Vision for APEC Online Dispute Resolution Part I: Leveraging Technology to Increase Access to Justice

Submitted by: United States
VISION FOR APEC ODR Part I:
Leveraging Technology to Increase Access to Justice
ODR is not an Avatar
Online dispute resolution (ODR) combines the social science of alternative dispute resolution with powerful, pre-built workflows and sophisticated communications technology to resolve disputes. 

Colin Rule
WHAT IS ODR?
APEC ODR Follows UNCITRAL Work
WHAT IS ODR?

ODR Saves Time and Costs

According to UNCITRAL, ODR is:
designed to assist buyers and sellers in resolving disputes in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing.


- UNCITRAL's work on ODR follows sharp increase in online cross-border transactions and resulting increase in disputes.
- UNCITRAL finalized ODR instrument in July 2016 to provide technological best practices for ODR platforms.
WHAT IS ODR?

UNCITRAL ODR Notes

General Assembly Resolution 71/138, UNCITRAL Technical Notes on ODR:

- “reflect the principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency.”

- “are expected to contribute significantly to the development of systems to enable the settlement of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications.”

- “will significantly assist all economies, in particular developing economies and members whose economies are in transaction, online dispute resolution administrators, online dispute resolution platforms, neutrals and the parties to online dispute resolution proceedings in developing and using online dispute resolution systems.”
WHY ODR?

Internet Facilitates Trade Expansion (Including for MSMEs)

3.9 billion people connected to the Internet.
(Internet World Stats
http://www.internetworldstats.com/stats.htm)


APEC MSMEs account for 97% of all enterprises and generate more than 70% of all jobs in the region.
(APEC Iloilo Initiative (2015))
WHY ODR?

APEC and the expansion of global trade

APEC total trade (goods & services) has increased more than **6.7 TIMES** to $20 TRILLION between 1989 and 2015.

Trade by the rest of the world grew less by **5.6 TIMES** between 1989 and 2015.

Average tariffs fell from **17%** in 1989 to **5.6%** in 2014.

Since 1989, APEC’s role in facilitating regional integration has proven essential to promoting trade and economic growth in the Asia-Pacific.

Lowering trade transaction costs by **5%** (2007-2010 period) and saving USD **56.7 BILLION**.
WHY ODR?

Many Cross-Border Disputes Unresolved

- In APEC, dispute resolution one of the greatest challenges for MSMES trading across borders.
  - 83% of APEC MSMEs reported effective and consistent dispute resolution as a problem.
  

- According to EU, for B2B –
  - Approximately 25% of B2B disputes went unresolved: on average this equaled 1.2 million unresolved disputes annually.
  - Businesses involved in disputes averaged 6 disputes with other businesses.
  - As businesses grew from small to medium-sized companies their disputes grew five-fold.


3% to 5% of all transactions, online and offline, result in a dispute. (See Ethan Katsh & Colin Rule, What We Know and Need to Know About Online Dispute Resolution, 67 S.C. L. 329 (2016))
WHY ODR?

*Disputes Keep Small Businesses from Doing Business*

- [EU] SMEs estimated costs of unresolved disputes at 2.8% of turnover. (European Commission, *Business Disputes Keep Businesses from Doing Business*, supra at 3)

- Unresolved disputes lead to damaged client relationships and hurt sales.

- Especially serious for small businesses as they have fewer clients. (European Commission, *Business Disputes Keep Businesses from Doing Business*, supra at 4.)
WHY ODR?
Courts Not An Option

- 4 billion people lack access to well functioning judicial system.  

- APEC EODB indicator for Enforcing Contracts measures time, cost and procedural efficiency for resolving commercial domestic lawsuits.
  
  - 451.4 days on average to enforce contracts in APEC.
  
  - 31.8 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.  
**WHY ODR?**

**Existing Arbitration Forums Not An Option**

- In-person arbitration predominant form of dispute resolution in cross-border trade.
  (Queen Mary University of London and White & Case, 2015 International Arbitration Survey
  https://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations (90% of respondents prefer international arbitration to resolve cross border commercial disputes))

- “Surveys find that firms are attracted to arbitration due to the expertise and neutrality of the decision maker, confidentiality of the proceedings, a lack of familiarity with the courts and laws in foreign countries, and enforceability.”
  (Myburgh, A., & Paniagua, J., The Impact of UNCITRAL on FDI, supra, Section 2)

- But according to multiple sources, including the World Bank, arbitration is too expensive/slow for e-commerce/supply chain disputes.
  ((Myburgh, A., & Paniagua, J., The Impact of UNCITRAL on FDI, (2017), supra); 2015 International Arbitration Survey, supra (to reduce the time and cost associated with international arbitration, 92% of respondents favored inclusion of simplified procedures in institutional rules for claims under a certain value).
WHY ODR?

**MSMEs Underdog By Definition**

- Majority of B2B disputes involving small businesses concern payments.
  
  (Study on the use of Alternative Dispute Resolution for Business to Business disputes, *supra*, at 124; *Business Disputes Keep Businesses from Doing Business, supra*, at 5. (Finding in EU that “71% of the disputes of small enterprises and 44% of medium-sized enterprises are concerned with payments.”)

- 55% of small businesses face liquidity problems.
  
  (Study on the use of Alternative Dispute Resolution for Business to Business disputes, *supra* at 12.)

- Speedy dispute resolution “essential for small enterprises, which may lack the resources to stay in business while awaiting the outcome of a long court dispute.”
  
  (World Bank, *Doing Business 2017, Regional Profile, Asia-Pacific Economic Cooperation (APEC)* at 215)
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 supply chains/MSMEs.

Emerging ODR systems for e-commerce are B2C focused.
WHERE ODR STANDS TODAY

**Government Initiatives**

- **Mexico**: *Concilianet* provides government-run ODR platform for B2C. Participation is mandatory for domestic vendors. **Available at** [http://www.profeco.gob.mx/Folletos/Queja_ing.pdf](http://www.profeco.gob.mx/Folletos/Queja_ing.pdf)

- **Republic of Korea**: e-commerce dispute resolution committee mediates disputes in e-commerce transactions between consumers & providers. **Available at** [https://www.ecmc.or.kr/](https://www.ecmc.or.kr/)


- **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](http://www.chinadaily.com.cn/bizchina/2015-12/12/content_22708965.htm)
WHERE ODR STANDS TODAY

- **Flexible**
  - Range of ADR options
  - Continuous improvement

- **Accessible**
  - 24/7
  - Free legal information and support
  - Free telephone interpretation

- **Affordable**
  - Staged fees
  - Usually no travel/legal costs
  - Simple fee waivers

- **Timely**
  - Focus on early resolution
  - 60-90 day process

- **Efficient**
  - Active case management
  - Tailored timelines and processes
  - Avoid duplication
WHERE ODR STANDS TODAY

ODR Gaining Traction in US. Courts

- Franklin County, Ohio Small Claims
- Washtenaw County, Michigan Online Traffic Pleading
- Ottawa County, Michigan Family Court Compliance
- Utah Courts Small Claims
- New York State Unified Court System
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 for B2C.
  
  Proposed OAS ODR regional platform would establish model law/cooperative framework and procedural rules to govern ODR proceedings including arbitration of disputes for B2C. Available at http://www.oas.org/dil/esp/CIDIPVII_proteccion_al_consumidor_united_states_guia_legislativa_anexo_A.pdf

- OAS Inter-American Juridical Committee recently adopted a resolution in support of ODR mechanisms for cross-border consumer transactions.


- EU ODR regional platform allows submission of B2C complaints within EU via online form.

- EU refers complaint to competent national ADR entity, which provides online mediation/arbitration.

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WHERE ODR STANDS TODAY

**ODR and Smart Contracts**

- Smart contracts potentially provide for faster, more effective cross-border dispute resolution and enforcement.

- These contracts would combine ODR with effective enforcement mechanisms.

- Solutions would include tools to freeze the execution of smart contracts, choose from dispute resolution solutions and vendors on a marketplace (based on dispute size), and the ability to immediately conduct enforcement of the resolution.
WAY FORWARD FOR ODR IN APEC
APEC EC ODR Work Plan

- Build a pilot in conjunction with platform host/ODR provider via outreach to regional arbitration/mediation centers to determine possible partners for hosting ODR platform
- Continue to promote harmonisation of the relevant laws for ODR using existing international instruments
- Cross-APEC collaboration (with e.g. ABAC, ECSG, SMEWG, GOS, TWELWG)
- Conduct relevant research/information gathering
- Design ODR platform
- Develop ODR procedural rules
- Capacity building
- Leverage private sector and academic community support
THANK YOU

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