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Session 9

Commercial Justice in a Digital World – Online Dispute Resolution

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COMMERCIAL JUSTICE IN A DIGITAL WORLD

Online Dispute Resolution

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February 26, 2016



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Why ODR?



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COMMERCIAL JUSTICE IN A DIGITAL WORLD

Online Dispute Resolution

1. Why APEC MSMEs Need ODR

2. Where ODR stands today

- a. Role of Private Sector
- b. Role of Governments
- c. Role of Regional Organizations
- d. Role of UNCITRAL



3. The Way Forward For ODR in APEC

- a. Harmonizing Law Using Existing Instruments
- b. Building a Sustainable ODR Platform
- c. Harmonizing ODR Rules
- d. Building Capacity

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WHY APEC MSMEs NEED ODR

UNCITRAL Sees ODR as Essential

- UNCITRAL found e-commerce requires tailored mechanism that keeps costs, delays and burdens in proportion to economic value at stake.

Report of 2010 UN Commission on International Trade Law, UN Doc. A/65/17, para. 254.



- UNCITRAL finalizing Technical Notes for ODR for Summer 2016. Notes will provide technological best practices for ODR platforms.

See Draft Outcome Document Reflecting Elements and Principles of An ODR Process, UN Doc. A/CN.9/WG.III/WP.140 [hereinafter UNCITRAL ODR Technical Notes]

- Highlight ODR as being fast and affordable thanks to technology.

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THE WAY FORWARD FOR ODR IN APEC

Consumer Protection Issues

- At present, consumers have few rights in most cross-border disputes. “The creation of an ODR standard could have the effect of creating such rights.”

Secretariat Note, A/CN.9/WP/113, para. 16, endorsed in UNCITRAL Working Group Report on ODR, May 2012, UN Doc. A/CN.9/744, para. 132.

- Yet many private international law instruments, including the CISG, exclude consumers because state laws providing for the protection of consumers vary substantially.

- U.S./Colombian proposal in OAS CIDIP negotiations would provide for protection of consumers by linking ODR to credit card chargebacks.

See http://www.oas.org/dil/esp/CIDIPVII_proteccion_al_consumidor_united_states_guia_legislativa_anexo_B.pdf



WHY APEC MSMES NEED ODR

Explosion of E-Commerce

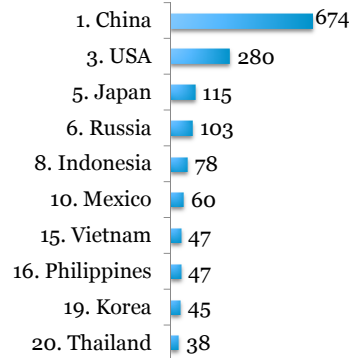
- Internet economy to reach \$4.2 trillion in 2016 in G-20 economies.

APECT Development Steering Group, <http://www.apec.org/Home/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Telecommunications-and-Information>

- “Electronic commerce has rapidly developed over the past decade, based largely on the exponential diffusion of the Internet, increased broadband access and the rise of mobile commerce throughout the world.”

Report of 2010 UNCITRAL Colloquium on ODR, UN Doc. A/CN.9/706, para 8

Internet Users (in millions)



Source: <http://www.internetworldstats.com/stats.htm>

WHY APEC MSMES NEED ODR

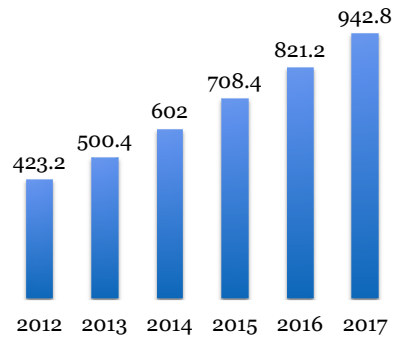
E-Commerce Disputes Growing

- 1% to 3% of all transactions, online and offline, result in a dispute



- There will be nearly 1 billion e-commerce disputes per year by 2017

**Worldwide
E-Commerce disputes per
year
(in millions)**



Colin Rule, Redesigning ODR Processes for the Future, at 6.

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WHY APEC MSMES NEED ODR

Traditional Justice Not an Option

- APEC EoDB indicator for Enforcing Contracts measures time, cost and procedural efficiency for resolving commercial *domestic* lawsuits.
 - “APEC’s progress on this indicator has been minimal.”
 - 422.9 days on average to enforce contracts in APEC.
 - 33.3 percent of claim on average taken by administrative fees.
- In cross-border disputes, traditional judicial relief not only slow but creates jurisdictional, choice of law, and enforcement difficulties.

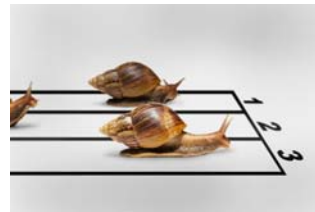


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WHY APEC MSMES NEED ODR

Arbitration too Slow and Expensive

- In cross border trade, arbitration is predominant form of international dispute resolution.
- But arbitration too expensive/slow for e-commerce.
- ODR relies on same legal framework as offline dispute resolution and arbitration.
- Should use same standards: fairness, due process, transparency, and accountability.



UNCITRAL ODR Technical Notes, *supra* para. 52.

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WHY APEC MSMES NEED ODR

ODR Faster, Cheaper, User-Friendly

Information/communication technology provides time and cost savings:

1. Enables direct negotiation through a messaging platform without need for a third party;
2. Provides an outcome without need for in person meeting or hearing;
3. Reduces timeline and brings cost in proportion to underlying transaction.



UNCITRAL ODR Technical Notes, *supra*, Overview of ODR.

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WHY APEC MSMEs NEED ODR

ODR Helps MSMEs Compete & Flourish

- APEC MSMEs account for 97% of businesses and 70% of jobs, but only 35% of direct exports.
APEC Iloilo Initiative (2015).
- Digital technology provides MSMEs in APEC an unprecedented access to international trade.
- Justice via ODR fosters buyer & seller trust in cross-border e-commerce.
- Speedy dispute resolution is “essential for small enterprise which may lack the resources to stay in business while awaiting the outcome of a long court dispute.”
WB Doing Business 2016, APEC at 88.



Digital highway provides MSMEs unprecedented access to international markets

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WHERE ODR STANDS TODAY

Role of Private Sector

- ODR in the global marketplace is a dynamic but fragmented field.
- So far, none of these initiatives has resulted in widespread use of ODR in B2B disputes involving MSMEs.
- Emerging ODR systems for e-commerce are B2C focused.



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WHERE ODR STANDS TODAY

Role of Governments



- **Mexico:** *Concilianet* provides government-run ODR platform for B2C. Participation is mandatory for domestic vendors.

Available at http://www.profeco.gob.mx/Folleto/Quieja_ing.pdf



- **Republic of Korea:** e-commerce dispute resolution committee mediates disputes in e-commerce transactions between consumers & providers.

Available at <http://www.ecmc.or.kr/home.it>



- **Colombia:** government promotes ODR for disputes involving e-commerce, chargebacks, simplified insolvency, and shareholder disputes.



- **China:** e-courts offered in Hangzhou Province (home of Alibaba) for e-shopping, copyright, and online financial services disputes (since August 2015). All materials filed online; courtroom replaced by three-way video conference.

Available at http://www.chinadaily.com.cn/bizchina/2015-12/12/content_22708965.htm

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WHERE ODR STANDS TODAY

Regional Organizations

- Proposed OAS ODR regional platform would establish model law/cooperative framework and procedural rules to govern ODR proceedings including arbitration of disputes.

Available at http://www.oas.org/dil/esp/CIDIPVII_proteccion_al_consumidor_united_states_guia_legislativa_anexo_A.pdf



- EU ODR regional platform allows submission of complaints within EU via online form (operational Feb. 2016).
 - EU refers complaint to competent national ADR entity, which provides online mediation/arbitration.

Regulation No. 524/2013 on online dispute resolution for consumer disputes, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>
See also Directive 2013/11 on alternate dispute resolution for consumer disputes, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>

WHERE ODR STANDS TODAY

Role of UNCITRAL

- UNCITRAL is not trying to build global ODR platform, model law, or procedural rules but rather an instrument that enables ODR. *UNCITRAL a cheerleader, not an actor*

UNCITRAL ODR Technical Notes, *supra*.

- UNCITRAL can provide legal framework, but private entities, governments and regional organizations will play the main role.



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THE WAY FORWARD FOR ODR IN APEC

Harmonization of Law Using Existing Instruments

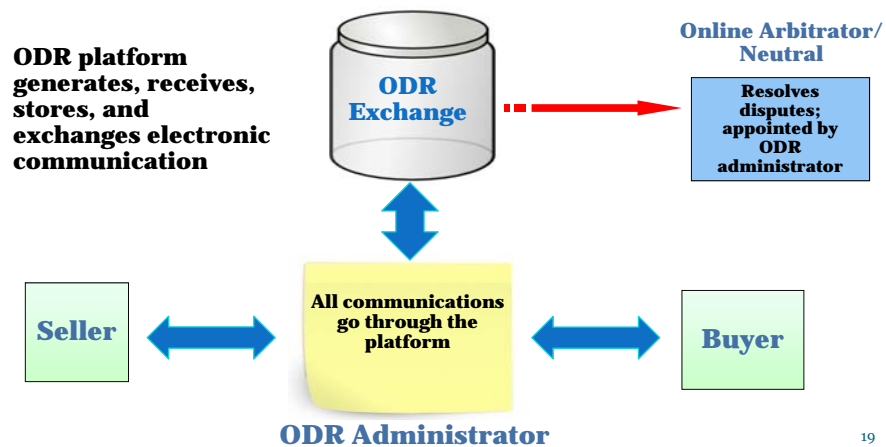
- Effective use of ODR across APEC requires adoption of relevant laws and treaties by member economies:
 1. **New York Convention** ratified by 19 APEC economies;
 2. **UNCITRAL Model Law on International Commercial Arbitration** (revised 2006) enacted by 18 APEC member economies;
 3. **UNCITRAL Model Law on Electronic Commerce** followed in 13 APEC economies;
 4. **UN Convention on the Use of Electronic Communication in International Contracts** ratified by 2 APEC economies;
 5. **UN Convention on Contracts for the International Sales of Goods** (CISG) ratified by 13 APEC member economies.
- “In Writing” must include electronic communications.

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THE WAY FORWARD FOR ODR IN APEC

Building an ODR Platform

“ODR requires a technology-based intermediary” UNCITRAL ODR Notes para 26



THE WAY FORWARD FOR ODR IN APEC

Harmonizing ODR Rules

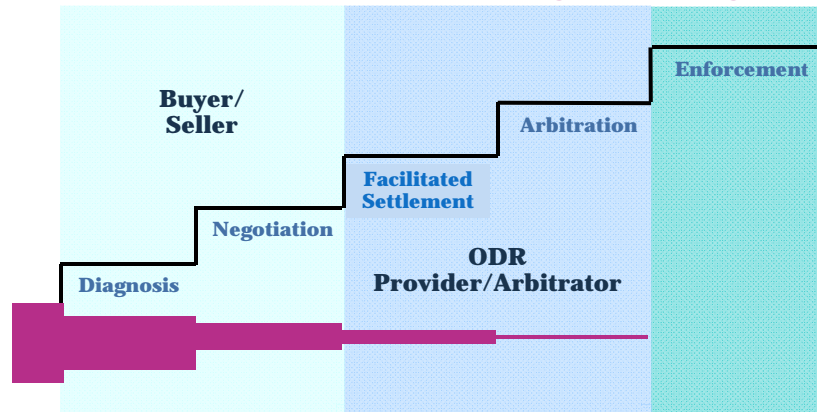
- “Efforts have remained disjointed, i.e. applying different standards of due process to participants, largely addressing only domestic online disputes, failing to offer effective enforcement mechanisms, and are often not readily apparent options to buyers compared to mainstream litigation and ADR.”
- “...why it is crucial that a global harmonizing instrument or set of principles be created ... to support online dispute resolution systems that can handle cross-border disputes across the commercial spectrum...”
Note supporting work on online dispute resolution by UNCITRAL, Institute of International Commercial Law, UN Doc. A/CN.9/710 at 2-3 (2010) (co-sponsored by 35 organizations).
- APEC might recognize/design a common set of ODR procedural rules for B2B cross border e-commerce within the APEC region.
- The Rules should be based on the upcoming UNCITRAL ODR Technical Notes.



THE WAY FORWARD FOR ODR IN APEC

Harmonizing Rules: ODR Phases

Each phase acts like a filter, resolving a percentage of disputes



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THE WAY FORWARD FOR ODR IN APEC

Harmonizing Rules: Fast-track ODR

- **APEC rules should provide fast-track ODR procedures that comply with due process requirements.**
- Major challenge to building an ODR system for low-value disputes involving MSMEs is cost.
- By making the ODR process more structured, easier, faster, and less expensive to complete ODR improves redress and access to justice.



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THE WAY FORWARD FOR ODR IN APEC

Harmonizing Rules: Applying CISG



349	China	11	Vietnam	2	Brazil
139	Japan	7	Mexico	2	Costa Rica
60	USA	6	Indonesia	2	Austria
42	Chinese Taipei	6	Israel	2	Netherlands
32	Republic of Korea	5	France	1	Canada
21	Malaysia	5	Czech Republic	1	Portugal
24	Philippines	3	Belgium	1	Spain
21	Thailand	3	Italy	1	Morocco
17	Singapore	3	Ireland	1	Puerto Rico
13	Germany	3	UK	1	Malta
				1	Hungary

THE WAY FORWARD FOR ODR IN APEC

Building Capacity

- Key implementation issue is getting businesses to agree to ODR.
- Requires businesses to understand and trust ODR.



- APEC could take the lead in explaining ODR to private sector, governments, and legal community and build capacity by leveraging finance from donors, law facilities and corporate social responsibility programs.

CONCLUSIONS

- Formidable challenge ahead for APEC.
- E-commerce cross-border disputes:
 - Will form significant share of complaints in coming years
 - Require tailored mechanisms that reduce cost, delays, and disproportionate burdens to the economic value at stake.
- Creation of enabling legal environment via ODR will:
 - Provide MSMEs with an opportunity to compete and flourish
 - Build capacity for economic growth and trade
 - Extend real access to Justice for all.
- The time is now to build an APEC-wide legal framework for ODR and extend e-justice to people who are not served by existing systems.



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Thank You

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