao dispute settlement mechanism

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- 12 "Taobao Rules" <<https://rule.taobao.com/detail-14.htm?spm=a2177.7231193.0.0.8qLTRA&tag=self&cId=114>> accessed 15 November 2016.
- 13 "Taobao Rules of Dispute Settlement" <<https://rule.taobao.com/detail-99.htm?spm=a2177.7231193.0.0.MaUIEz&tag=self>> accessed 15 November 2016.
- 14 "Tmall International Dispute Resolution Rules" <http://help.world.taobao.com/rule/rule_detail.htm?spm=0.0.0.0.pSMnHg&id=1519&tag=self> accessed 15 November 2016.
- 15 "Trade Dispute Rules" <<http://rule.alibaba.com/rule/detail/2055.htm?spm=a271m.8038972.1999288231.3.wp1WDA>> accessed 15 November 2016.
- 16 "Convention on Taobao Public Review" (Trial Implementation) <<http://pan.taobao.com/jury/help.htm?spm=a310u.3036333.0.0.1rsikh&type=standard>> accessed 15 November 2016.
- 17 Including "Taobao Rules" <<https://rule.taobao.com>> accessed 15 November 2016; "TMALL Rules" <http://help.world.taobao.com/rule/rule_detail.htm?spm=0.0.0.0.pSMnHg&id=1519&tag=self> accessed 15 November 2016; "Alibaba Rule Centre" <<http://rule.alibaba.com/rule/detail/2060.htm?spm=a271m.8038972.1999288231.10.ccNTkU>> accessed 15 November 2016; "Taobao Judgment Centre" <<http://pan.taobao.com>> accessed 15 November 2016.

Sources from: <<https://rule.taobao.com/index.htm?spm=a2177.7231193.1998145763.1.HKwXzk>>.

2.1.1 *Negotiation between the parties*

If a transaction disputes happened, according to "autonomy" principle, it is possible to choose negotiation to resolve the disputes. Other than negotiation it is possible to seek Taobao consumer service intervening, public review system or choose other alternative method.¹⁸ The choice should be made after the application of refund, (Figure 3) ie the starting point of the application of Taobao Rules of Dispute Settlement is the buyer's application to refund through Taobao platform.

2.1.2 *Taobao Consumer Service Intervening*

The status of Taobao consumer service is equal to the neutral third party in mediation and its decision is non-binding. There are 3 ways to initiate the intervening of Taobao consumer service: 1) 3 days after the submission of refund request, and the seller did not negotiate with the buyer; 2) the parties failed to meet the agreement, the buyer could enter the right protection channel after 3 days of the refund request; or 3) If the transaction has been finished, the consumer found aftersales serviced is needed, he can submit the appropriate complaints in 15 days after the end of the transaction for the reasons such as delay to delivery, violation a promise, etc (Figure 3). The parties should submit the evidences, which include: photos of the goods, chat records of Aliwangwang, record on Taobao concerning the transaction procedure, etc. Although the decision made by the consumer service is non-binding, Taobao could directly take action against the seller and force the seller enforce the decision by the private implementation measures. If the consumer is not satisfied with the decision, he could find other relief method such as litigation or arbitration. At the same time, if the seller is not satisfied, he could appeal to Taobao in 15 days since the decision is made by the consumer service.

2.1.3 *Public Review System*

Being the biggest e-commerce platform, Taobao not only faced the problem of great disputes, but the difficulty of fairness. Taobao has found that majority of the disputes are not complex, so that sometimes a common person could make the decision to support a party according to his own experience. Furthermore, the knowledge, time and method of the Taobao consumer service are limited. Therefore, Taobao created the public review system and Taobao Judgment Centre,¹⁹ which can

18 Taobao Rules of Dispute Settlement, art 3 and art 100.

19 <<https://pan.taobao.com>> accessed 16 November 2016.

let the members participate in review of the dispute, save the waiting time for both parties, make the decision comparatively fairer.

In 3 contexts, a public review could be launched. After the failure of negotiation, the buyer could choose Taobao consumer service intervening or public interview system, and the latter also could be initiated by Taobao if necessary, or launched by the seller under circumstances that the seller is dissatisfied with the decision that was decided by Taobao according to the report of the consumer. The whole public review team is constituted of 31 reviewers, selected by the platform at random.²⁰ In 168 hours,²¹ any party gets at least 16 support votes will win, and an effective final decision has been constituted; however, if no party gets 16 votes, Taobao consumer service will intervene.²²

2.1.4 *Report to Taobao*

With the rapid development of Taobao, the diversified commodity composition and pluralistic business model has made Taobao platform close to a social ecosystem. When contributed to transactions among consumers and merchants, the ecosystem also bred many irregularities. Although Taobao has devoted great efforts to refine the market environment, it can't fundamentally solve the violation phenomenon. To more rapidly and effectively prevent unfair competition, Taobao established the Report platform²³ to delegate netizens to report the irregularities to Taobao and let the social power to participate the platform governance, in order to construct a fairer and more just e-commerce platform order. Taobao will investigate the report in 7 days and make a decision. If the seller is dissatisfied with the result, he can apply for the public review. The creation of Report to Taobao could not only effectively prevent unfair competition, but also protect the members from being damaged in advance. Moreover, through active regulatory and socialized governance, it could make up for the deficiency of the platform on the time limit to find the irregularities, and help the platform continuously perfect and renovate the rules.²⁴

20 Convention on Taobao Public Review (Trial Implementation), art 9.

21 Ibid art 10.

22 Ibid art 11.

23 <<http://jubao.taobao.com>> accessed 16 November 2016.

24 Alibaba Group "Alibaba Ecosystem Internet Volunteers Research Report 2016" p 6 <<http://i.aliresearch.com/file/20161010/20161010180743.pdf>> accessed 15 November 2016.

2.2 Online Court: Taking Zhejiang Online Court as the Example

Litigation is the ultimate authority in dispute settlement, which has been expected as the "fairest" method. The good utilizing of litigation system is inevitable to curb the dispute production and promote the success of the dispute settlement. Electronic court or online court is not just to apply some internet technology in judicial activities,²⁵ but the model that all trials and relevant litigation activities are conducted through electronic communication method, which is a new court form in e-times with the overall merging of the trial and information technology.²⁶ Online court could not only facilitate the consumers and other e-commerce participant to protect their rights rapidly, but also take advantage of Big Data to promote the transparency of the judiciary. China has also made an attempted in some pilot courts.

China Civil Procedural Law and its judicial interpretation, Contract law and Electronic Signature Law have confirmed the legality of the legal instruments in electronic form and the evidence transferred in electronic form, as well, the trial with the internet video technology is also permitted. The province or city with a developed internet transaction could be the pilot, with the independent online trial team and the specific technology persons.²⁷ Therefore, being the province where the leader of Chinese e-commerce platform, Alibaba is located, Zhejiang province has become the first pilot to fully utilize the modern information technology to promote judicial efficiency. In 2015, Zhejiang Supreme People's Court has focused on the establishment of e-commerce online court.²⁸ Until now, there are totally 14 basic level people's courts²⁹ have involved in online trial and 13 types of cause of action.³⁰

25 Long Fei "Development Condition and Future Prospect of China ODR" (2016) 10 Journal of Law Application 2-7.

26 Zhou Ziyu, Quan Quan and Chang Bai, 'Online Court: Trial Model in Internet Times' (2014) 06 Journal of Law Application 103-107.

27 Luo Xiulan (n 10) 57-64.

28 <www.zjwsft.gov.cn/portal/main/domain/index.htm?spm=a1z8s.8020637.0.0.QYobBd> accessed 15 November 2016.

29 14 Online courts in Zhejiang province includes Binjiang People's Court, West Lake People's Court, yuhang People's Court, Yiwu People's Court, Taizhou Luqiao District People's Court, Lishui Suichang People's Court, Lishui Liandu District People's Court, Taizhou Huangyan District People's Court, Wenzhou Lucheng District People's Court, Quzhou Qujiang District People's Court, Maanshan Yushan District People's Court, Hangzhou Xiacheng District People's Court, Jinyun People's Court, Lishui Yunhe People's Court. Hangzhou Intermediate People's Court is the appealing court.

30 13 categories of cause of action of Zhejiang online court are: e-commerce transaction, copyright, credit card, alimony, trademark, marriage and family, financial loan contract, folk loan, e-commerce small amount loan, traffic, contract, property insurance contract, alimony.

The concrete procedure of online court is the same with the offline litigation, restrictedly to comply with the Civil Procedural Law. It depends on the internet service platform and moves every step, such as launching a lawsuit, accepting a case, burden of proof, trial and judgment, to be completed online, which resulted in promoting trial efficiency and save the judicial sources.³¹ Besides, other local courts in China are also actively promoting the establishment of electronic court.

Additionally, at present, Chinese courts are actively transforming and upgrading to set up informationization 3.0 of the People's Court, which focuses on data, to make it a foundation of the future overall online court. Since 2014, China Supreme People's Court (SPC) built China Judicial Process Information Online to disclose various judicial information,³² China Judgement Online to publish judgments,³³ the trial broadcast live platform to broadcast live all open trial of SPC through the Internet,³⁴ China Implementation Information Disclosed Online to disclose information on the lists of dishonest persons subjected to execution, implementation procedure, and the relevant legal instruments.³⁵ All local courts have linked with the above platforms. All of these activities are preparing for the future online court, which would be intelligent, opening-up and transparent.

2.3 Online Dispute Resolution

Online Dispute Resolution (ODR) is a new way developed on the basis of the traditional ADR with the help of information technology, which would allow all of the participants to communicate without the restriction of space and time. UNCITRAL defines "ODR" as a solution which can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing, which includes but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, arbitration and others.³⁶ Now, ODR has developed in countries where online transaction has been prosperous, which is the important method to solve the domestic or international online transaction disputes for its flexibility, convenience, cheapness, speciality and justice. Chinese ODR system is at the beginning of establishment, which includes

31 <<http://zjnews.zjol.com.cn/system/2015/08/17/020791159.shtml>> accessed 17 November 2016.

32 <<http://splcgk.court.gov.cn/zgsplcxxgkw/>> accessed 18 November 2016.

33 <<http://wenshu.court.gov.cn>> accessed 18 November 2016.

34 <<http://tingshen.court.gov.cn>> accessed 18 November 2016.

35 "Implementation in the Sunshine is Powerful" <<http://www.chinacourt.org/article/detail/2016/11/id/2335287.shtml>> accessed 18 November 2016.

36 Part II, Section 1, 2, TNODR.

online negotiation, arbitration and conciliation with the participation of third party. Some ODR platforms supply a specific service, while others supply different ODR methods and the concrete one would be decided by the party. Most of the ODR platforms in China haven't distinguished the domestic or cross-border transaction.

2.3.1 *Online Negotiation*

Online negotiation, the other name is "online conciliation", refers to negotiation with the utilizing of internet technology, which is often the basis of other methods.³⁷ Through the private communication between the parties, many disputes would be solved economically. It's a kind of self-help way and especially plays an important role in low-value transactions. It is different from the online negotiation of Taobao, because the platform of online negotiation of ODR is independent from both parties; while the latter has the interests with both parties.

In China, the representatives of the specific online negotiation platform are China Consumers Association Complaint, Conciliation and Supervision Platform (CCA Platform),³⁸ and some local ones such as Pudong New Area Zero Power Dispute Coordinate Service Platform (Pudong Platform).³⁹ The former is a right protection website created by China Consumers Association (CCA), with the intention of setting up a way "to consult and conciliate with business operators"⁴⁰ regulated in Law of the People's Republic of China on the Protection of Consumer Rights and Interests. Pudong Platform is an e-commerce trusted environmental portal and a third party public service platform, charged by Shanghai Pudong New Area Commerce Commission and Pudong E-commerce Sector Association. According to the delegation of the government, the platform is to establish a trusted transaction environment and supply the fundamental service for the e-commerce.

2.3.2 *Online Mediation*

Online Mediation refers to a neutral third party be the mediator to solve the dispute in a confidential online chatroom or online video meeting. Presently, few specific platform supplies the ODR mediation service and most of them are combined with online arbitration, which can give the consumers more choices.

37 Douglas Walton and David M Godden "Persuasion dialogue in online dispute resolution" (2005) 13 *Artificial Intelligence and Law* 273–295, 275.

38 <<http://hjxt.cca.cn>> accessed 18 November 2016.

39 <www.shodr.org> accessed 18 November 2016.

40 Law of the People's Republic of China on the Protection of Consumer Rights and Interests, Standing Committee of the National People's Congress, Order No 7 of the President of the People's Republic of China (25 October 2013), art 39 (1).

Generally, the website which supplies the online mediation will publish its rules and procedures on its platform. After well understanding the rules, the consumer can submit a mediation application to the platform, which will confirm whether the respondent is willing to participate in the online mediation. If there is a consent, the parties will choose the mediators, just like the traditional mediation procedure, or the platform appoints the mediator.

The representatives of online mediation is Shenzhen Zhongxin E-commerce Transaction Safeguard and Promotion Centre (Zhongxin Centre), which is delegated by the government and established by Shenzhen Market Regulatory Bureau and Futian District Government.⁴¹ The platform particularly created Shenzhen Cross-border E-commerce Credible Transaction Security System to solve cross-border e-commerce transaction. Through services of online consultation, online complaint, online mediation, consumer precaution and guidance, and credit evaluation, Shenzhen Zhongxin Centre has got certain achievements to help the consumers to smoothly solve the disputes out of court.

2.3.3. *Online Arbitration*

Being a dispute resolution method, the operation rules and judgment principles are similar between online arbitration and traditional arbitration. The main difference is that the carrier and method to transfer the information of online arbitration is the Internet.

On basis of whether the arbitration award has the judicial enforceability, some scholar divided the online arbitration into 2 categories: binding and non-binding.⁴² Binding online arbitration is conducted by the government arbitration institutions, which refers to the award that has the judicial enforceability and confirmed by the national law. Its effect is equal to the legality of traditional arbitration; non-binding is not conducted by the government arbitration institution, which means the award is not recognized by the laws, without the judicial enforceability. The effect of non-binding award is similar to a contract.⁴³ According to China Arbitration Law,

41 <www.ebs.org.cn/AboutUs/Index.html?navIndex=5&subNavIndex=0> accessed 18 November 2016.

42 Li Hu *Research on Online Arbitration* (Beijing, China Democracy and Law Press, 2005) 32.

43 Gao Wei "Legal Analysis on Non-Binding Online Arbitration to Solve E-commerce Dispute" (2012) 2 *Academic Journal of Zhongzhou* 76-80.

only arbitration commission⁴⁴ could be the arbitration institution. Therefore, in China, only binding online arbitration is permitted.

In December 2000, China International Economic and Trade Arbitration Commission (CIETAC) established the "Online Dispute Resolution Centre", to solve the domain disputes online.⁴⁵ In recent years, CIETAC began to find a way to solve online e-commerce disputes. In 2009, it promulgated Online Arbitration Rules of the China International Economic and Trade Arbitration, which is the first formal online arbitration rule in China.⁴⁶ To rapidly, economically and efficiently solve the e-commerce disputes in big-amount and low-value, besides the general procedure, it also sets final procedure⁴⁷ and expedited procedure⁴⁸ according to different amount of the transaction. This is a significant development of China ODR. Pursuant to this national online arbitration rule, several local arbitration institutions have also attempted the online arbitration method, such as 2015 Online Arbitration Rules of China Guangzhou Arbitration Commission,⁴⁹ Specific Online Arbitration Rules on Online Transaction dispute in Low-value of China Guangzhou Arbitration Commission,⁵⁰ and 2016 Shenzhen Court of International Arbitration Rules which also introduced online arbitration articles.⁵¹ Those rules has clarified that the arbitration agreement could be in forms of data messages, including telegrams, telexes, faxes, electronic data interchange and emails, etc.,⁵² and recognized the validity of electronic signature.⁵³ Therefore, parties of the arbitration could realize

44 Chapter II, Arbitration Commissions and the Arbitration Association, Arbitration Law, Standing Committee of the National People's Congress, 31 August 1994. See also, Susan R Patterson and D Grant Seabolt *Essentials of Alternative Dispute Resolution* (2nd ed, Dallas, Pearson Publications 2001) 115.

45 <<http://dndrc.cietac.org>> accessed 19 November 2016.

46 <www.cietacodr.org> accessed 19 November 2016.

47 Online Arbitration Law, Chapter IV.

48 Ibid Chapter V.

49 Online Arbitration Rules of China Guangzhou Arbitration Commission 2015 <www.gzac.org/WEB_CN/AboutInfo.aspx?AboutType=4&KeyID=100b1ae3-9f15-4bfc-bf59-a90273778fa5> accessed 19 November 2016.

50 "Specific Online Arbitration Rules on Online Transaction dispute in Low-value of China Guangzhou Arbitration Commission" <http://www.gzac.org/WEB_CN/AboutInfo.aspx?AboutType=4&KeyID=09600071-6843-4990-9bae-dcfbaf55e927> accessed 19 November 2016.

51 "2016 Shenzhen Court of International Arbitration Rules" <www.sccietac.org/web/doc/view_rules/856.html> accessed 19 November 2016.

52 Online Arbitration Rules, art 2(7).

53 Ibid art 29.

online arbitration from the signing arbitration agreement to submitting various evidences, without going to the arbitration institution in person. It's necessary to indicate that Guangzhou Arbitration Commission has firstly defined that "low-value online transaction" is under RMB 10,000.⁵⁴

Generally, Chinese ODS mechanism has the basic built up. The next question is whether all of the channels have functioned well.

III COMPARING OF THE PRACTICE CONDITION AMONG VARIOUS ODS PLATFORMS

In China, the development of different ODS channel is imbalanced. The paper will access their performance from aspect of speed, procedure, neutrality, fairness, professionalism, validity, expense and popularity. "1" represents the best, "2" is moderate, and "3" is not so good.

	Internal platform of e-commerce	ODR	Online court
Speed	1	2	3
Procedure	1	2	3
Neutrality	3	1	1
Fairness	3	2	1
Professionality	3	2	1
Expense	1	3 ⁵⁵	2
Validity	3	2	1
Popularity	1	3	2

Table 1 Assessment index of each way to solve online dispute

The time span of different platforms to deal with a dispute is respectively:⁵⁶ Taobao or Tmall consumer service and public review, in 7 days after it decided to intervene in the dispute;⁵⁷ CIETAC, the most rapid expedited procedure time is in 15 days after the formation of the arbitration tribunal;⁵⁸ Court, summary procedure

54 Specific Online Arbitration Rules on Online Transaction dispute in Small Amount of China Guangzhou Arbitration Commission, art 2.

55 Here it refers to arbitration, other ODR methods in China are all free.

56 Not every platform has disclosed the settlement procedure rules. Here and the following comparisons are only about what has been regulated.

57 <http://support.taobao.com/myservice/rights/right_main.htm> accessed 3 January 2017.

58 Online Arbitration Rules of CIETAC, art 50.

in 3 months.⁵⁹ Therefore, the fast settlement channel is the internal ODS mechanism of the e-commerce platform, which is one of its biggest advantage.

In fact, the settlement speed is closely related to the complexity of the procedure. Usually, the simpler of the procedure, the shorter the time spent on solving the problem. Comparing the three channels, the procedure of Alibaba is the simplest: consult – apply the intervening of consumer service or public review – submit the evidence – make final decision; ODR is more complex in 2 folds: (1) although the negotiation and mediation procedure is similar with that of Taobao, but it's more difficult to collect evidence, because being the e-commerce platform, all transaction marks left on Alibaba platform could be directly taken as the evidence. However, ODR platform is an independent third party, all evidences should be collected by the parties and submitted to the platform; (2) Online arbitration procedure is the same with the offline arbitration, which would be more complex than that of Taobao.⁶⁰ Furthermore, the procedure of online trial should accord with the Civil Procedure Law, which is the most complex generally.

As for the neutrality, ODR and online trial is much better than that of Alibaba. The internal ODS mechanism is supplied by the e-commerce transaction platform itself, the consumer service is the employee of the platform, and the reviewer of the public review platform is also the buyer or seller from the platform. It's inevitable that the third party could have more or less interest or relationship with the platform, which could impact the neutrality of the third party. On the contrary, no matter ODR or online trial, the mediator, arbitrator or the judge is an independent third party and more neutral.

The neutrality and independence will influence the fairness of the final decision. In practice, there are many complaints and blames on the fairness of the consumer service of Taobao. What could more serious is the corruption problem of consumer service: from the early disguised means such as reputation forgery and bad evaluation deletion, to directly obtaining improper benefits such as accepting the bribe.⁶¹ Since 2012, Taobao has closed many e-commerce shops forever and launched the judicial procedure, which has the suspected bribery to the consumer

59 China Civil Procedural Law, art 161.

60 The arbitration procedure in China is: arbitration agreement – the claimant apply for the online arbitration - the form of the online arbitration panel – the respondent make the defence – evidence submission – arbitrate online – make the decision.

61 "Surprising Internal Investigation of Taobao Corruption" <<http://b2b.toocle.com/detail--6185290.html>> accessed 2 January 2017.

service.⁶² However, the third party of ODR and the judge of online trial, which has no interest with the parties, would be fairer. Combing the consideration of the professionalism and the coercive power, online trial is comparatively fairer than ODR.

One of the reasons why the consumer service is easy to be involved in the bribery scandal maybe because there is no specific qualification requirement to be a consumer service, also, the auxiliary supervision and penalty system is in blank. On the contrary, it's worthy to point out in Public Review system, to be a reviewer, one must satisfy with some requirements. No matter the buyer or seller, both can apply for the reviewer, only if he is a Taobao member and the registration time is up to 1 year, as well as Alipay has verified the real identification (ID) of the reviewers. At the same time, the buyer and the seller should meet other prerequisites such as credit, transaction amount and rule compliance condition, etc.,⁶³ which could also facilitate the reviewer to make a more informed judgment.

As for the expense on low-value disputes, the internal ODS mechanism of the e-commerce platform and ODR methods, except arbitration, are free. Online court is RMB 50 for each case if the object sum is under RMB 10,000.⁶⁴ The most expensive method is arbitration. In 2014, Online Arbitration Rules of CIETAC has regulated the calculation method of the case-acceptation fees according to different involving value of the case, the minimum is RMB 100.⁶⁵ Therefore, online arbitration is the most expensive way to settle low-value e-commerce disputes.

At last, let's check the popularity of different channels in China. In general, the dispute settlement mechanism of Alibaba has operated well. Although there is lack of recent statistics, according to Consumer Protection White Book, published by Taobao in July 2011, in the early half year of 2011, Taobao has accepted and dealt with 2,631,000 complaints and successfully protected RMB 190,000,000 damages.⁶⁶ From 25 December 2015 to 25 October 2016, the report platform of Taobao has attracted more than 800,000 social persons to participate the platform governance

62 "Anti-corruption of Alibaba" <<http://tech.qq.com/a/20150325/026972.htm>> accessed 2 January 2017.

63 Convention on Taobao Public Review (Trial Implementation), art 4.

64 Measures on the Payment of Litigation Costs, State Council (19 December 2006), art 13(1).

65 "Arbitration Fee" <www.cietac.org/index.php?m=Page&a=index&id=121> accessed 19 November 2016.

66 "Taobao Has Conducted 2,600,000 Cases Concerning Consumer Right Protection in the Early Half Year" <www.ebrun.com/ebnews/23911.html> accessed 16 November 2016.

and accumulatively got 4,230,000 report messages through Report to Taobao.⁶⁷ Until 26 November 2016, there were 1,026,117 public reviewers to make a judgment on 2,174,498 cases through public review platform. Comparatively, online trial cases were much less. From 12 August 2015 to 26 November 2016, Zhejiang e-commerce online courts have accepted 1,897 cases, among which e-commerce transaction disputes accounted to 1,052 cases.⁶⁸ Regarding the cases settled by ODR, it's surprisingly poor. Viewing the typical cases in CCA, although it has published some cases, no evidence is shown that they were settled by the CCA platform. Besides, from 1 March 2013 to 17 July 2014, there were 70 cases solved on Pudong Platform, and after 2014, no cases were disclosed.⁶⁹ Additionally, since April 2014 till now, only 18 cases were solved on the Shenzhen Zhongxin Centre platform, including 2 cross-border disputes.⁷⁰ As for online arbitration, there is no specific number about online arbitration, but the total number of 2005 is 1,968 cases.⁷¹ Although the above statistics is not in the same period, it's enough to get some preliminary indication of the general trend because of the gigantic difference among them, that is, in China, the internal ODS system of the e-commerce platform is the most welcomed.

IV CAUSATION ANALYSIS OF CHINA ODS DEVELOPMENT STATUS

An impartial, quick, and affordable dispute resolution system can reduce the uncertainty associated with e-commerce, and enhance confidence in online markets and trade.⁷² Comprehensively evaluating the various index according to Table 1, it seems like online trial should have been the most popular channel in China because it has got the most No "1". Additionally, in China, there is always a traditional "Moderate" ideology⁷³ existing. In the assessment, ODR has got the most No "2",

67 Alibaba Group (n 24) 6.

68 <www.zjwsft.gov.cn/portal/main/domain/index.htm> accessed 26 November 2016.

69 <www.shodr.org/Article/ArticleTagSearch.aspx?Dir=54&Page=5> accessed 18 November 2016.

70 <<http://kj.ebs.org.cn/news/detail/bdeb4dfa-7abb-4c7e-9848-612f3c9ba61a>> accessed 18 November 2016. See also <<http://odr.ebs.org.cn/news/CaseDetail/3e05ec69-2bcc-4915-91ee-0c91a3bbaf69>> accessed 18 November 2016.

71 <www.cietac.org/index.php?m=Page&a=index&id=24> accessed 15 January 2017.

72 Ofir Turel and Yufei Yuan "Online dispute resolution services for electronic markets: a user centric research agenda" (2007) 5(6) *International Journal of Electronic Business* 590-603.

73 "Moderate" ideology is a compromise attitude avoid leaning to either side and the "middle" is the best. It's a Confucian idea and from the famous classic literature "Zhong Yong", written by Zi Si, in *Li Ji*. Later, it became one of the life philosophy of Chinese people.

which should have been the most correspondent to Chinese traditional culture. But the truth is just on the contrary: the internal ODS mechanism is much more welcomed than other two channels, followed by online court. The main reasons are as following:

4.1 Scientific Design of Internal ODS System of Alibaba

The huge numbers have shown that the design of this internal ODS system is scientific, reasonable, low cost and high efficiency.

4.1.1 Modularization of the Platform Design

Taobao has found that under different categories of the commodities, the dispute causes and settlement results are always in convergence. Through market investigation and statistics analysis, Taobao summarized the most regular disputes causes, including commodity damaged; wrong or missed distribution; commodity needs repair; the commodity is not conformity with the description; quality problem; and the commodity is not delivered at the promised time, etc. And the settlement methods are summarized as change; return; and refund, etc. When designing the dispute settlement procedure, Taobao utilized this kind of modularization method to give the complainants choice. For the complainant, on one hand, it could save time to describe what problem he has met; on the other hand, the result could be predicted. Moreover, it could impel the consumer services to be more professional when they intervene the disputes.⁷⁴

4.1.2 Strictly Comply With the Time Limits

Figure 3 shows that each step of the dispute settlement procedure is controlled with the restricted time. For example, after 3 days of the submission of application of refund, the buyer could apply for Taobao consumer service intervening, who will make the decision to intervene the dispute in 2 days and then make the final decision in 15 days.⁷⁵ Dispute settlement should comply with this pace, which is also the important content to safeguard the procedural justice. If any party could not submit the evidences in the prescribed time, it would fail. However, for ODR, except arbitration, the time limit is very vague.

74 Shen Xinwang "Taobao Internet Dispute Settlement Mechanism – Structuring Right Protection and Its Judicial Value" (2016) 3 *Inside and Outside of Court* 7-11.

75 "Question on Time Used to Deal with the Dispute by Consumer Service of Taobao" <<http://wangdian.hznzcn.com/wenti/4519.html>> accessed 16 November 2016.

4.1.3 *Be Coincided With the Characteristics of E-Commerce*

According to the comparison, Taobao ODS platform has the characteristics of high speed, simple procedure and low expense. Its popularity has testified that in B2C and C2C disputes, efficiency and economy are more important than fairness, neutrality, professionalism and validity, which are just coincided with the characteristics of e-commerce.

4.1.4 *Social Participation to Jointly Construct E-Commerce Ecosystem*

Through public review and report to Taobao, Taobao has introduced the social power, including the excellent buyer and seller to jointly participate the construction and governance of Ali e-commerce ecosystem. There are so many transactions on Taobao every day, it's hard to avoid that sometimes the consumer service is not familiar with the phenomenon. Furthermore, since the evidence principle of Taobao is "the product and the description are identical on surface",⁷⁶ public review could bring in more knowledgeable person to judge a case. From the justice aspect, the system utilizes the method of delivering the task to the interviewer at random⁷⁷ and challenge system to effectively prevent the reviewer to select cases for his own interests.⁷⁸ Moreover, either the buyer or the seller could participate the public review and report, so it's a good chance to make the market education to the participant to let them know the causes of the disputes, and then to avoid the disputes. The most outstanding point is that the system is a way to realize social cooperative governance.⁷⁹

Of course, the limitations of the Taobao ODS mechanism is also obvious, such as the rules are uncertain; the decision has no legal binding; the fact ascertaining methods are limited;⁸⁰ the third party to help to settle down the dispute could have interests with both parties; lack of supervision and regulatory mechanism; the fairness of the decision is doubtful;⁸¹ and the unreasonable immunity of responsibility of platform itself,⁸² etc. That is just the reason why other channels are

76 Taobao Rules of Dispute Settlement, art 101.

77 Convention on Taobao Public Review (Trial Implementation), art 9.

78 Ibid art 5.

79 Shen Xinwang "Taobao Internet Dispute Settlement Mechanism – Structuring Right Protection and Its Judicial Value" (2016) 3 Inside and Outside of Court 7-11.

80 Zheng Jun "On Development of ODR in China – Taking Taobao Dispute Settlement Model as the Example" (2014) 20 Legal System and Society 44-45.

81 Luo Xiulan (n 10) 57-65.

82 Zheng Jun (n 80) 44-45.

also necessary. Being a non-independent third party, the internal ODS mechanism could never substitute other external systems. However, in the context that there are still no relevant formal e-commerce laws in China, for the characteristics of rapid, large volume and low value of B2C and C2C transactions, the internal ODS model is undoubtedly the most direct and efficient way to solve online disputes.

4.2 Obstacles and Challenges of ODR Development in China

From the current development situation of ODS, for the merits of economy, efficiency and flexibility, in China, the internal ODS mechanism of the e-commerce platform is the most welcomed; and the online court has also been warmed-up with the advocate of "Internet + Judiciary" reform.⁸³ Only ODR, is not developed well, it even has the backward tendency. The obstacle and challenge to ODR are more serious.

4.2.1 Inadequate Legislation

As for internal e-commerce platform, each one has its own rules on dispute settlement; and although online court has also no specific regulation, there are relevant procedural laws to be the reference; but in ODR, except the arbitration institution, others have no specific rules. Therefore, it's difficult to negotiate or mediate "in the shadow of the law". For the traditional ADR, the disputing parties are aware of the legal rules governing the area of their dispute. The outcome that the law will impose if no agreement is reached gives each party a reasonably good idea of its bargaining position.⁸⁴ Cortes indicates that "the establishment of a legal framework in the ODR field for B2C disputes will increase legal certainty, facilitating the expansion of quality and fair ODR methods."⁸⁵ Parties will take the law into consideration when setting out a strategy in the ADR procedure.⁸⁶ However, the legislation of ODR is far from enough to make this kind of negotiation. Online arbitration has some regulations but still imperfect. In the offline commerce

83 "Convergence and Extension: the Improvement Road of Judiciary Promulgation in Context of "Internet +"" <www.chinacourt.org/article/detail/2015/12/id/1759991.shtml> accessed 15 January 2017.

84 Esther van den Heuvel "Online Dispute Resolution as A Solution to Cross-Border E-Disputes - An Introduction To ODR", p16 <www.oecd.org/internet/consumer/1878940.pdf> accessed 19 November 2016.

85 Pablo Cortes "Accredited Online Dispute Resolution Services: Creating European Legal Standards for Ensuring Fair and Effective Processes" (2008) 17(3) Information and Communications Technology Law 221-237, 224.

86 R Cooter, S Marks and R Mnookin "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior" (1982) 11 The Journal of Legal Studies 225-251.

transaction, due to territorial restriction, even if there are a lot of disputes, the issues of jurisdiction, applicable law and the enforcement of the award would not often be challenging. With the continuous development of e-commerce, the consumer could make transaction with the merchants at every corner of the world. Parties in the internet environment, especially cross-border transaction, would feel difficult to solve the problems of applicable law, jurisdiction and enforcement etc., which is not prescribed in the relevant arbitration regulations.

4.2.2 *Limited Acceptance Scope*

In China, the ODR platform is very few, no matter the specific ODR supplier, or traditional mediation or arbitration institutions which could supply ODR service. Furthermore, usually, ODR platform only accepted cases concerning its member enterprises, which has restricted the consumers to utilize the platform. As of early 2017 only 48 enterprises were registered on the CCS platform⁸⁷ and 9 on Pudong platform.⁸⁸ As for arbitration, it only supplies binding arbitration, and non-binding arbitration is illegal in China.

4.2.3 *Casual Quit System*

Any method to get the jurisdiction over the case needs the consent of both parties. Except binding online arbitration, as to other ODR methods, if any party is not willing to utilize ODR, he can retreat from ODR at any time without any cause. This would make the complaint, who had submitted the acceptance fee, very passive but with no redress.

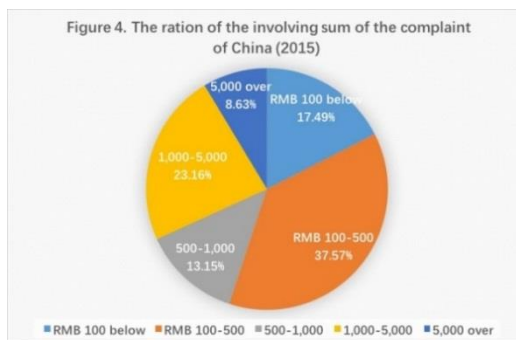
4.2.4 *Unreasonable Fees*

According to 2009 calculation method of arbitration fee made by CIETAC, each case at least needs RMB 4,000. However, the general online transactions are low-value. The cost of online arbitration is so high, which is seriously mismatched. In 2014, it has been changed to minimum RMB 100, which seems that the cost has been reduced much. However, according to statistics, the involving sum of the complaint of 2015 in China is respectively: RMB 100 and below accounted for 17.49%; and RMB 100-500 37.57%. (Figure 4) Obviously, 17.49% of the disputes involving RMB 100 and below would not select online arbitration because the arbitration fees are over the transaction price or value. 37.57% of the disputes involving RMB 100-500 may also not firstly select online arbitration, because they can get effective resolution through the internal mechanism of e-commerce

87 <<http://hjxt.cca.cn>> accessed 3 January 2017.

88 <http://www.shodr.org/Article/List_72.aspx> accessed 3 January 2017.

platform. That is to say, the online arbitration would not function on over 50% of complaints.



Sources from: 2015 Report on E-commerce Consumer Experience and Complaint Supervision; available at: <www.100ec.cn/zt/upload_data/2016315/images/2015bg.pdf> [accessed on 15 January 2017].

On the contrary, other ODR methods are all free. For a platform, it needs funds for maintenance. Without the continuous financial support, ODR is hard to maintain its operation. Thus, a more reasonable, appropriate and detailed calculation of ODR expense is required in any efforts to re-design the system.

Facing the above difficulties and challenges, based on China's national conditions and the domestic and international experiences, it is better to re-design China ODS mechanism, especially the ODR.

V ESTABLISH CHINESE ODR FOLLOWING UNCITRAL AND ALIBABA

Various e-commerce enterprises, business organizations, governmental institutions and international organization have actively advocated and promoted ODR. ODR is regarded as the important aspect to guarantee e-commerce safety,

enhance the consumer's trust and confidence in e-commerce, and establish a good environment to the development of e-commerce.⁸⁹ One of the important contributions relating to ODR is from UNCITRAL. Since 2010, Working Group III of UNCITRAL has started its work on ODR. After 6 years of analysis and discussion, finally the TNODR has been adopted. TNODR is to establish guidance in the field of ODR relating to cross-border electronic commerce transactions, which includes low-value sales or service contracts (including B2C transactions) concluded using electronic communications. TNODR has no binding and the content is the consensus of its member countries. Besides, UNCITRAL has also discussed questions about the validity of the arbitration agreement and the implementation system. Being the member of the UN, China has also submitted its opinions and suggestions, which would bring the new direction and requirement to the construction of China ODR. In addition, the internal ODS mechanism of e-commerce platform, such as Alibaba Group, has supplied many experiences and innovations to be a good reference to ODR system. Combing the domestic and foreign experiences, next, the paper attempts to outline some key points concerning the establishment of China ODR system.

5.1 Settlement Procedure: Negotiation; Facilitated Settlement; Final Stage

TNODR prescribed the process of an ODR proceeding may consist: negotiation; facilitated settlement (mainly mediation);⁹⁰ and a third (final) stage. The ODR proceeding may commence when a claimant submits a notice through the ODR platform to the ODR administrator. The concrete commencing time is that ODR administrator notifies the parties that the notice is available at the ODR platform. The first stage of proceedings may commence following the communication of the respondent's reply to the ODR platform. If the respondent didn't reply in a reasonable time, or the parties haven't made an agreement through negotiation, or if any party asked, the second stage namely the facilitated settlement could be initiated. At the second stage, a neutral is appointed by the ODR administrator and communicates with the parties to try to achieve a settlement. If the neutral has not succeeded in facilitating the settlement, it is desirable that the ODR administrator or neutral

89 Ding Ying "Online Settlement of Online Consumer Dispute – Taking Taobao Platform as the Example" (2014) 2 Wuhan University International Law Review 208-236, 211.

90 Mediation is viewed as a kind of "facilitated negotiation". See Susan M Leeson and Bryan M Johnston *Ending it: Dispute Resolution in America* (Cincinnati, Anderson Publishing, 1988) 133. See also Patterson and Seabolt (n 44) 53.

informs the parties of the nature of the final stage, and of the form that it might take.⁹¹

Each stage of TNODR is need not be exhausted in order to initiate the next stage, ie, the party could launch mediation without negotiation, or directly access to the final stage without mediation, reflecting the flexibility of ODR. Although ADR has the same characteristic, it can't meet the high requirements of internet world when internet has gradually penetrated into the legal relationships with its characteristics such as global, non-centralized management and high autonomy.⁹² Under ODR model, the initiation of any procedure only needs press of some keys in a certain internet environment. This space and time fragmentation model makes ODR more flexible and convenient than ADR, and enhances the efficiency of dispute settlement.

It's worthy to note that TNODR excludes the question of the nature of the final stage of the ODR process (arbitration/non-arbitration), for there are many arguments on it. The focus is whether the pre-dispute arbitration agreements are binding on consumers: countries represented by USA considered it's binding; while countries represented by EU considered non-binding. For different jurisdiction has different opinion, Working Group III decided to adopt "two-track" rule to solve the problem:⁹³ Track I makes the ODR ending in a binding arbitration stage; Track II to the contrary. Each country should notify to the Secretariat, which track it belongs to. Once decided, the seller could judge which jurisdiction the consumer belongs based on the delivery address, to tell which track should be applied to solve the dispute. Because of diversified opinion concerning the validity of pre-dispute agreement, and in fact, most cases could be successfully resolved in negotiation and mediation stage,⁹⁴ the final TNODR doesn't involve the online arbitration. However, what can be predicted is that it's impossible to harmonize all countries' attitude on the question, and two-track system is the best way at present.

⁹¹ TNODR, paras 18-21.

⁹² Xiao Yongping and Xie Xinsheng "ODR: New Model to Solve E-commerce Dispute" (2003) 6 China Legal Science 146-157, 146.

⁹³ Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules, para 15.

⁹⁴ Report of Working Group III (Online Dispute Resolution) on the work of its twenty-second session, para 30.

As for Chinese regulation, either pre-dispute or post-dispute arbitration agreement is valid,⁹⁵ so China belongs to Track I. If the consumer is from China, then the pre-dispute arbitration agreement is valid. When China establishes ODR system, the track system of UNCITRAL will be a good reference to classify the consumers in different jurisdiction in order to cope with the potential disputes from around the world.

5.2 *The Third Party Who Helps to Solve the Dispute*

ODR can hardly operate without the third party. Here, the third party means all participants in ODR except the opposing parties. On basis of TNODR and the practice, the third parties should at least include "technology third party", "administrator third party" and "neutral third party".

"Technology third party" refers to all electronic and information technology support required in ODR, including hardware and software environment. Some scholars have pointed out that code – the number combination of the regulations in the cyberspace – is the law,⁹⁶ which has totally transformed the regulation order in cyberspace. Different with the physical space, the software and hardware make the cyberspace what it is, also regulate cyberspace as it is.⁹⁷ Ethan Katsh called it the "fourth party".⁹⁸ However, technology support is the most important composition of ODR, which "provides both disputants and third parties with unprecedented procedures and capacities".⁹⁹ Technology is the necessary requirement of ODR, which has created the possibility to fulfil ODR. Technology is already being widely used as both an assistant and a full participant in the dispute resolution process,¹⁰⁰

95 Arbitration Law, art 16, "An arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms before or after disputes arise".

96 William J Mitchell *City of Bits: Space, Place, and the Infobahn* (Cambridge, Massachusetts, MIT Press, 1995)111; Joel Reidenberg "Lex Informatica: The Formulation of Information Policy Rules Through Technology" (1998) 76 *Texas Law Review* 553-593; Lawrence Lessig *Code: Version 2.0* (Cambridge, Basic Books, 2006).

97 Lawrence Lessig (n 96) 5.

98 Ethan Katsh and Leah Wing "Ten Years of Online Dispute Resolution: Looking at the Past and Constructing the Future" (2006) 38 *University of Toledo Law Review* 101-126, 112.

99 Marta Poblet "Introduction to Mobile Technologies, Conflict Management, and ODR: Exploring Common Grounds" in Marta Poblet *Mobile Technologies for Conflict Management* (Netherlands, Springer, 2011) 6.

100 Arno R Lodder and John Zeleznikow "Artificial Intelligence and Online Dispute Resolution" in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice, A Treatise On Technology And Dispute Resolution* (The Netherlands, Eleven International Publishing, 2012) 61.

i.e., it not only could facilitate the dispute settlement, but the code and its self-implementation nature could also breed the ODS mechanism, such as Smartsettle,¹⁰¹ which could never be realized in an offline environment.¹⁰²

"Administrator third party" is the organizer or host of ODR, which would be responsible to control the whole ODR procedure according to the relevant rules, as well as regulate and adjust the internet environment. ODR administrator in TNODR belongs to administrator third party, which is the important facet to guarantee the procedural justice of ODR. ODR proceeding cannot be conducted on an *ad hoc* basis involving only the parties to a dispute and a neutral (that is, without an administrator).¹⁰³ Its main functions are: 1. Confirmation: Confirm the receipt of any communication by the ODR platform;¹⁰⁴ 2. Notification: Notify the opinions of parties, and the commencement and conclusion of different stages of the proceedings;¹⁰⁵ 3. Disclosure: Publish anonymized data or statistics on outcomes in ODR processes, in order to enable parties to assess its overall record, consistent with applicable principles of confidentiality,¹⁰⁶ and the information concerning the neutral party;¹⁰⁷ 4. Selection and training of the neutral person;¹⁰⁸ 5. Supervision: Supervise the activities of the neutral and ensure the neutral conforms with the standards it has set for itself,¹⁰⁹ and in the event of an objection to an appointment of a neutral, the ODR administrator be required to make a determination as to whether the neutral shall be replaced;¹¹⁰ 6. Coordination: To avoid wasting time, the administrator could coordinate the whole ODR procedure. ODR administrator has the power to extend deadlines, in order to allow for some flexibility when appropriate.¹¹¹ The administrator third party could be part of the ODR platform. In

101 Fang Xuhui and Wen Yunzhi "Internet + Times: Opportunity to Introduce the 'Fourth Party' of ODR – Taking Smartsettle as the Example" (2015) 8 Enterprise Economy 101-104.

102 Gao Wei "System Analysis of Internet Dispute Settlement – Two Paths and Society Adoption Problem" (2014) 4 Peking University Law Journal 1059-1079.

103 TNODR, para 27.

104 Ibid para 31.

105 Ibid.

106 Ibid para 11.

107 Ibid para 42.

108 Ibid paras 13 and 15.

109 Ibid para 16.

110 Ibid para 48(d).

111 Ibid para 32.

this context, the software and working procedure are set in advance. In fact, it will partly overlap with the technology third party. The software and hardware requirements of the network platform would be very high, not only to support the whole process of the system, but also ensure that the design of the system is reasonable, scientific and enforceable. However, it's impossible that technology and administrator totally merged into one. After all, the technology requires the design, operation, management and repairing by human being. Therefore, the legal status of administrator third party should be clearly and distinctly reflected.

"Neutral third party" is independent from the opposing parties, technology third party and administrator third party, who is the assistant to solve the substantial problems, including the neutral, mediator and arbitrator, etc. Neutral third party is the biggest difference between ODR and internal ODS mechanism of e-commerce platform. TNDOR has prescribed the qualification, power and duty of the neutral. It requires that the neutral has the relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question. However, subject to any professional regulation, ODR neutrals need not necessarily be qualified lawyers.¹¹² Additionally, the neutral should be required to declare his impartiality and independence, and disclose at any time any facts or circumstances that might give rise to likely doubts as to his impartiality or independence.¹¹³ He is appointed by the administrator and will intervene the ODR procedure in the second stage,¹¹⁴ and only one neutral is prescribed for each dispute.¹¹⁵ The main duty of the neutral is to fairly, independently and effectively communicate with the parties to get to conciliation,¹¹⁶ which is to safeguard the substantial justice. If failed, the neutral will notify the parties the nature and the possible means of the final stage.¹¹⁷

Turning to China, except the online arbitration, most ODS platform of China has no regulation on the neutral party. Although the content of different platform is different, the characteristics of the neutral should be at least independent and just, with the qualification requirements. Moreover, in order to safeguard the procedural and substantive justice, technology third party, administrator third party and the neutral third party must cooperate well.

112 Ibid para 47.

113 Ibid para 48(b).

114 Ibid para 40d.

115 Ibid para 48(e).

116 Ibid para 49.

117 Ibid para 45.

5.3 *Implementation Mechanism*

As mentioned before, the result of negotiation, mediation or non-binding arbitration award may not be consciously enforced by the parties. If most of the result of ODR has no binding effect, then this method of dispute settlement would be of no significance.¹¹⁸ In view of this, many countries have introduced the definition of "private enforcement mechanism". TNODR has no description on this issue. However, on the 28 Session of Working Group III of UNCITRAL, they had drafted Overview of Private Enforcement Mechanisms and suggested several private enforcement measures, which could supply some ideas for China ODR enforcement mechanism. In addition, the private enforcement mechanism of e-commerce platform such as Taobao has also functioned well in China, which is another reason why it is more welcomed than ODR.

The working group has not defined "private enforcement mechanisms", while in the note of Secretariat, it was explained as "an alternative to a court-enforced arbitration award or settlement agreement, and which can either create incentives to perform or provide for the automatic execution of the outcome of proceedings".¹¹⁹ The final target of private enforcement is to urge the failing party in a dispute to consciously enforce the ODR result or assist him to enforce. Combing the content of UNCITRAL and Taobao, "private enforcement mechanisms" could include the following systems:

5.3.1 *Incentives to Perform*

5.3.1.1 Trustmarks

Working Group III considered the trust marks are similar to quality label, which could be sold or granted by ODR providers to e-commerce platform or online merchandise.¹²⁰ The merchants can let buyers know that they are certified by an authoritative third party, so that they can get more trusts. The ODR supplier could also get trustmarks from an independent third party.¹²¹ Through their own brand reputation, or jointly with the government agencies or relevant certification standards promulgation institutions, ODR supplier could form the social confirmation and make the relevant standard. The merchants should be required to

118 Xue Yuan "Establishment of On-line Global Dispute Resolution System for Cross-border E-commerce Transactions" (2014) 4 *International Business* 95-103.

119 Overview of Private Enforcement Mechanisms, para 4.

120 Ibid para 20.

121 Ibid.

promise that when dispute happened, they will utilize ODR to solve the dispute, as well as subject themselves to the outcome or the decision of the ODR. Doing like this, the right of the consumers would be safer and the e-commerce platform would get recognition and preference from the consumers. If the merchant doesn't enforce the decision of ODR, the trust marks should be cancelled, which would impact its reputation and make the consumers not willing to purchase there.

Taobao has the similar trust marks system, some are granted by the third parties, such as food regulatory department or insurance company; some are provided by Taobao itself. For example, the mark of "consumer protection plan", represents that if a consumer purchases in the online shop with the trust marks, the consumer will enjoy the services of "1 false, 3 times compensates", "return and change the product without any reason in 7 days", "repairing service of digital products in 30 days", "quality inspection by the third party", and "rapidly delivery product service", etc.¹²² For these protection guarantees, the seller could choose one or more items and make the correspondent promises to the buyer.

5.3.1.2 Rating

When the transaction finished, the consumer could voluntarily provide rating to the merchants. If the consumer is not satisfied with the quality or service of the merchants, he can make the feedback through the rating system.¹²³ Taobao also does so. The rating system is connected with the credit level. Each time Taobao membership successfully makes the transaction, he can make a credit evaluation to the merchant. The evaluations include "positive", "moderate" and "negative", and each evaluation will be correspondent with a credit score: "positive" with 1 score; "moderate" with no score; and "negative" with 1 minus. Being a seller, the credit level has 20 ranking.¹²⁴

ODR must get the trust from the parties. No matter how big advantages of the platform, if the parties don't trust them, it's impossible for the parties to select ODR to solve the disputes. As Katsh (2006), the father of ODR, has put it: "Dispute resolution processes are generally perceived as having a single function, that of settling problems. What has come to be understood online, perhaps more than it is offline, is that dispute resolution processes have a dual role, that of settling disputes

122 "How Many Kinds of Safeguard Measures of Consumer Protection Plan" <www.godbc.cn/0013.htm> accessed 21 November 2016.

123 Overview of Private Enforcement Mechanisms, para 17.

124 "How to Calculate the Credit Ranking of the Seller" <<https://service.taobao.com/support/seller/knowledge-847753.htm>> accessed 21 November 2016.

and also of building trust."¹²⁵ The trust object contains either the ODR mechanism itself, or some specific ODR platform. Adopting the reputation and rating system, on one hand, it enhances the transparency of the transaction and facilitates the consumers to identify the ID of the online merchants and confirm the relevant credit; on the other hand, it also encourages the merchants to abide by the principle of "good faith", in favour of them to form into the credit advantage. This method can positively encourage the merchants, who want to receive the trust marks and high rating, to actively perform the decision of the settlement mechanism.

Besides the above practice, the ODR rating system could also add the rating on the implementation condition of the merchants, including whether the merchant complies with the mediation agreement article; the decision made by the neutral; the performance of the arbitration award, etc. If the merchant doesn't perform the ODR decision, the consumer would rate in low score, the merchant's reputation would be damaged. Generally, the merchant would not choose not to perform the decision for the reputation pressure, which would greatly reduce the possibility of non-compliant.

5.3.2 *Penalty on the Non-Compliant Behaviour*

Sometimes the encouragement method does not work. More severe and direct way is to take specific measures against the non-compliant merchant and to force the merchant abide by ODR decision. Working Group III of UNCITRAL made some suggestions: (i) The non-compliant merchant could be subject to suspension of its domain name; (ii) Establish and maintain a "merchant black list" and the browsers marks a merchant as risky (eg, turning the URL red); (iii) To work with marketplaces (like eBay and Amazon) or payment providers (like PayPal, or MasterCard/Visa) to suspend accounts of non-compliant merchants; (iv) Fines or potential of loss of membership could be set up through business associations and chambers of commerce in order to penalize merchants for non-compliance.¹²⁶ All of these penalty measures could work in conjunction with ratings or trust marks systems and/or other enforcement mechanisms.¹²⁷

The punitive measures of Taobao could arise in response to general irregularity and serious irregularity. As for general irregularity, Taobao adopts the punitive

125 Ethan Katsh "Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace" (2006) 10(3) Lex Electronica 6
<www.lex-electronica.org/articles/v10-3/katsh.htm> accessed 15 January 2017.

126 Overview of Private Enforcement Mechanisms, para 27.

127 Ibid para 28.

measure of "score minus + disclose 3 days". If it is a serious irregularity, there are more types of punitive measures imposed namely: minus scores; shield the shop in a certain period; restrict the products publication; restrict the shop establishment; restrict to send emails internally in Taobao; restrict the community function; public warning; withdraw all products for sale; close the shop; and seize the account, etc.¹²⁸ All such imposed punitive measures would be disclosed in the seller's information introduction to warn the prospective buyers and the merchants.

Through the positive encouragement and negative penalty, most of the merchants will well implement the decisions of the ODR.

5.3.3 *Other Alternatives to Secure Enforcement*

Besides the conscious enforcement of the seller and the pressure from the e-commerce platform or ODR platform, the smooth implementation of ODR decision could turn to other alternatives involving different stake holders. This method in essence is to extend the application of credit guarantee theories of Civil law, Mortgage Law and Security Law to ODR implementation field.¹²⁹ Comparing with the aforesaid 2 methods, because of the some independent characteristics in the alternative methods, it could be relatively easier to enforce the outcome of the ODR process. Working Group III of UNCITRAL only introduced the chargeback and escrow system. In China and other countries, there are some other experiences.

5.3.3.1 Chargeback

The consumers pay the merchant through credit card company. If the consumer believes that the merchant has fraud or non-complied, he can apply for the credit card company to chargeback. Meanwhile, the credit card company is the judge and decides whether to refund to the consumer according to the statement or evidence submitted by the consumer.¹³⁰ However, in author's opinion, this way is not so practical. First, the credit card company needs a complete judgment standard and procedure. Visa and MasterCard have made a detailed procedure but the judgment standard is still uncertain. Second, the credit card itself has the interests with one or two parties, being the judge, its independence and justice would be in doubt. Third, the chargeback must be within the scope of decision, which maybe not equal to a full

128 Rule of Taobao, Chapter V.

129 Zheng Shibao "On Compulsory Enforcement Mechanism of ODR Decision" (2014) 185(3) Law Review 161-169, 165.

130 Overview of Private Enforcement Mechanisms, paras 35-39.

refund. Moreover, in this process the money would have to be transferred for many times, which cause the inconvenience of the implementation.

5.3.3.2 Deposit System

Generally, deposit system could be applied in case of money involved or money measured. When the parties agreed to be subject to the jurisdiction of ODR, they should pay a certain amount of deposit to the platform. Once any party failed, the platform will deduce the decided sum directly from the deposit to pay to the successful party, and the remaining amount would be refunded. Deposit system is the application of guarantee system of civil law in ODS mechanism.¹³¹

The practice of Taobao is a little bit different. The deposit system is only utilized to the merchants. The seller is required to submit the deposit to Taobao when he wanted to open a shop there.¹³² Also, the deposit system could be bundled with the trustmarks. Only if the merchant pay 1,000 deposits to Taobao, the trustmarks of "Consumer Protection Service" would be provided to the merchant by Taobao. It is a kind of implied consent that any disputes happened, the merchant agree to the jurisdiction of Taobao. When the consumer found any problem about the commodity, the consumer could ask for the right protection. Once the consumers succeed, Taobao will deduce the deposit prepaid by the merchant to compensate the buyer.¹³³

5.3.3.3 Escrow System

Escrow system refers that the consumer pays in advance, after certain period, barring any complaints or conversely upon verification that the goods have been received as expected, money is disbursed to the merchant.¹³⁴ In the event there is a complaint, the escrow agent withholds payment until the dispute is resolved *via* an ODR process. The escrow agent may be a third party, or the ODR provider itself.

Alipay belongs to this system, which is similar to the Property Preservation of the court. But property preservation would be implemented by the court after the dispute submitted to the court. The escrow platform participate in the procedure, which is

131 Zheng Shibao (n 129) 165.

132 This deposit is different the deposit system mentioned before. The deposit in the deposit system is particularly for the agreement to submit the dispute to some specific ODS platform; while the prepaid deposit of the merchant here is to open a shop in Taobao. Both deposits could be used to implementation.

133 "Consumer Protection Plan" <www.taobao.com/go/market/xiaobao/xbintro.php> accessed 25 November 2016.

134 Overview of Private Enforcement Mechanisms, paras 41.

established on the presumption of the great possibility of a dispute taking place.¹³⁵ Alipay is a branch of Alibaba, which is a payment platform. When the seller has submitted the deposit, and the buyer has transferred the payment of the commodity to his account in Alipay this would let Taobao control funds of both parties. Taobao could ask Alipay to transfer funds according to the settlement result of Taobao itself and Alipay could assist to enforce the fund transfer according to the negotiation between the parties, or the decision of a third party, or the judicial judgment.¹³⁶

5.3.3.4 Subrogated Performance

If ODR decision supports the consumer, the platform directly compensates the buyer. Later, the platform recourse to the merchant according to their agreement.¹³⁷ Taobao has launched the system of "pay in advance", which is the expression of subrogated performance. On this point, Taobao has considered more for the consumer. If the parties can't reach the agreement, Taobao will make a preliminary judgment. If Taobao thinks the buyer has no responsibility, before the final decision (Taobao consumer service or public review), Taobao will first compensate the buyer with its own funds.¹³⁸ When the final decision comes out, Taobao will recover the money from the merchant.

5.3.3.5 Insurance System

With the notification and agreement to the merchant, the e-commerce platform will draw some proportion of money from each transaction to pay for the insurance fee. Once disputes happen, and the decision has supported the consumer, the insurance company will compensate the consumer in advance. Taobao has also connected the insurance system with the trustmarks. Only if the merchant has joined the insurance plan, Taobao will grant the correspondent insurance mark. If the merchant doesn't perform the decision, besides the deposit, Taobao can also use insurance to pay to the consumer in advance.¹³⁹

Comparing with the incentive and penalty measures, the implementation measures of the above alternatives are more independent, which does not purely rely

135 Gao Wei (n 102) 1074.

136 Ma Yongbao, 'Dispute Settlement of Taobao from Aspect of Legal Perspective' (2013) 5 *Journal of Shanghai University of Political Science & Law* 71-78, 72.

137 Zheng Shibao (n 129) 166.

138 Taobao Rules of Dispute Settlement, art 111.

139 See the example: <<https://rate.taobao.com/user-rate-UMCg4vFH4OFkS.htm?spm=a1z10.1-c-s.0.0.SWJgnc>> accessed 25 November 2016.

on the e-commerce itself or the conscious behaviour of the merchant, but to utilize the implementation mechanism itself to play an effective enforcement function. The deliberations of UNCITRAL and the experience of Alibaba provide valuable insights and suggestions for ODR mechanism reform. Of course, any single implementation measure may have its own limitations. Therefore, only with a comprehensive application of various implementation mechanisms that complement each other, can cross-border e-commerce disputes be efficiently solved and the relevant outcome be enforced more effectively.

5.4 Innovate a "Sector-Oriented, Government Regulatory and Public Participation" ODR Mechanism

The lukewarm growth of China ODR has proved that government-oriented model is not very effective. At the beginning of system establishment, the government is the most important advocate power. Like USA and EU,¹⁴⁰ the initial stage of ODR is promoted by the government, reflected in the promotion and making regulations, to let the public know ODR and understand ODR. But later, at the development stage, market is the decisive aspect for ODR because e-commerce is sector-oriented. Government should play its regulatory role well. Unfortunately, in China, at the first establishment stage, the ODR has failed to take-off due to limited promotion, insufficient regulation and few funds to support. It is imperative that the government pays more attention on ODR establishment.

After the ODR developed along the right line, it should strengthen the self-discipline of e-commerce sector, also the autonomy of ODR platform. Additionally, from the experiences of the developed ODR platforms in other countries, such as Web Seals, Trust Mark and Code of Online Business Practices, it is clear that most of them have through sector autonomy voluntarily submission of the disputes to ODR provider and promised the implementation of the decision and created a trust relationship among the e-commerce merchant, the e-commerce platform and the consumer. Just by means of sector-oriented and private implementation mechanism, ODR could pass through the barriers of the national jurisdiction to create a new rapid, cheap and fair method, which is suitable to the online economy under the circumstances of the global e-commerce environment.¹⁴¹

140 Paul Stylianou "Online Dispute Resolution: The Case For A Treaty Between The United States And The European Union In Resolving Cross-Border E-Commerce Disputes" (2008) 1 Syracuse Journal of International Law and Commerce 117-143.

141 Xu Jiqiang "Rise of ODR and the Replying of Our Country" (2001) 59 Journal of Gansu Institute of Political Science and Law 34-38, 36.

Another important force to promote the development of ODR is from the society. In essence, the social power could participate in ODR, which is a way to propagate ODR. In the context of social participation, it is important to make sure the result is fair and just, the procedure should be reasonable, the qualification of the participant clear and the dispute within the knowledge of the social power. On this point, Taobao public review system has been a model. Furthermore, there is an encouragement system to the reviewer. For each time the reviewer participated a review, he can earn the corresponding credits, which could be used to public welfare undertaking or change to the peripheral products of Taobao. Until March 2016, the public welfare funds contributed by public reviewer have accumulated to RMB 800,000. To utilize these funds, Taobao has purchased critical illness insurance for nearly 5,000 orphans; supplied free warm lunch for 120,000 pupils in poverty areas; extended the pneumoconiosis patients 1,250,000 hours' life.¹⁴² Getting from the society and repaying to the society, with which, Taobao has got a very high social status in China.

VI CONCLUSION

One couldn't leave the society and culture of a country when understanding the ODS mechanism. In China, presently, almost every e-commerce platform has its own internal ODS mechanism and the operation condition is comparatively good. The number of utilizing E-commerce internal platform is the biggest and the rules of disputes settlement are rich, but the defect is that the result has no legal effect. While online court is the latest channel and the forcibility is the strongest, but because of high cost and complex procedure, it is not the main stream to solve large- volume and low-value commercial disputes. China has created the pilot and enhanced the technology support concerning online court with the reform of judicial system. But it could not be perfected in a short span. ODR is the most important way as it invites the third party to neutrally judge, and in comparison with the E-commerce internal platform ODR would be more just and fairer. On the other side, comparing with online court, ODR costs less and the procedure is simpler. In China, although the ODS mechanism has been generally established, the ODR system has developed very slowly.

The main challenges of China ODS mechanism establishment include limited legislation, developing technology, government ignorance, and unreasonable fees, etc. To analyse the international practice of UNCITRAL and domestic experience of e-commerce platform in China, the future directions of ODR should focus on the

142 Alibaba Group (n 24) 6.

scientific procedure design, the important function of the third party, the diversity of the decision implementation methods, and the new operation way of ODR, that is, "Sector-oriented, Government regulatory and Public participation".

	eWTP	ODS
Target 1	Through the dialogue between the public and the private to improve the trade environment and cultivate the cross-border e-commerce trade rules	Through the dialogue between the public and the private to improve the ODS environment and cultivate the cross-border e-commerce ODS rules
Target 2	Cooperate with WTO to enhance the requirements of developing e-commerce and perfect WTO Agreement on Trade Facilitation	Follow UNCITRAL to enhance the requirements of developing e-commerce and perfect TNODR
Target 3	Assist the development of cross-border e-commerce	Assist the development of cross-border e-commerce

Table 2 Target Comparison between eWTP and ODS

Since 2015, the State Council of China has advocated "Internet +" strategy, which is to combine internet with different industries, among which, "internet + e-commerce" is one of the important content.¹⁴³ Additionally, to safeguard the success of "internet +" strategy, the State Council also requires the legislation of "internet +".¹⁴⁴ Under the circumstances, eWTP has been recently prompted by Jack Ma, who is the director of Alibaba. Being an important sector, the complete of eWTP could not ignore the ODS mechanism. Comparing the eWTP and ODS, (Table 2) their targets and realized methods are greatly similar. The final dream of eWTP is to create a global e-commerce platform, with the characteristics of global buy, global sale, high efficiency, complete transparency without obstacles. Consumers and merchants from every country could cross the national boundary and physical barriers, and arrive at any corner of the world.¹⁴⁵ This is totally coincided with that of ODS system. Thus, what can be predicted is that with the complete development of eWTP, the auxiliary ODS mechanism should be further developed. For China, it

143 State Council Guiding Opinion on Actively Promoting "Internet +" Activity, State Council, (1 July 2015), Section II (8).

144 Ibid Section III (3) 4.

145 11.11 of this Year is the First Step toward EWTP <www.alibabaneews.com/article/alijinnian_shuangl1shimaixiangewtpdediyibu> accessed 25 November 2016.

is urgent to grasp the opportunity to develop the e-commerce sector under the circumstances of "internet +", at the same time, to utilize eWTP, to improve its ODS mechanism, especially ODR, and try to become the legislator of new rules on e-commerce.

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