



**Asia-Pacific
Economic Cooperation**

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

Submitted by: United States



**Workshop on the Use of Modern
Technology for Dispute Resolution and
Electronic Agreement Management
Particularly Online Dispute Resolution
Port Moresby, Papua New Guinea
3-4 March 2018**

APEC EC
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**VISION FOR APEC ODR Part I:
Leveraging Technology to Increase
Access to Justice**



**ODR is not an
Avatar**

WHAT IS ODR?

ADR Enhanced by Technology



Diagnosis



Negotiation



Mediation



Arbitration

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.

Technical Notes on Online Dispute Resolution of United Nations Commission on International Trade Law (UNCITRAL), para. 2, *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, annex I, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/048/29/PDF/V1604829.pdf?OpenElement>.



- 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 transition, 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>)



UNCTAD: E-commerce B2B nearly \$20 trillion in 2015.

(<http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1281>)

APEC MSMEs account for 97% of all enterprises and generate more than 70% of all jobs in the region.

(APEC Iloilo Initiative (2015))



APEC total trade (goods & services) has increase 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

WHY ODR?

APEC and the expansion of global trade

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

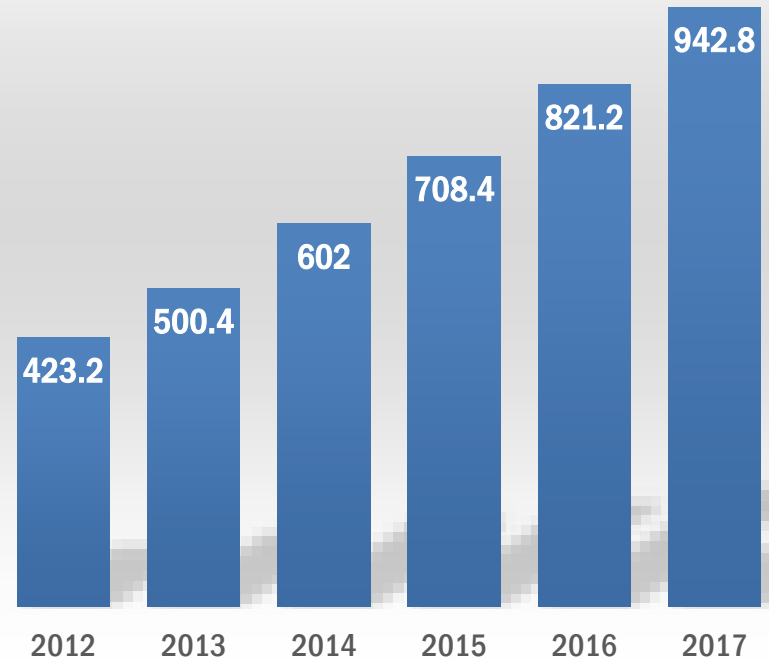
- In APEC, dispute resolution one of the greatest challenges for MSMEs trading across borders.
 - 83% of APEC MSMEs reported effective and consistent dispute resolution as a problem.

(Driving Economic Growth Through Cross-Border E-Commerce in APEC: Empowering MSMEs and Eliminating Barriers at 35, 69, 81. <http://ncapec.org/docs/ABAC%20Documents/USC%20Marshall%20ABAC%202015%20MSMEs.pdf> (interviews with 506 business executives plus 244 survey responses))

- 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.

(Ecorys, Study on the use of Alternative Dispute Resolution for Business to Business disputes in the European Union at 6, 123, 125 (commissioned by the European Commission) <http://www.adrcenterinternational.com/wp-content/uploads/2015/01/ADR-Final-Report-151012.pdf> (based in part on Flash Eurobarometer 347: Business to Business Alternative Dispute Resolution in the EU (interviews with 10,840 businesses including MSMEs)); European Commission, DG Enterprise and Industry, Business Disputes Keep Businesses from Doing Business, at 4.)

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



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.

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.

(Secretariat Note, Selected legal issues impacting microfinance, April 2012, UN Doc. A/CN.9/756, para. 24 citing UNDP, Commission on Legal Empowerment of the Poor, Making the Law work for Everyone, available at: www.undp.org/legalempowerment).

- 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.

(APEC's Ease of Doing Business: Baseline for Second EoDB Action Plan (Feb. 2018) APEC Policy Support Unit; Doing Business 2018 (APEC), Regional Profile Asia-Pacific Economic Cooperation, at 56-57.)

- In *cross-border disputes*, traditional judicial relief not only slow but creates jurisdictional, choice of law, and enforcement difficulties.

(Myburgh, A., & Paniagua, J., *The Impact of UNCITRAL on FDI*, (2017) (Section 2) available at <http://www.uncitral.org/uncitral/en/commission/colloquia/50th-anniversary-papers.html>; Born, G, *International Commercial Arbitration*, 579 (2009))

"I'm glad we settled our conflict this way.
Litigation is Expensive & Time Consuming



Alternative Dispute Resolution

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))

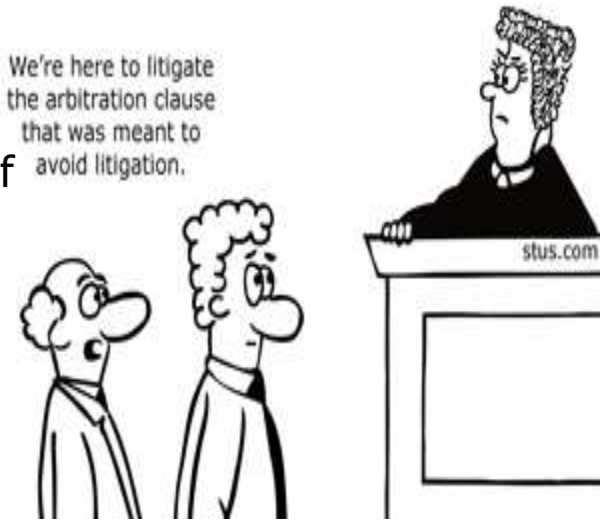
- "Surveys find that firms are attracted to arbitration due to the expertise and neutrality of the decision maker, confidentiality of the proceedings, a lack of familiarity with the courts and laws in foreign countries, and enforceability."

(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).

We're here to litigate the arbitration clause that was meant to avoid litigation.



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)



WHERE ODR STANDS TODAY

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 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



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



- **Canada:** Quebec provides free ODR dispute resolution platform for mediation of consumer disputes; British Columbia online Civil Resolution Tribunal resolves small claims \$5,000 and under. Available at

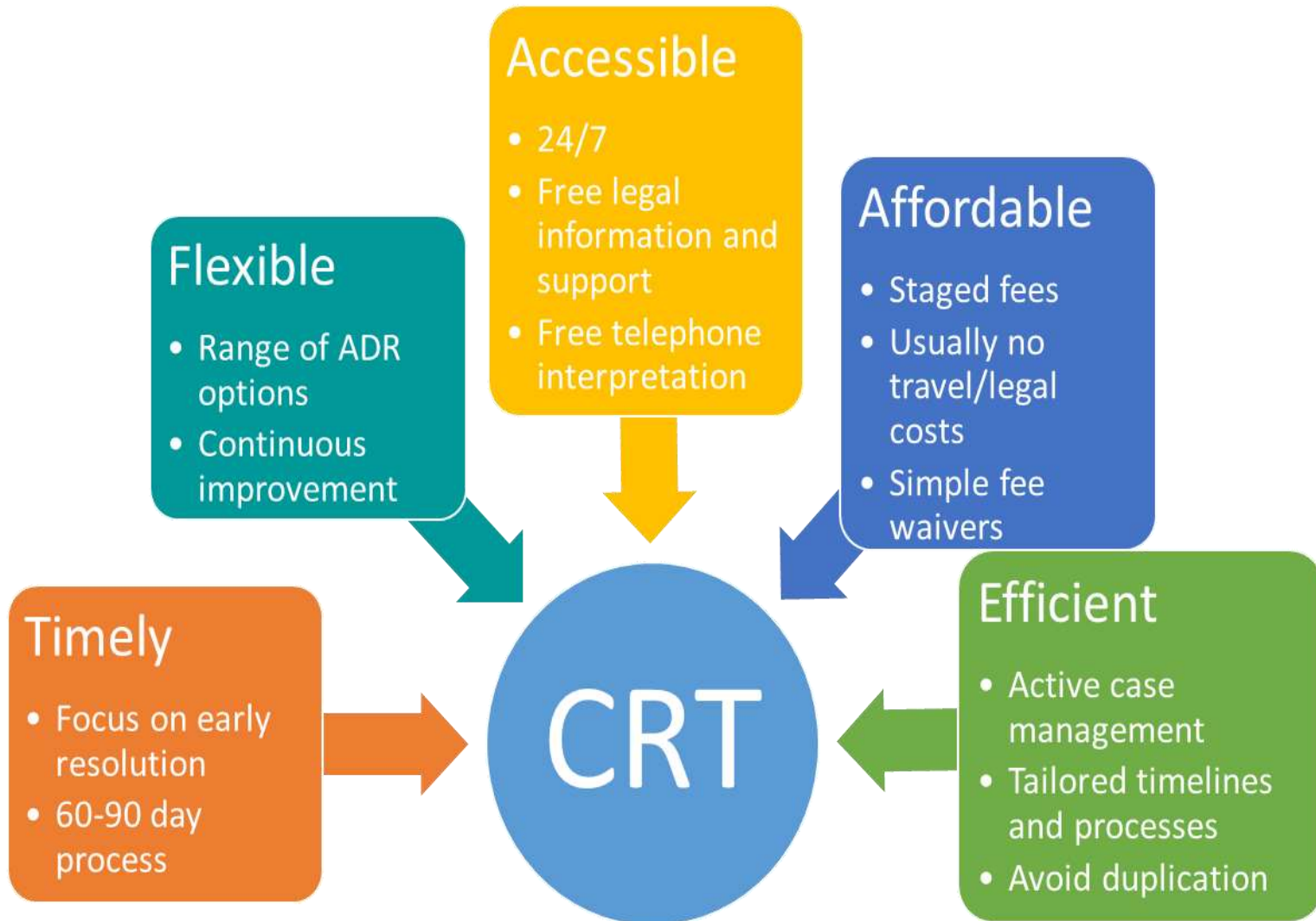
<http://www.slaw.ca/2017/02/10/publicly-funded-consumer-odr-is-now-a-reality-in-quebec/>;
<https://poseidon01.ssrn.com/delivery.php?ID=790086090127100085019068126099125117016083053010057028103075006126105109078101004074010017029060104024054108097076097083004100005023049082020120111076080101118104031019062051091030064109091111113094006107004121008120087113107116088075097099080027125064&EXT=pdf>



- **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

WHERE ODR STANDS TODAY



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

[Case Studies](#)
[ODR for Courts](#)

The screenshot shows the 'Online Dispute Resolution' registration page for Franklin County Municipal Court. The page title is 'Online Dispute Resolution Franklin County Municipal Court Columbus, OH'. The main heading is 'Enter your information'. Below this, there is a welcome message and a form with the following fields: Name (First, Middle, Last), Current Mailing Address (Address 1, Address 2, City, State, Zip), Case Number (if present), and a question 'Is this a City of Columbus case?'. There are also radio buttons for 'Yes' and 'No'. Below this, there are three options for resolving the case: 'Discounted long term', 'Discounted short term payment plan', and 'Long term payment plan'. There is a 'Submit' button and a 'Go to the chosen' link. At the bottom, there are fields for 'Email', 'Call Phone', and 'Password', and a 'Log In' button. A note at the bottom states: 'For more characters, enter 333 lower case letters, at least one digit or special character.'

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.

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.

Inter-American Juridical Committee, International Protection of Consumers, CJI/RES. 227 (LXXXIX-O/16) (Oct. 13, 2016).



Organization of
American States



- 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.

- 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

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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