

APEC Online Dispute Resolution Framework

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Abstract

The Internet and communications technology are changing every aspect of our lives. Now ODR is set to revolutionize commercial dispute resolution across APEC with the adoption of a new ODR Collaborative Framework. In this article, we will look at the challenges APEC small businesses face today and how the APEC ODR Collaborative Framework provides a much-needed solution to improve justice and boost trade.

Keywords: APEC, ODR, e-Commerce, small business, dispute resolution.

1 The Promise of ODR

Imagine you are a small vendor embroiled in a dispute with a foreign business in Asia-Pacific Economic Cooperation (APEC). You argue back and forth but cannot find a common solution. You feel annoyed and frustrated and at the same time worry about your business relationship. So you ask Apple Siri – or Google or Alexa – ‘What do you think a fair resolution to this dispute is?’ Siri searches through millions of cases and says: ‘A fair resolution is a full payment for your product and shipping costs.’

What we are describing here is the not distant future. In fact, online dispute resolution (ODR) providers already offer this service for certain types of disputes.¹

The Internet and communications technology are changing every aspect of our lives. Now ODR is set to revolutionize commercial dispute resolution across APEC with the adoption of a new ODR Collaborative Framework. In this article, we will look at the challenges APEC small businesses face today and how the APEC ODR Collaborative Framework provides a much-needed solution to improve justice and boost trade.

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1 Some ODR platforms like Modria, FairClaims and Smartsettle already offer negotiation assistance providing suggestions on potential solutions for certain types of disputes. eBridge China Research Institute announced at Cyberweek 2019 that it is launching an AI-driven platform for ODR of trademark disputes. The challenge of developing such a tool in an ODR platform more broadly for sales and service contracts is to accumulate a sufficient amount of digital data about similar cases to support the generation of statistically reliable results. See Jean-François Roberge & Veronique Fraser, ‘Access to Commercial Justice: A Roadmap for Online Dispute Resolution (ODR) Design for Small and Medium-Sized Business (SMEs) Disputes’, December 2018.

2 APEC Adopts Collaborative Framework

APEC represents roughly 40% of the world's population, 50% of the world's trade and 60% of the world's GDP. Its 21 member economies include the United States, China, Japan, Canada, Russia, South Korea, Australia, Mexico and Indonesia. The goals are free trade, regional integration and economic growth.

The Economic Committee (EC) is one of the key pillars of APEC. It engages in structural reform, including the economic and legal infrastructure and the ease of doing business framework.

The APEC EC has studied the use of ODR and information and communications technology since 2016, following the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Technical Notes on Online Dispute Resolution. In 2017, the EC approved a work plan to pilot the use of ODR for business-to-business (B2B) disputes involving micro-, small- and medium-sized enterprises (MSMEs).

In August 2019, at the APEC Senior Officials Meeting (SOM 3) in Puerto Varas, Chile, the EC endorsed an ODR Collaborative Framework for B2B disputes.² It also approved a corresponding set of ODR Procedural Rules.

3 APEC ODR Collaborative Framework

Under the Collaborative Framework, APEC will partner with platform hosts and ODR providers, including regional arbitration and mediation centres, that comply with APEC's ODR Collaborative Framework and Procedural Rules.

The EC will promote partnering ODR providers on its web page and encourage MSMEs to use them to resolve low-value disputes.

The Collaborative Framework and Procedural Rules call for the use of online negotiation, mediation and arbitration. While negotiation, mediation and arbitration are traditional dispute resolution mechanisms, they can be automated with modern technology such as artificial intelligence.

This is excellent news for small businesses across the APEC region because they lack a viable solution for their disputes.

4 Why APEC Small Businesses Need ODR Now

4.1 A Seamless Legal System for Trade

APEC small businesses account for over 97% of businesses and employ over half of the workforce but represent only 35% of direct exports.³ APEC MSMEs' expan-

2 The endorsed text is available at http://mddb.apec.org/Documents/2019/EC/EC2/19_ec2_022.pdf. See APEC Secretariat, *How APEC Helps Small Businesses Go Global*, 29 August 2019. Available at https://www.apec.org/Press/Features/2019/0830_EC.

3 APEC, *Small and Medium Enterprises*, available at: <https://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Small-and-Medium-Enterprises>.

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sion into international markets is crucial for their continued growth and APEC economies' well-being.

A recent APEC Business Advisory Council (ABAC) survey of small businesses found lack of dispute resolution to be the major reason why small businesses abandon cross-border trade. It is a 'major' or 'severe' problem for 58% of respondents. In emerging economies, that number rose to 74%.⁴ European Union studies have reached similar conclusions, and 35% of cross-border disputes involving EU small businesses remain unresolved. The average value of disputes was \$50,000.⁵ Studies also show that the vast majority of disputes concern payment. Small businesses are particularly vulnerable to late payments because their cash flow and access to credit lines are limited.

Dispute resolution is a key component of a seamless legal system for trade. Yet David Dodwell, who served as the APEC Business Advisory Council (ABAC) representative to the EC, remarked that pushing small businesses into the unfamiliar world of global value chains without contracting skills and access to commercial justice 'is like ordering soldiers out of the trenches armed with baguettes'.

4.2 Courts and In-Person Arbitration Not an Option

Theoretically, MSMEs could turn to courts to settle international disputes. But courts are too slow and expensive. According to the World Bank's 'Ease of Doing Business, Enforcing Contracts', APEC courts take an average of 451 days to resolve simple domestic contract disputes at a cost of nearly a third of the value of the claim.⁶

Besides, courts are tied to jurisdiction and in-person enforcement. Even if special courts were created or made more efficient, the cost of local counsel and travel combined with culture and language barriers makes the use of courts a fiction.

Most large companies turn to in-person arbitration for cross-border trade disputes as the only viable alternative.⁷ Surveys show that the expertise and neutrality of the arbitrator, confidentiality of proceedings and enforceability of awards are major draws. Arbitration also avoids the need to know local laws.⁸ But in-person arbitration is too slow and expensive for MSMEs involved in cross-border disputes. Under one survey, three-fourths of respondents favoured simpli-

4 USC Marshall & APEC Business Advisory Council, *Realizing the Untapped Potential of MSMEs in APEC*, at 6, 40 (2018) (APEC interviews with 560 business executives and trade association leaders plus 430 survey responses).

5 Ecorys, *Study on the Use of Alternative Dispute Resolution for Business to Business Disputes in the European Union*, at 6, 123-125 (2012) (commissioned by the European Commission). APEC, *Small and Medium Enterprises*, *supra* note 3.

6 World Bank Group, *Doing Business 2019*, APEC Regional Profile, at 55-56.

7 Queen Mary University of London & White & Case, *2018 International Arbitration Survey* at 5, available at: <https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf> (97% of respondents prefer international arbitration to resolve cross-border commercial disputes).

8 Andrew Myburgh & Jordi Paniagua, 'The Impact of UNCITRAL on FDI', Section 2, available at: www.uncitral.org/pdf/english/congress/Papers_for_Programme/113-MYBURGH_and_PANIAGUA_The_Impact_of UNCITRAL_on_FDI.pdf.

fied procedures for claims under \$500,000.⁹ As arbitration expert Mark Walter observed, “micro businesses couldn’t afford the coffee at most arbitration centers”.¹⁰

4.3 *Accelerating Justice, Boosting Trade*

The UN General Assembly acknowledged that ODR “can assist the parties in resolving disputes in a simple, fast, flexible, and secure manner, without the need for physical presence at a meeting or hearing”.¹¹ By automating processes, modern technology makes traditional methods – such as negotiation, mediation and arbitration – fast and affordable.

Communications take place in a structured online platform using seamless navigation. Participants select from an extensive list of dispute resolution options. The computer-led process is instantaneous and brings costs down in proportion to the value of the dispute. Businesses engage in the process at their convenience.

4.4 *ODR a Proven Solution*

ODR is already successful in other contexts across APEC. eBay processes millions of disputes every year using only automation in 90% of cases. The Hong Kong International Arbitration Centre (HKIAC) and China International Economic and Trade Arbitration Commission (CIETAC) offers ODR for domain name disputes. In New Zealand, Fairway Resolution is launching ODR for commercial building and construction disputes. In the United States, Judicial Arbitration and Mediation Services (JAMS) offers ODR for mediation, and the American Arbitration Association (AAA) uses ODR to resolve New York No-Fault Insurance Disputes.

APEC courts are also turning to ODR. In China, Internet courts have been established at several locations, including Hangzhou, Beijing and Guangzhou. In British Columbia, the Civil Resolution Tribunal (CRT) replaced its small claims court for disputes under \$5,000 with ODR. In the United States, around 70 courts are implementing ODR for small claims, family courts, child custody cases and traffic violations.

However, none of these ODR initiatives currently provide a solution for APEC small businesses engaged in cross-border commerce.

5 **Building a Collaborative Framework**

5.1 *Partnering with ODR Providers*

ODR requires an online platform for generating, sending, receiving, storing, exchanging and processing communications.

9 Queen Mary University of London & White & Case, 2015 International Arbitration Survey at p. 26.

10 Mark Walter, ‘Can Online Dispute Resolution Change the Way Global MSMEs Do Business?’, 2018.

11 GA Resolution 71/138, UNCITRAL Technical Notes on Online Dispute Resolution, December 13, 2016.

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The APEC EC decided to partner with existing ODR providers, such as regional arbitration and mediation centres, that are willing to provide platforms. Partnering ODR providers will be responsible for process issues, including fairness, due process, transparency, accountability, neutral selection and appointment and the performance of the ODR platform. They must abide by the APEC ODR Collaborative Framework and Model Procedural Rules, keeping all information confidential, maintaining secure databases and websites, and reporting to APEC and other providers on the success of the initial pilot. They must also agree to charge fees proportionate to the amount in dispute.

To date, ODR providers that have expressed interest in participating in the pilot include Fairway Resolution, the Arbitration and Mediation Center Chamber of Commerce Chile, the Thai Arbitration Center, CIETAC, the Mediation Center of CCPIT (China), eBridge (China), e-Bram Center (Hong Kong) and BBB (US).

The EC will also play a limited role in overseeing ODR providers. If an ODR provider is not in compliance with the rules, the EC may remove the ODR provider from its accredited list. The EC is looking to academic institutions for help with evaluating the providers. Several institutions have expressed interest.

APEC economies will also encourage businesses, especially MSMEs, to use the ODR providers. The APEC EC is enlisting the APEC Business Advisory Council (ABAC) to recruit business participants to the pilot. ABAC represents numerous businesses across APEC.

5.2 *Ensuring Access to Justice*

The APEC EC created procedural rules to ensure parties receive the same due process regardless of location. The UNCITRAL Arbitration Rules and Technical Notes on Online Dispute Resolution provide the framework for the APEC ODR Procedural Rules. They provide that ODR proceedings should be subject to “the same confidentiality and due process standards that apply to dispute resolution proceedings in an offline context, in particular independence, neutrality and impartiality”.¹²

The APEC ODR Procedural Rules require the agreement of the parties to a transaction, are subject to applicable mandatory law of APEC economies and apply to B2B disputes only.

The APEC Procedural Rules also provide for online negotiation, mediation and arbitration. The various stages act as a funnel so that few cases need to escalate to an online arbitrator. This way, most disputes can be resolved by negotiation or facilitated settlement.

The negotiation phase will be managed entirely by software for speed, efficiency and cost effectiveness. Studies show that drawn-out procedures create dissatisfaction even if they work out in the party’s favour.

If no settlement can be found, the case may escalate to third-party resolution. The ODR provider selects the online arbitrator from a list of approved neutrals. The neutral provides online mediation and, if required, online arbitration.

12 UNCITRAL Technical Notes on Online Dispute Resolution, para. 53.

Including binding arbitration as a 'backstop' creates a strong incentive for the parties to settle earlier.

5.3 *Strengthening the APEC Legal Regimes*

While laws and practices relevant to ODR need not be identical, APEC economies need to implement key international instruments, including the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the UNCITRAL Model Law on International Commercial Arbitration, the UN Convention on the Use of Electronic Communications in International Contracts and the UNCITRAL Model Law on E-Commerce. Significantly, APEC leaders already

encourage wider use of these instruments ... in facilitating cross-border trade and investment, enhancing ease of doing business, and fostering effective enforcement of contracts and efficient settlement of business disputes.¹³

All APEC economies have implemented the New York Convention, and 18 out of 21 have implemented the UNCITRAL Model Law on International Commercial Arbitration. Twenty out of 21 APEC economies provide for legal recognition of e-signatures and electronic contracts, consistent with the UNCITRAL Model Law on E-Commerce and the UN Convention on the Use of Electronic Communications.

6 The Way Forward

ODR e-justice is an essential component of economic growth. Use of ODR promises MSMEs access to commercial justice, with tailored procedures that bring down costs, delays and burdens in proportion to the economic value at stake. It makes transactions more efficient, reduces risk and boosts small business competitiveness by lowering costs for both buyers and sellers.

The APEC ODR Framework will therefore reduce barriers to entry into international trade, help create markets where none exist, establish trust between business partners and promote a culture of contract-based relationships. It will benefit the millions of small businesses who have no access to effective dispute remedies. It will help the most vulnerable MSMEs, such as women-led businesses, compete and flourish in the global supply chain.

ODR is the cornerstone of the next global justice system in APEC. Because small businesses employ the majority of workers in the private sector, APEC ODR will help build the capacity for economic growth in APEC economies based on trade not aid.

13 2014 APEC Leaders' Declaration, para. 32.