

CHAPTER 17

CONSIDERATIONS IN DRAFTING THE UNCITRAL ODR RULES AND THE IMPLICATIONS FOR THE ODR PRACTICE IN CHINA

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I INTRODUCTION

Along with the lightning speed of internet, e-commerce in China has seen a remarkable surge over the past years. According to the 35th report by the China Internet Network Information Center (CNNIC), the number of online shoppers in China has reached 361 million by December 2014, with an annual growth rate of 19.7%. And the percentage of online shoppers in China reached 55.7%.¹ One out of every seven consumers shops online every day.²

The booming e-commerce inevitably gives rise to a large amount of online disputes. A survey of the State Administration for Industry and Commerce of China (SAIC) indicates that the SAIC and market regulators have handled 77,800 online shopping complaints in 2014, an increase of 356.6% over the previous year.³ However, to settle online disputes, traditional litigation is not the best resolution because its process can take considerable cost and time.

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1 China Internet Network Information Center "The 35th Statistical Report on Internet Development in China" (January 2015) at 47.

2 A report by PricewaterhouseCoopers in 2014 indicates, in China, one out of every 7 consumers is shopping online every day, with a percentage of online transactions of 60% every week. This weekly online shopping frequency percentage in China is much higher than the world average, which is only 21%. Available at <www.isc.org.cn/zxzx/sjbg/listinfo-29316.html>.

3 China Industry and Commerce Newspaper "The report of consumer complaints of 2014 by the SAIC and other market regulators" (16 March 2015) <www.saic.gov.cn/zwgk/tjzl/zxtjzl/xxzx/201503/t20150316_154221.html>.

Therefore, more and more countries started to develop online dispute resolution (ODR), which holds great promise for effective online resolutions. Remarkably, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III has been working on establishing an ODR framework for low-value, high-volume cross-border electronic transactions since 2010.⁴ Although there is still much work to be done, the support for ODR from countries and international organizations is clear and firm.

II THE WORK OF UNCITRAL WORKING GROUP III

2.1 A Historical Review of the Negotiation Process

The UNCITRAL Commission (the Commission) holds sessions once a year. It has been aware of the importance of ODR since its 34th commission session. At the 43rd commission session, the Commission required its Working Group III to undertake the study work of ODR. Since then, the Working Group III has been holding working group sessions twice a year and reporting its work annually to the commission sessions.

2.1.1 Commission Sessions

At its 34th (25 June-13 July 2001) and 35th (17-28 June 2002) sessions, the commission decided that its future work concerning e-commerce should include the study of ODR. Besides, UNCITRAL Working Group II should cooperate with Working Group IV with regard to possible work in this area.

At its 42nd session (29 June-17 July 2009), representatives suggested the Commission to conduct a specialized study on the possible work concerning ODR. The Commission then requested the UNCITRAL Secretariat (the Secretariat) to prepare the study and to hold a colloquium on the topic of ODR.

At its 43rd session (21 June–9 July 2010), the Commission required its Working Group III to undertake the ODR study work in the field of cross-border e-commerce, including B2B and B2C transactions. The Commission also agreed that, the form of the legal standard to be prepared should be decided after further discussion on this topic.

At its 44th session (27 June–9 July 2011), the Commission reaffirmed that the mandate of the Work Group III included ODR for B2B and B2C transactions. It also was decided that, while the Working Group could interpret the mandate as

4 The Working Group III Documents is available at <www.uncitral.org/uncitral/commission/working_groups/Online_Dispute_Resolution.html>.

covering C2C transactions and draft possible rules governing C2C transactions where necessary, it should be mindful not to displace consumer protection legislation.

At its 45th session (25 June–6 July 2012), the Commission agreed that the Working Group should consider the necessity of including arbitration as a phase of ODR. Moreover, the Working Group should deliberate the effect of ODR on consumer protection, and its enforcement issue. At its 46th (8 – 26 July 2013) and 47th (7–18 July) sessions, the Commission reaffirmed the Working Group III's mandate, and encouraged it to conduct its work in an efficient manner.

At its 48th session (9 June–16 July 2015), the Commission found that after several working group sessions, fundamental differences still remained between different jurisdictions. Therefore, the Commission heard the suggestions of developing a non-binding descriptive instrument for the use by ODR providers and neutrals. The Commission then instructed the Working Group III to continue elaborating a non-binding descriptive instrument on the basis of issues they had reached consensus. And it gave the Working Group III a time limit of one year or no more than two Working Group sessions to undertake its work. After the deadline, its work will come to an end, no matter a result has been achieved or not.

2.1.2 Working Group Sessions

The Working Group III commenced its work on ODR at its 22nd session (13–17 December 2010). It requested the Secretariat to prepare draft generic procedural rules (the Rules) for ODR. It also decided that the Rules should mainly address online cross-border, low-value and high-volume B2B and B2C transactions.

At its 26th session (5-9 November 2012), the Working Group identified that the Rules should be designed into two tracks in order to accommodate the difference between jurisdictions where pre-dispute agreements to arbitrate are considered binding on consumers and those jurisdictions in which such pre-dispute arbitration agreements are considered not binding on consumers. The design was trying to maintain the advantages of both the two tracks, and integrate them reasonably.

At its 27th session (20–24 May 2013), the Working Group reviewed a proposal on the two tracks system. In Track I, the dispute resolution process ended up with binding arbitration phase, whereas the process in Track II did not necessarily end in arbitration phase. The Working Group also considered the detail text of Track I of the Rules at this session.

At its 28th (18–22 November 2013) and 29th (24–28 March 2014) sessions, the Working Group discussed the detail text of Track II of the Rules. At the 30th

session (20–24 October 2014), the Working Group further reviewed the draft text of Track I of the Rules and some proposals thereon. At this session, progress was made on Track I, but fundamental differences remained between jurisdictions which allowed binding pre-dispute arbitration agreements and those which did not allow binding pre-dispute arbitration agreements. At its 31st session (9 – 13 February 2015), delegates from different jurisdictions still couldn't reach a compromise, notwithstanding the strenuous efforts put forth by the Secretariat.

At its 32nd session (30 November–4 December 2015), the Working Group followed the Commission's instruction and commenced its deliberations on elaborating a non-binding descriptive document which reflected the elements of an ODR process. This descriptive document would be produced on the basis of the issues which the Working Group had previously reached a consensus on, and would exclude the question whether the nature of the final stage of an ODR process should be arbitration or non-arbitration.

According to the requirement of the Commission, the 33rd session (29 February–4 March 2016) would be the last Working Group session on the study of ODR. Till the time of writing, only a draft outcome document reflecting elements and principles of an ODR process has been posted on the UNCITRAL's official website. According to this document, the final outcome of the UNCITRAL's work would give up the idea of using a two-track system, and would be entitled "technical notes" or "guidelines" on online dispute resolution. This means, the technical notes or guidelines are only of a descriptive nature and will not establish any obligation on the parties or the ODR administrators or providers.

2.2 Consideration of the Two Track System

2.2.1. Two Typical Approaches to Consumer Protection

The most difficult issue in the negotiation process is the coordination of the ODR process with national rules on conflict of laws and consumer protection. If any global ODR system is to be successful, it must avoid the difficult problems about the application of national mandatory rules of law and ensure the results obtained are enforceable across borders. This will only happen if the system respects parties' ability to enter into binding ODR agreements at the time they form the basic contract for online transactions.⁵ However, different states have different policies governing this issue.

5 Ronald A Brand "Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project" (2012) 10 Loy U Chi Int'l L Rev 11.

The distinct approaches adopted by the EU and the US are the two typical examples to illustrate the differences. From the EU's perspective, a pre-dispute arbitration agreement which has not been individually negotiated is deemed as a cause to a significant imbalance in the consumer's rights and obligations, because it hinders the consumer's right to take legal action by requiring the consumer to take disputes exclusively to arbitration. Therefore, a pre-dispute agreement to arbitrate is always regarded as being unfair, and is consequently not permitted to be binding on consumers under the EU legislation.⁶

In contrast, the US rules of law have no such provisions. In other words, pre-dispute arbitration agreements shall be binding on both the sellers and the consumers in the US. Does the US style of parties' autonomy in reaching an arbitration agreement indicate a lack of a public policy to protect the consumers' access to remedy? The answer is no.

In fact, we can discern two very distinguishable approaches to consumer protection from these two styles. The rationale behind these two approaches can be analysed as outlined below. Practically speaking, it is unrealistic for a consumer to travel abroad and enter a foreign court to have his claims resolved when he only spent several hundred dollars on the goods he bought online.⁷ To overcome this problem, the EU Brussels I and Rome I Regulations provide that consumer disputes should always be resolved in the consumer's country of domicile and apply the relevant national laws therein. This means, most of the dispute resolution procedures (or at least up until enforcement) should be carried out in the consumer's local court, where the consumer can bring proceedings in his/her native language. Therefore, in case that a seller may force a consumer to enter into an agreement that excludes the consumer's right to take legal action of which the procedure is largely in favour of the consumer, pre-dispute arbitration agreements are not allowed under the EU regime.

However, this advantage for consumers comes at the expense of sellers. A seller like Amazon which ships goods to places all over the world can suddenly be

6 Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts [1993] OJ L95/31.

7 See "Protecting Consumers in Cross-Border Transactions: A Comprehensive Model for Alternative Dispute Resolution" A White Paper Prepared by the Better Business Bureau System, the Council of Better Business Bureaus, Inc and BBBOnLine (San Francisco, 11-12 September 2000) <www.ilpf.org/events/jurisdiction2/presentations/blumenfeld_pr/blumenfeld1.htm>. Section II the problem – consumers in North America do not utilize their rights to judicial redress for most problems they encounter in the marketplace.

subject to court filings from every jurisdiction where one of their buyers resides. Amazon will have to defend itself in every remote court from Russia to Australia. It also has to find lawyers who are familiar with the national laws and can communicate in the official language of the courts in different countries each time when a dispute arises. This legal risk can be problematic to any seller who wants to be engaged in global business, and can massively increase the seller's cost in trading. Consequently, it would likely have a negative impact on consumers as large hurt consumers as large because sellers would transfer these additional costs onto every transaction, which makes goods more expensive.⁸

To conclude, the EU approach is of the belief that consumers are best protected if they have the advantage of settling disputes in their home courts when disputes arise. This approach focusses on the interests of the consumers who are allegedly breached by the sellers and ultimately involved in disputes. However, it does not give much deliberation to the interests of all consumers at the initial stage of forming the contract in each transactions. On the contrary, the US approach focuses on the interests of all consumers and ensures the majority of the consumers could be benefited. From the US perspective, it is reasonable to assume that to be able to purchase goods at a lower price would have an overall benefit to all consumers, and this benefit would outweigh the detriment to the individual consumers who unfortunately get involved in disputes with the sellers and are then forced to enter the courts in the sellers' domicile. It can be observed that while the US approach places an emphasis on the interests and the benefits to all consumers at the initial contract formation stage, it pays less attention to interests involved in the litigation stage which is core to the EU approach.⁹

2.2.2 *The Contents of the Two Track System*

Due to the two distinct approaches, the main contention between the US and most of the EU member states is on the issue of whether online arbitration should be mandatory, or whether both the seller and the consumer should be denied access to the court if a pre-dispute agreement to arbitrate is in presence. While in Working Group III sessions the US supported to include mandatory arbitration which binds both the sellers and the consumers as the final phase of ODR procedures, the European delegates pointed out that European laws rendered arbitration clauses

8 Louis F Del Duca, Colin Rule and Vikki Rogers "Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims-OAS Developments" (2010) 42 UCC L J 221.

9 Brand, above n 5.

non-binding on consumers. As such, to draft into the Rules a provision that requires mandatory arbitration could be problematic in those countries where pre-dispute arbitration agreements are not permitted to be binding on the consumers.

To address this problem, a two-track system was proposed. Track I would end up with a binding arbitration phase, whereas Track II would not necessarily require the parties to go through an arbitration stage.¹⁰ To illustrate the benefits and drawbacks of these two tracks, a table is provided as follows.

	Track I	Track II
Binding or not	Binding	Not binding
Application Limitation	Limited by mandatory rules of certain states	Not limited
Resolved or not	Fully resolved	If mediation fails, non-binding suggestion will be given.
Time and money cost	Need certain time and money	If mediation fails, time and money cost can be higher than cost in arbitration.

2.2.3 *The Possible Manner to Practice the Two Track System*

Although the two-track system is now provided, it is still unclear as to how a consumer, with little knowledge of international law, is expected know which track would be applicable in accordance with the conflict of laws rules specific to his or her domicile? Granted, he can seek a legal counsel, but that would entail considerable amount of cost in comparison with the value of his claims. Therefore, should this two-track approach be adopted, a straightforward mechanism to determine the applicable track is indispensable. In light of this issue, at the

¹⁰ This means, in Track I, the parties would probably settle their dispute through negotiation and then mediation. If the mediation fails, the parties will enter the arbitration phase, but they would be denied to seek recourse to the courts. In Track II, the parties will only choose to go through negotiation and mediation phase. If the mediation fails, only non-binding suggestion will be given, and the parties have the autonomy to go to the court. See UNCITRAL Working Group III Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules (Track I) (UN Doc. A/Cn.9/WG.III/WP.133/Add.1, 2015); UNCITRAL Working Group III Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules (Track II) (UN Doc. A/Cn.9/WG.III/WP.130/Add.1, 2014).

Working Group's 30th session, it considered four proposals on the methods that can be used to determine the appropriate track.¹¹

The first proposal provides that the seller's online transaction system would automatically generate a dispute resolution clause, under which any dispute should be handled according to the UNCITRAL ODR Rules. The online transaction system should also provide an Annex, which would list all the jurisdictions that does not permit pre-dispute arbitrations. If a purchaser who is a consumer that has an address which falls within the list in the Annex, the online transaction system would generate a clause mandating the use of Track II. For all other purchasers, the system would generate a clause mandating the use of Track I.

The second proposal provides that the seller would offer a dispute resolution clause according to which any dispute will be settled under Track I. However, the dispute clause is accompanied by a footnote which notes that such a clause and any arbitral award thereunder may not be enforceable against consumers located in any of the jurisdictions listed in the Annex.

The third proposal provides that the seller would issue a dispute resolution clause which stipulates that any dispute would be settled according to the Rules. However, whether or not it will designate the applicable Track would be left in square brackets.

The fourth proposal provides that the seller would issue a dispute resolution clause that identifies whether any dispute would be settled under Track I or Track II. The dispute resolution clause would be accompanied by a footnote which would note that any designation of Track I under the Rules as well as any arbitral award thereunder, may not be enforceable against consumers located in certain jurisdictions.

However, no proposal appeared to be perfect since several problems arising from each proposal was challenged by the Working Group III. For instance, how to decide whether a purchaser is a consumer or not if only his/her residential address has been provided? After the online transaction system mandates the use of Track II according to the consumer's address, what if the consumer agrees to use binding arbitration and wants to transfer the dispute to Track I? Consequently, knotty

11 UNCITRAL Working Group III Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Procedural Rules (Track I) (UN Doc. A/Cn.9/WG.III/WP.133/Add.1, 2014).

problems remain on how to create a reliable system that can adequately handle these problems.

III CURRENT ODR PRACTICE IN CHINA

While UNCITRAL is making every effort to produce procedural rules for ODR in cross-border e-commerce, many countries and regions including the US, EU, Japan have begun to establish their own ODR platforms. In China, dispute resolution entities have also been trying to adapt traditional ADR to the online arena by employing internet technology. Although these mechanisms are still in their preliminary stage, they can present the future of Chinese ODR.

3.1 Internal Complaint Mechanisms

Internal complaint mechanisms are a kind of dispute resolution established by e-commerce platforms. As the most popular auction website in China, Taobao has well developed internal complaint mechanisms. Once a Taobao buyer is dissatisfied with a product, he can file an online claim within 15 days after the deal.¹² The buyer shall indicate the reasons of claims with supporting documents attached. The seller shall respond and try to negotiate within 5 days (physical commodities) or 3 days (virtual commodities) after the claim is filed. If seller rejects the claim, the buyer can apply for mediation within 7 days. Both parties are offered an opportunity to provide narratives of the problem, which states facts of the dispute and desired outcomes. The mediator will examine these narratives and ask both the parties additional questions for clarification. Then he will suggest a settlement which can be satisfactory to both parties. Generally speaking, Taobao mediators are usually customer service representatives within the company, but not legal specialists.

Besides, Taobao has set up a pilot "Jury Center", which recruits mass jurors to settle disputes online by voting.¹³ Taobao members, including sellers and buyers,

12 Taobao Inc. "Rules in the Handling of Taobao Disputes" (20 April 2015) Taobao Service Centre's Common Problems <<https://service.taobao.com>>.

13 Taobao "Jury Center" (25 March 2016) Taobao Jury Center <www.pan.taobao.com/jury/juryIndex.htm>.

who meet certain requirements¹⁴ can apply to be jurors. In order to protect parties' privacy, members shall agree with a confidentiality agreement first before applying to be jurors. In the resolution process, either party whose number of votes reaches 16 will win the case.

3.2 *CIETAC Domain Name Dispute Resolution Center*

CIETAC Domain Name Dispute Resolution Center is established in 2000. It provides services mainly in three ways: 1) resolution services regarding .CN domain names under CNNIC Domain Name Dispute Resolution Policy (CNDRP); 2) resolution services regarding keywords managed by CNNIC under CNNIC Keyword Dispute Resolution Policy; 3) resolution services regarding generic top level domain names (gTLDs) such as .com, .net and .org under Uniform Domain Name Policy (UDRP). Totally, the center has successfully settled more than 3,000 domain name disputes by 2015. As the Beijing Office of Asian Domain Name Dispute Resolution Center (ADNDRC), it has settled more than 700 cases under UDRP by 2013.¹⁵

3.3 *CIETAC Online Commercial Arbitration Center*

Besides of the domain name resolution service, CIETAC also set up an online commercial arbitration platform.¹⁶ This platform applies the *CIETAC Online Arbitration Rules* which was adopted by the China Council for the Promotion of International Trade and China Chamber of International Commerce on 4 November 2014. As indicated by Affix II of this set of rules, for disputes in which the amounts are less than RMB 100,000 yuan, the arbitration fee should be 5% of the amounts, and should not be less than RMB 4,000 yuan.¹⁷ For disputes in which the amounts exceed RMB 100,000 yuan, the arbitration fee can be even higher. And

14 For example, the requirements for buyers on taobao are: 1) members who have registered for more than 1 year; 2) members who have already been real-name authenticated; 3) reach all the following requirements: members whose member levels are higher than VIP 2; members whose credit ratings are more than "2 hearts"; members whose disputed deals which require taobao mediators to get involved are less than 3 within 90 days. Available at <<http://notice.taobao.com/jury/help.htm?spm=a310u.3044425.0.0.k6qlHO&type=standard>>.

15 See CIETAC Online Dispute Resolution Centre <<http://dndrc.cietac.org/>>.

16 See generally China International Economic and Trade Arbitration Commission <www.cietacodr.org/>.

17 See Affix II of the CIETAC Online Arbitration Rules, for cases in which the amounts involved are less than 100,000 yuan, the arbitration fee should be 5% of the amount in the disputes, and should not be less than 4,000 yuan. China Economic and Trade Arbitration Committee "Online Arbitration Rules of CIETAC" (2009) <www.cietacodr.org/defaultonlinearbi.html>.

for cases involving foreign interests, a filing fee of 10,000 yuan per case will be charged additionally. In light of the high arbitration fee, it can be presumed that this platform was designed mainly for settling disputes arising from those high-value B2B transactions (including both online disputes and offline disputes). However, since ODR is still in its preliminary stage in China, a fair and credible online environment has still not been created yet. Under such circumstance, parties in high-value disputes would rather handle their cases face-to-face by traditional mechanisms, so that the procedures and results can be more predictable and reliable. As a consequence, the CIETAC Online Commercial Arbitration Center as well as its CIETAC Online Arbitration Rules have rarely been used since established.

3.4 Shenzhen EBS Center Pilot ODR Programme

As a neutral ODR platform, the Shenzhen EBS Center (EBS Center) is one of the most successful ODR organizations dealing with e-commerce disputes.¹⁸ With the authorization and guidance from the government, the EBS Center offers free ODR services to consumers. Its services include justifying and saving e-evidence for consumers, issuing trust marks to merchants, offering legal advices, providing online complaint, mediation and arbitration platforms, etc. Till now, there are totally 18,739 e-business websites listed in the EBS Good Business Alliance. Thousands of legal advices are given by ODR lawyers and hundreds of disputes have been well settled by the EBS ODR platform. Besides, the EBS Center has also become a member of the World Trustmark Alliance. Since 2011, it has started coordination with other international organizations to jointly conduct cross-border ODR services.

According to a report by a Working Group of the State Administration for Industry and Commerce, the EBS Center is supposed to provide services not only to Shenzhen City but also to the whole nation in the future. Hopefully, the EBS Center can become a model for developing other ODR platforms or even be transformed into a nationwide ODR network platform. However, the barriers to achieving this goal is obvious – the EBS Center lacks enough financial support and human resources from other regions. The Chinese e-commerce market is so big that the success of a nationwide ODR platform calls for cooperation of all provinces in terms of financial support, human resources as well as administrative management guidance, etc. Therefore, governments from different regions shall

18 See further at <www.ebs.org.cn> for more information about the Shenzhen EBS Center.

enhance their communication and collaboration. Moreover, financing channels shall be further expanded to ensure the daily operation of a nationwide ODR system.

3.5 315 Online E-commerce Safeguard Center

315 Online¹⁹ seems to have been further on the way of constructing a nationwide ODR platform. The 315 Online platform is instructed by the State E-commerce Technology Project Laboratory, hosted by China Electronic Commerce Association Policy and Law Committee²⁰ and China Electronic Commerce Law Website,²¹ supported by Judicial Protection for Intellectual Property Website, Peking University Institute for Internet Law, National Citizen Identity Information Center, etc. The services it offers are similar as those offered by the EBS Center, including both online dispute prevention as well as online dispute resolution. For the part of prevention services, it has verified 11,377 identities of e-business. It also provides P2P assistant, e-evidence justification, order records verification services, etc. Noticeably, it even offers a database of controversial buyers, which record buyers that blackmail sellers, disturb market order or deliberately discredit sellers without a reason. For the part of resolution services, it has handled 22,828 complaints by offering online facilitated conciliation or online mediation service since established.

IV THE IMPLICATION OF THE UNCITRAL ODR WORK TO CHINESE ODR PRACTICE

From the former part, we can see that there are already many ODR platforms that are in operation in China. However, such platforms are relatively separate and have nearly no collaboration with each other. Besides, there are no uniform rules to regulate the ODR providers' work and keep due process in ODR. Such problems can be hurdles to ODR's growth in the future. The factors that the UNCITRAL ODR Rules took into consideration can have significant implications for overcoming such hurdles. The main implications addressed in this article are: to establish a uniform ODR legislative framework and to set up a nationwide ODR platform conducted by the government.

19 Online E-commerce Safeguard Center (2001) <www.315online.com.cn/>.

20 China Electronic Commerce Association (2000) <www.chinaeclaw.com/list.php?catid=26>.

21 China E-commerce Law Network (2001) <www.chinaeclaw.com/>.

4.1 A Uniform ODR Legislative Framework

Firstly, a uniform online dispute resolution framework shall be established. The framework shall include: a) guidelines and minimum requirements for online dispute resolution platforms or administrators; b) guidelines and minimum requirements for neutrals; c) substantive legal principles for resolving disputes; and d) enforcement mechanism. Several articles which have been well-developed on by UNCITRAL delegates can be taken as reference for Chinese ODR legislation work. For example, Article 5 deals with the commencement procedure of negotiation stage and facilitated settlement stage. Article 9 addresses the appointment of a neutral and objections to the appointment of a neutral. On the basis of these articles, legislation work should also consider some further issues like how electronic documents can be used as evidence and whether information exchanged during an online mediation or negotiation may be used in a court procedure, etc.

4.2 The Establishment of a Nationwide ODR Platform

Secondly, in the absence of a mature national ODR system, it is thought imprudent to establish an international ODR platform in China. Therefore, the first task aiming at fostering ODR is to establish a nationwide ODR platform. For such purpose, China should first consider which track is more appropriate for its domestic practice, despite the fact that how far the two-track system will go in the UNCITRAL negotiation process is still uncertain.

Since there are no rules limiting parties' autonomy to reach a pre-dispute agreement to arbitrate, Track II seems to be applicable in China. However, there are still several issues to be further addressed. First of all, in order to popularize it, a free nationwide ODR platform shall be established by the governments. The platform is supposed to be constructed, operated and maintained by an administrative organization such as the State Administration for Industry and Commerce. To support its work, local administrations for industry and commerce shall report to the platform regularly, suggest lawyers or neutrals to the platform. In terms of finance, e-businesses shall pay membership fees for being a member of the good business alliance certified by the platform. Local governments shall also allocate funds to support the ODR platform work according to number of cases in that regions. It should also contain a review system which allows parties to comment on the platform's service, so that to ensure its further service quality and encourage other parties to use it.

4.3 The Legal Feasibility of the Nationwide ODR Platform

Legal issues concerning the uniform platform can be mainly related to online mediation work and online arbitration work.

4.3.1 Mediation Work

In Chinese legal system, mediation can be categorized into several types: people's mediation, mediation by courts, mediation by arbitral tribunal, and mediation by administrative departments.

The "pure" form of mediation which can be used in the platform is people's mediation. In accordance with People's Mediation Law, people's mediation commissions are mass-based organizations legally formed to settle disputes among the people. In the mediation process, the people's mediator persuades the parties into reaching an agreement on the basis of equality and free will. Since people's mediation is free of charge, it plays quite an important role in Chinese dispute resolution system. According to People's Mediation Law, Administration for Industry and Commerce can arrange social organizations to form mediation committees.²² The online mediation committees can offer non-binding suggestions for parties, and the service should also be free of charge.

Another issue shall be address is the legal effect of the mediation settlement agreement. There are different understandings towards the legal effect of people's mediation settlement agreement. Some believe that the agreement should not be binding, and parties may go back on their words even if a settlement agreement is reached. However, in Chinese legal system, a mediation agreement which is reached under the mediation of people's mediation committee and is signed by both sides shall have the nature of civil contract. The parties shall perform pursuant to the stipulations in the contract, and shall not unilaterally modify or rescind the agreement.²³ This binding nature should also be applicable to online mediation, and will help enhance the development of the online mediation platform.

4.3.2 Arbitration Work

While the Administration for Industry and Commerce can require social organizations to set up mediation committees, it has no power to establish

22 People's Mediation Law of the PRC 2011, art 34; see also Ministry of Justice "Opinions of the Ministry of Justice on Strengthening the Building of Industry-based and Profession-based People's Mediation Committees" (No.93, 2011).

23 Some Provisions of the Supreme People's Court on Trying Civil Cases Involving the People's Mediation 2002, Art 1.

arbitration commissions according to the Arbitration Law.²⁴ An alternative to solve this problem is to encourage the collaboration of current arbitration commissions with the ODR platform. The ODR platform can provide arbitration commissions with an online forum as well as technical instruction. Arbitration commissions can then offer binding arbitration service to consumers using the ODR platform. When the arbitration commissions are conducting their arbitration work, there are two main issues to be noticed. First, as required by Article 39 of the Arbitration Law, arbitration shall be conducted by means of oral hearing, unless parties agree otherwise. Hence, if the arbitration is only conducted through textual communication like email exchanges without any oral hearing, the procedure may be contradictory to the legal requirement. One possible solution to resolve this question is to employ video-conference. In this way, it will be easier for arbitrators to assess a witness's credibility by checking his expression and demeanour, especially in the occasion that some key facts in the case are disputed.

Second, Article 40 of the Arbitration Law requires arbitration to be conducted in camera, which means that confidentiality shall be ensured. However, where there is online communication, there will be copies surviving on the hard drives of the sender and the receipt (at least in the form of temporary file) as well as the internet server's backup system. Therefore, it is crucial for the arbitration commissions to deploy effective technologies (such as encryption) to avoid information leakage. When the ODR platform discovers illegal or criminal acts (such as intercepting, tampering with or deleting other persons' emails or other data), it shall report to the authority without delay.²⁵ And certainly, there could be more new advanced future technologies which can help secure parties' privacy.

V OTHER FACTORS IN DEVELOPING ODR FOR E-COMMERCE IN CHINA

Besides of issues mentioned above, there are still other factors to be taken into consideration for the purpose of fully exploiting the potential of ODR in China.

24 See generally Arbitration Law of the PRC (1994), art 10 & art 11. The establishment of an arbitration commission must meet rigour conditions. Arbitration commissions shall be organized in a unified manner by departments and chambers of commerce that are arranged by governments. The establishment of an arbitration commission shall also be registered with the administrative department of justice of the relevant province, autonomous region or municipality directly under the Central Government.

25 Decision of the Standing Committee of the National People's Congress on Preserving Computer Network Security 2000, art 4 & art 7.

5.1 Enforcement

Enforceability is a key factor for the success of ODR providers. The UDRP is a good case in point. To ensure the result enforceable, one possible way is the cooperation between ODR providers and e-commerce platforms' internal resolution mechanisms. E-commerce platforms may establish credit rating system as well as rewards and penalties system according to information offered by ODR providers. For example, all the sellers should get real-name authenticated before opening their online shops. On the basis of the real-name authentication system, if a seller rejects to abide by an ODR award or agreement, this behavior shall be recorded in his or her credit history. Also, the e-commerce platforms may restrain this seller from selling goods again until he or she execute the decision.

5.2 Trustmark Programme

Trustmark programmes have been worked well in the US, EU and Japan so far. Various groups have recommended the use of trustmarks and try to create an international trustmark for e-businesses. It can be predicted that more countries will collaborate with each other and will recognize other countries' trustmarks or even form alliances in the future. China should actively take part in the establishment of related alliance or organizations, and try to reach consensus with other countries in order to share more benefits from e-commerce market.

5.3 Public Awareness

The dominant hindrance to the use of ODR is attracting users. Indeed, the best indicator for success of ODR is the parties' willingness to participate.²⁶ Parties are more likely to be attracted by dispute resolutions with which they are more familiar, such as court proceedings. And currently, most people know little about ODR and have little confidence in it. Therefore, the e-commerce industry, the government, professionals and public-interest organizations must endeavor to publicize the wide range of ODR options as well as the main benefits and risks of ODR mechanisms to the public.

For example, e-commerce platforms, trustmark bodies, consumer groups and judicial authorities can launch advertising campaigns on ODR using both traditional offline and new online methods to both the e-businesses and e-consumers. For example, the relevant information can be placed in traditional print publications or broadcast media. Online promotion can be utilized through online

26 Bruce L Mann "Smoothing Some Wrinkles in Online Dispute Resolution" (2009) 17(1) Int'l JL & IT 110.

videos, bulletin board services, banner advertisements, or hyperlink, etc. Moreover, these entities can also offer educational programmes or host public forums and conferences for the public. The academia can help introduce and put more emphasis on incorporating ODR concepts and content into applicable business, law and technology courses.

5.4 The Role of China in the Global Marketplace

As one of the largest e-commerce countries, China should actively participate in UNCITRAL's work on ODR mechanism. The Chinese government should hold dialogues and exchange views as well as cooperate more with other states in order to achieve common progress. Also, it should seize every opportunity to speak out and help promote UNCITRAL to set out procedural rules and model legal standards for ODR providers. Further, the Chinese government shall try to collaborate with more foreign governments, enterprises as well as non-governmental organizations so as to learn from each other and work together for the strong and steady growth of ODR.

VI CONCLUSION

Through this article, the work of UNCITRAL Working Group III has been presented and examined. The contents of the two-track system as well as the consideration of it was also elaborated. No matter whether or not consensus can be reached ultimately, the implication of the UNCITRAL work can be of great significance to Chinese ODR legislation as well as ODR practice.

In the light of the huge Chinese e-commerce market, it can be predicted that ODR is highly feasible and can develop successfully in China. Under the implication of UNCITRAL's work, it is believed that a systematic ODR legislative framework shall be established in order to regulate ODR provider, ensure the due process and enhance the trust in ODR. Also, a nationwide ODR platform is needed, which calls for public awareness as well as governmental investment.

Where is ODR headed? "The most obvious and fundamental goals are for ODR to meet the demands of globalization, to provide landmarks for e-commerce, and to operate in harmony with the speed required by contemporary society."²⁷ It is believed that ODR holds a promising prospect in China as the e-commerce market

27 Gabrielle Kaufmann-Kohler and Thomas Schultz *Online Dispute Resolution: Challenges for Contemporary Justice* (Kluwer Law International, The Netherlands, 2004).

develops continuously. Therefore, more and more importance should be attached on ODR by the government and social organizations in the future.

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