



**Asia-Pacific
Economic Cooperation**

Advancing Free Trade
for Asia-Pacific **Prosperity**

Study on Best Practices in Using ODR

APEC Economic Committee

January 2023



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Economic Cooperation**

Study on Best Practices in Using ODR

**Including How to Develop a User-Centric ODR Design for Use in
Private and Public Fora**

APEC Economic Committee

January 2023

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The information and recommendations provided in this study were developed using information available at the time and through dialogue with economies that responded to a questionnaire as part of this study.

The views expressed in this document are those of the author and do not necessarily represent those of the APEC member economies. The APEC Economic Committee may further consider the recommendations provided.

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Introduction – ODR Best Practices for APEC Commercial Disputes

Expanding Access to Justice—The Need for User-Centric ODR

Even in the most advanced economies, commercial disputes cost too much, take too long, and are excessively confrontational and complex.¹ Before the COVID-19 pandemic, the Asia-Pacific Economic Cooperation (APEC) Doing Business Report 2020 reported an average of 440 days to resolve a simple contract dispute involving an Micro, Small and Medium Enterprise (MSME) in a domestic APEC court at a cost of 37 percent of the value of the claim.² According to an APEC Business Advisory Council (ABAC) survey of small businesses, many abandon cross-border trade due to lack of effective dispute resolution. Fifty-eight percent of respondents listed it as a "major" or "severe" problem. In emerging economies, that number rose to 74 percent.³ The Strengthening the Economic Legal Infrastructure Friends of the Chair (SELI FoTC) Work Plan under the Enhanced APEC Agenda for Structural Reform (EAASR), endorsed by the Economic Committee (EC) in December 2021, recognized that "[l]ack of access to commercial justice is one of the reasons that MSMEs constitute some 97% of APEC businesses domestically, but account for only a fraction of APEC exports. The fact that they lack cost-effective and timely commercial justice for cross-border transactions means that many avoid that risk by not trading across borders."⁴

The United Nations (UN) recognized Online Dispute Resolution (ODR) as a viable solution to the lack of access to effective justice.⁵ The development of ODR during the COVID-19 pandemic was instrumental to providing access to justice, particularly for cross-border trade, because of restrictions on travel and court closings. The APEC Collaborative Framework for ODR of Cross-Border Business-to-Business Disputes (APEC ODR Collaborative Framework)⁶ was launched after the start of the pandemic, and ODR providers already see positive preliminary results. For example, a provider reported a 37-day average to resolve a

¹ See Online Courts: Keynote address by Richard Susskind on the future of justice, Harvard Law School, <https://www.youtube.com/watch?v=X1oXoTr-aW8>.

² APEC Doing Business 2020 at 54-55, <https://www.doingbusiness.org/content/dam/doingBusiness/media/Profiles/Regional/DB2020/APEC.pdf>. The third APEC Ease of Doing Business Action Plan (2020-2025) includes enforcing contracts. APEC Economic Committee, Action Plan, <https://www.apec.org/groups/economic-committee>.

³ ABAC, Realizing the Untapped Potential of MSMEs in APEC: Practical Recommendations for Enhancing Cross-Border Trade (November 2018) at iv, vi, 52, 54, 57, 68, https://www2.abaconline.org/assets/2018/ABAC_Research/ABAC_IV_Marshall_School_Final_Report_MSMEs_trade_11132018_compressed.pdf.

⁴ Strengthening Economic and Legal Infrastructure (SELI) Friends of the Chair (FoTC), Workplan on Structural Reform under APEC Agenda for Structural Reform (EAASR), endorsed by the Economic Committee (EC) in December 2021, http://mddb.apec.org/Documents/2022/EC/EC1/22_ec1_016.pdf.

⁵ UN General Assembly (GA) Resolution 71/138, Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law (UNCITRAL) (December 19, 2016), <https://digitallibrary.un.org/record/853454?ln=en>.

⁶ APEC Collaborative Framework for Online Dispute Resolution of Cross-Border Business-to-Business Disputes, (hereinafter APEC ODR Collaborative Framework) and Model Procedural Rules (hereinafter APEC ODR Model Rules), http://mddb.apec.org/Documents/2019/EC/EC2/19_ec2_022.pdf.

dispute under the APEC ODR Framework, with 62% of the claims resolved during the online negotiation and mediation stages.⁷

Pandemic-related travel restrictions and social distancing measures have forced an unprecedented adoption of technology by APEC courts. In most APEC economies, this has mostly meant virtual hearings.⁸

Alternative Dispute Resolution (ADR) providers have also shifted to virtual hearings.⁹ However, adding Zoom to ADR mechanisms or the current court system does not equate to

⁷ Workshop on Modernizing Secured Transactions Legal Regimes in APEC Economies through International Instruments and Effective Dispute Resolution Mechanisms (September 2022), at 25 (Statement of GZAC representative Mr. Chen Chen), <https://www.apec.org/publications/2022/09/workshop-on-modernizing-secured-transactions-legal-regimes-in-apec-economies-through-international-instruments-and-effective-dispute-resolution-mechanisms>; Email from Mr. Chen Chen, November 25, 2022 providing updated statistics.

⁸ APEC courts using communications technology to implement online hearings included:

- Brunei Darussalam High Court conducted first virtual hearing on Zoom with witnesses in Malaysia and counsel in Brunei appearing before a Brunei High Court judge sitting in Singapore (Oct 2020);
- Hong Kong, China courts conducted 1,000+ remote hearings by late September 2021;
- Indonesia Supreme Court (MA), Constitutional Court (MK), and lower courts switched to virtual trials to keep the judicial system running during the Pandemic;
- The Republic of Korea revised Procedure Act (Aug. 2021) allows remote virtual trials in civil and criminal proceedings;
- Malaysia in 2020 amended its law to allow courts to conduct remote hearings and will continue after the pandemic;
- Philippines courts conducted 1,139,720 videoconferencing hearings (civil and criminal) between May 2020 and October 2022 and will continue after the pandemic.
- Russia Supreme Court recommended that courts, if technically possible, hold court hearings of an urgent nature online during the pandemic;
- Singapore made widespread use of virtual hearings during the pandemic;
- Chinese Taipei approved special legislative measures during the pandemic allowing for virtual court hearings in civil and criminal cases to prevent a backlog of trials;
- Thailand Court of Justice implemented a voluntary online dispute mediation system;
- U.S. courts in every state adopted online hearings and electronic filings, case management, and digital notarization.

Sources: APEC Study on The Effect of the Covid-19 Pandemic on Secured Lending Reform and Access to Credit in APEC Economies, September 2022 (United States) at 28-29. <https://www.apec.org/docs/default-source/publications/2022/9/workshop-on-modernizing-secured-transactions-legal-regimes-in-apec-economies/study-on-the-effect-of-the-covid-19-pandemic-on-secured-lending-reform-and-access-to-credit-in-apec-economies.pdf?sfvrsn=3ce2d2d2>; Responses to Questionnaire from APEC economies on the implementation of ODR in courts and ODR platforms (2022) (responses from Hong Kong, China, Indonesia, Korea, Malaysia, Russia, the Philippines, Chinese Taipei, Thailand, United States).

⁹ Protocols issued by ADR Centers since 2020 to assist parties with virtual hearings:

- HKIAC Guidelines on Virtual Hearings (Hong Kong, China);
- SIAC Guides – Taking Your Arbitration Remote (Singapore);
- CIETAC Guidelines on Proceeding with [Virtual Hearing] during Pandemic (China);
- GZAC Recommended Standard for Online Arbitration (China);
- KCAB Seoul Protocol on Video Conference in International Arbitration (Korea);
- ACICA Online Arbitration Guide for the use of ODR (Australia);
- JIDRC Report on Virtual Hearings (Japan);
- AmCham Peru International Arbitration Center Guide to Virtual Arbitration (Peru);
- AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties (United States);
- CAM Santiago, Operating Statement (urging use of online hearings) (Chile);
- Indonesian National Board of Arbitration revised rules (allowing remote proceedings);
- AIAC Protocols on Virtual Arbitration Proceedings (Malaysia);

sufficiently capitalizing on all that technology has to offer beyond online communication.¹⁰ Advanced technologies like Artificial Intelligence (AI) and machine learning, which are an integral component of ODR, remain largely untapped by ADR providers and the justice system.

The post-pandemic technological shift creates an opportunity for more extensive use of ODR by courts, including for domestic and commercial disputes involving MSMEs. Online decision-making may not be appropriate for all cases but is invaluable for low-value disputes involving MSMEs where the parties cannot afford lawyers, travel to a physical court, or weeks-long wait for a decision.

Four billion people lack access to justice according to the Organization for Economic Co-operation and Development (OECD),¹¹ meaning that more people (over 60% of the world) have access to the internet¹² than access to justice (less than 50%). ODR brings the potential to align the justice system with our digital society. As more providers roll out ODR, documenting what works or does not and developing best practices to guide existing players and new market entrants have become essential so that all can get ODR right.

This study details best practices for the use of ODR for commercial disputes in APEC and the need for a user-centric approach. The study considers best practices in the design of ODR platforms, basic principles relating to ODR providers and neutrals, special considerations regarding the use of ODR in courts, and use of ODR in consumer cases.

The starting point for ODR best practices is the UNCITRAL Technical Notes on Online Dispute Resolution (UNCITRAL ODR Technical Notes).¹³ The UN General Assembly observed that the UNCITRAL ODR Technical Notes

- “reflect the principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability, and transparency,” [and]
- “will significantly assist all [economies], in particular developing [economies].”

In its conclusion, the General Assembly “[r]ecommends that all [economies] and other stakeholders use the Technical Notes in designing and implementing online dispute resolution systems for cross-border commercial transactions.”¹⁴

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- Thai Arbitration Center provided guidelines for Online Dispute Resolution (Thailand).

Sources: APEC 2022 Study on The Effect of the Covid-19 Pandemic on APEC Economies, supra note 8 at 31; Response to Questionnaire on the implementation of ODR, supra note 8, (Responses of Hong Kong, China, Indonesia, Malaysia, South Korea, Thailand, and the United States).

¹⁰ See Richard Susskind, Online Courts, supra note 1 (noting that dropping the current court system into zoom is not a paradigm change).

¹¹ OECD, Leveraging the SDGs for Inclusive Growth, Delivering Access to Justice for All (2016), <https://www.oecd.org/gov/delivering-access-to-justice-for-all.pdf>.

¹² World Bank, Individuals Using the Internet, <https://data.worldbank.org/indicator/IT.NET.USER.ZS>.

¹³ UNCITRAL ODR Technical Notes on Online Dispute Resolution (UNCITRAL ODR Technical Notes) (2016), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf.

¹⁴ UNGA Resolution 71/138, Technical Notes on ODR, supra note 5.

The study also examines best practices gleaned from the regional implementation of ODR, which derives from the UNCITRAL ODR Technical Notes:

- The APEC ODR Collaborative Framework and its Model Procedural Rules (hereinafter APEC ODR Model Rules), launched in May 2022, to provide quick and affordable dispute resolution and enforcement across borders, languages, and legal jurisdictions to assist APEC businesses, particularly MSMEs, in cross-border trade;¹⁵
- The voluntary recommendations from the Public Policy Dialogue on Promoting Consumer Protection in Dispute Resolution and Redress Mechanisms, endorsed by the Committee on Trade and Investment (CTI) in 2021 (hereinafter APEC PPD Recommendations on Promoting Consumer Protection in Dispute Resolution);¹⁶ and
- The ASEAN Guidelines on ADR for Consumer Protection issued in October 2021¹⁷ and the ASEAN Guidelines on ODR issued in July 2022.¹⁸

The study further considers the responses to a questionnaire circulated to all APEC economies on the implementation of ODR, including for courts and ODR platforms.¹⁹ The study also reviews several organizations' ODR Standards, including the Online Dispute Resolution Standards collaboratively developed by the National Center for Technology and Dispute Resolution (NCTDR) and the International Council for Online Dispute Resolution (ICODR) and jointly issued in May, 2022 (hereinafter NCTDR/ICODR ODR Standards).²⁰ The International Standards Organization working group on Transaction Assurance in E-commerce -- Guidelines for Online Dispute Resolution (ISO/TC321/WG 3), is using the NCTDR/ICODR ODR Standards to develop Basic Principles for ODR.²¹

¹⁵ APEC ODR Collaborative Framework, para. 1.1.

¹⁶ Voluntary Recommendations from the Public Private Dialogue (PPD) on Promoting Consumer Protection in Dispute Resolution and Redress Mechanisms ([APEC PPD Recommendations on Promoting Consumer Protection in Dispute Resolution](https://www.apec.org/publications/2021/11/2021-cti-annual-report-to-ministers)), endorsed by CTI in August 2021, APEC CTI, Annual Report to Ministers (2021), para. 16, <https://www.apec.org/publications/2021/11/2021-cti-annual-report-to-ministers>). For the PPD Summary Report and Recommendations see https://www.apec.org/docs/default-source/publications/2021/9/ppd-on-promoting-consumer-protection-in-the-dispute-resolution-and-redress-mechanisms-of-ecommerce/toc/summary-report.pdf?sfvrsn=f4310d21_1. The PPD also produced additional Recommendations To Promote Best Practices for Consumers' Dispute Resolution and Redress Mechanisms of e-Commerce (APEC PPD Recommendations for Consumers' E-Commerce Dispute Resolution), (September 2021), <https://www.apec.org/docs/default-source/Publications/2021/9/PPD-on-Promoting-Consumer-Protection-in-the-Dispute-Resolution-and-Redress-Mechanisms-of-eCommerce/TOC/Recommendations-to-Promote-Best-Practices-for-Consumers-Dispute-Resolution-and-Redress-Mechanisms-of.pdf>).

¹⁷ ASEAN Guidelines on Alternative Dispute Resolution for Consumer Protection (ASEAN Guidelines for ADR for Consumer Protection), October 2021, <https://aseanconsumer.org/read-news-the-asean-alternative-dispute-resolution-adr-guidelines>).

¹⁸ ASEAN Guidelines on Online Dispute Resolution, July 2022, <https://asean.org/book/asean-guidelines-on-online-dispute-resolution-odr>.

¹⁹ Questionnaire responses (see note 8 supra) were received from Hong Kong China, Indonesia, Korea, Malaysia, the Philippines, Russia, Chinese Taipei, Thailand, and the United States.

²⁰ The National Center for Technology and Dispute Resolution and the International Council for Online Dispute Resolution ODR Standards (NCTDR/ICODR ODR Standards), https://odr.info/wp-content/uploads/2022/05/NCTDR_and_ICODR_ODR_Standards_2022.pdf.

²¹ See ISO/TC 321/Working Group 3, Online Dispute Resolution, <https://www.iso.org/committee/7145156.html>.

This study is based on desktop research, reports from international organizations, questionnaire responses, and comments on the draft study from APEC economies. An APEC workshop held on December 7-9, 2022, also discussed the study's preliminary results.

I. Best Practices for Designing ODR Platforms

A. ODR Must Include a Platform Allowing the Parties to Resolve the Dispute Electronically

ODR carries a wide definition that could include almost any dispute resolution process, including negotiation, mediation, arbitration, or other adjudication, so long as it is carried out online.²² The APEC ODR Model Rules following the UNCITRAL ODR Technical Notes define ODR as “a mechanism for resolving disputes through the use of electronic communications and other information and communication technology.”²³

However, ODR is more than e-ADR. As the UNCITRAL ODR Technical Notes and the APEC ODR Collaborative Framework state, a technological platform must be provided to the parties to offer ODR as a turnkey solution.²⁴

Unlike offline ADR, ODR cannot be conducted on an ad hoc basis and requires a technological solution for generating, sending, receiving, storing, exchanging, or otherwise processing communications to facilitate the dispute resolution process. Such a solution is referred to as an “ODR platform.” The platform is the framework that allows the parties to resolve the dispute electronically. The entity that carries out such administration and coordination is referred to as the “ODR provider.” The ODR provider may be separate from or part of the ODR platform.²⁵

CASE STUDY—The ODR.com platform software includes several key components:

- The Solution Explorer module helps parties diagnose their situation and envision acceptable resolution options. It assists users with filing cases.
- The Caseload Manager module tracks every case, calendar event, and completed activity to ensure cases stay on track and reports are accurate.

²² The UNCITRAL ODR Technical Notes (para. 2) recognize that “ODR encompasses a broad range of approaches and forms including but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration and others.”

²³ APEC ODR Model Rules, Art. 2(1); UNCITRAL ODR Technical Notes, para. 24.

²⁴ UNCITRAL ODR Technical Notes, para. 26; APEC ODR Collaborative Framework, para. 4.2.

²⁵ The UNCITRAL ODR Technical Notes, para. 26 and the APEC ODR Model Rules Art. 2(3), define an ODR Platform as “a system for generating, sending, receiving, storing, exchanging or otherwise processing communications.” Both also make clear that the ODR provider may be separate or part of the ODR platform. See UNCITRAL ODR Technical Notes, para. 27; APEC ODR Model Rules, Arts. 2(2), 15.

- The Meeting Room module enables disputants and neutrals to interact in an online collaborative workspace specifically designed for their case type.
- The Reporting Engine offers real-time visibility into data on customized dashboards that can be shared internally or externally.²⁶

B. All Communications Should Take Place Via the ODR Platform

Both the UNCITRAL ODR Technical Notes and the APEC ODR Model Rules further require that all communications take place via the ODR platform.²⁷

Requiring that all communications take place via the ODR platform helps ensure fairness, protect against fraud, and provide for privacy, data security, and confidentiality.²⁸

C. The ODR Platform Should Include Algorithmic Tools to Help Parties Find a Resolution Without the Help of a Neutral Third Party

The ODR process should make use of advanced facilitative and adjudicative technologies,²⁹ which give ODR functionalities that go well beyond what online ADR can deliver.

The UNCITRAL ODR Technical Notes and the APEC ODR Collaborative Framework describe three stages in the online dispute resolution process: online negotiation, mediation, and a third stage which in the case of the APEC ODR Collaborative Framework is arbitration.³⁰ During the negotiation stage, algorithmic tools enable the parties to communicate and negotiate within the online platform. ODR provides seamless navigation by offering many dispute resolution options. The computer-led ODR process saves on the cost of hiring lawyers, neutrals, or arbitrators, at least during the initial stage, where most disputes are being resolved. Algorithms deliver instant answers, greatly reducing timelines for dispute resolution.

²⁶ Report on 2022 APEC Workshop on Providing Effective Dispute Resolution Mechanisms, supra note 7, at 24 (Statement of ODR.Com CEO Colin Rule).

²⁷ UNCITRAL ODR Technical Notes, para. 30; APEC ODR Model Rules, Art. 3(1).

²⁸ Report of Workshop for Developing an APEC Collaborative Framework for ODR (Osaka, Japan, November 8-9, 2018) at 6 (hereinafter Report of 2018 Workshop for Developing APEC ODR Collaborative Framework) <https://aimp2.apec.org/sites/PDB/Supporting%20Docs/Forms/Supporting%20Docs.aspx?RootFolder=%2fsites%2fPDB%2fSupporting%20Docs%2f3682%2fCompletion%20Report&FolderCTID=&View=%7bCA72D0E0%2d295E%2d45DF%2dB491%2dF7BF6581A22F%7d>.

²⁹ Ethan Katsh and Colin Rule, What We Know and Need To Know About ODR, 67 South Carolina Law Review 328, (2016), <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=4166&context=sclr>; (“Online Dispute Resolution (ODR) is the application of information and communications technology to the prevention, management, and resolution of disputes”); National Center for State Courts, What is ODR, <https://www.ncsc.org/odr/guidance-and-tools> (“Online Dispute Resolution (ODR) is a public-facing digital space for parties to resolve their dispute or case. Court-implemented ODR is hosted or supported by the judicial branch and designed specifically to meet the needs of the public (not lawyers, judges, or court staff”).

³⁰ UNCITRAL ODR Technical Notes, paras. 37-45; APEC ODR Collaborative Framework, para. 1.2; APEC ODR Model Rules, Arts. 6-8.

D. ODR Should Include the Use of Advanced Technology Such as Artificial Intelligence

The APEC ODR Collaborative Framework states that modern technologies such as artificial intelligence should be incorporated into the design of ODR platforms whenever possible.³¹ APEC economies declined to offer more specific guidance on the use of modern technologies in the context of the APEC ODR Collaborative Framework because the direction in which technology will evolve cannot be anticipated and planned for. Our “exponential age” of technological development prevents policy development certainty.³²

However, existing and future technology must be interoperable to allow integration and data exchange between ODR solutions in real-time and on a secure and privacy-protected basis.³³ As such, the ASEAN Guidelines on ODR emphasize the importance of “Ensuring openness and compatibility between national ODR systems and related platforms.”³⁴

Artificial Intelligence, or AI, could power the components of ODR, such as handling multiple languages, guiding dispute resolution, evaluating cases, facilitating mediation, or AI-only mediation and adjudication. AI has the potential to simplify, accelerate, and even out the dispute resolution process.

By its nature, AI improves as it accrues data. However, today’s AI algorithms still struggle to make sense of unstructured data, which explains the limited use of AI in ODR. AI also carries risks, including reliance on inaccurate data leading to incorrect results. Machine learning and AI rely on data and software engineers that could be biased. The line of reasoning is scripted in code and not easily accessible or understandable by the parties to the ODR process. The APEC PPD Recommendations on Promoting Consumer Protection in Dispute Resolution state that “Artificial intelligence can play a valuable role in advancing and facilitating Online Dispute Resolution (ODR), but the development of Artificial Intelligence (AI) and algorithms must be based on ethical principles and be free of bias or other features that would lead to unfairness in its decision-making process.”³⁵

The NCTDR/ICODR ODR Standards include recommendations regarding the use of AI:

“ODR platforms must be auditable and the audit made available to users ... includ[ing] human oversight of i) traceability of the originality of documents and of the path to the outcome when artificial intelligence is employed, ii) determination of the relative control given to human and artificial decision-making strategies, iii) outcomes, and iv)

³¹ The APEC ODR Collaborative Framework, Overview, <https://www.apec.org/SELI/Overview>; APEC ODR Collaborative Framework, para. 1.2.

³² Report of 2018 Workshop for Developing an APEC Collaborative Framework for ODR, supra note 28 at 6.

³³ Id. The APEC PPD Recommendations on Promoting Consumer Protection in Dispute Resolution, supra note 16, at 17, state that “efforts should be made to achieve a level of interoperability. Systems that can “talk to each other” can better promote cross-border trade, cooperation, and trust.”

³⁴ ASEAN Guidelines on ODR, supra note 18, para. 67. The Guidelines further state “[w]hile customization is critical to make sure national ODR systems cater to [economy]-specific needs, application programming interfaces (API) should allow for extendibility and interaction with other ODR systems or platforms.” Id., para. 68.

³⁵ APEC PPD Recommendations on Promoting Consumer Protection in Dispute Resolution, supra note 16 at 17.

the process of ensuring availability of outcomes to the parties ... ODR system design must include proactive efforts to prevent any artificial intelligence decision-making function from creating, replicating, or compounding bias in process or outcome. Human oversight is required in ODR system design and auditing to identify bias, make findings transparent to ODR providers and users, and eliminate bias in ODR processes and outcomes ... The sources and methods used to gather any data that influences any decision made by artificial intelligence must be disclosed to all parties. ODR that uses artificial intelligence must publicly affirm compliance with jurisdictionally relevant legislation, regulations, or in their absence, guidelines on transparency and fairness of artificial intelligence systems. ODR must clearly disclose the role and magnitude of technology's influence on restricting or generating options and in final decisions or outcomes."³⁶

APEC ODR PROVIDERS EMBRACE ADVANCED TECHNOLOGY³⁷

The Guangzhou Arbitration Commission (GZAC) APEC-ODR platform features include multilingual translation, artificial intelligence to answer questions throughout the ODR process, online amendment of the settlement agreement, online signing, and issuance of legal documents for the international enforcement of settlement agreements.³⁸

The eBRAM International Online Dispute Resolution Centre Limited (eBRAM) APEC ODR platform uses AI machine translation, AI-powered e-KYC (electronic Know Your Customer) user registration and authentication management, encrypted cloud storage, in-house developed secure videoconferencing and e-signing solutions.

To address users' concerns about confidentiality, cybersecurity, and data privacy, eBRAM implemented safeguards, including multi-factor authentication, e-KYC and blockchain technologies. eBRAM enlists external, certified security experts to conduct cybersecurity/privacy impact assessments and total system audit on its ODR platform. eBRAM uses blockchain to ensure data integrity. Hash values of all files uploaded on the eBRAM ODR platform are stored in blockchain-enabled immunity storage.³⁹

CIETAC's APEC ODR platform includes an English/Chinese bilingual interface and multilingual translation services to facilitate parties' communication. The parties are aided by an intelligent negotiation assistant and can communicate synchronously or asynchronously. A multi-function video conference room allows for more flexible

³⁶ NCTDR/ICODR ODR Guidelines, supra note 20.

³⁷ Under the APEC ODR Collaborative Framework, APEC partners with ODR providers located in APEC economies that have opted-in to the APEC ODR Collaborative Framework. ODR providers provide their own platform, to offer online negotiation, mediation and arbitration and must comply with the APEC ODR Collaborative Framework and Model Procedural Rules. The APEC EC promotes ODR providers on its website and encourages small businesses to use them to resolve commercial cross-border disputes. The partnering ODR providers are listed at <https://www.apec.org/SELI/ODR-Providers>.

³⁸ Report on 2022 APEC Workshop on Providing Effective Dispute Resolution Mechanisms, supra note 7, at 25 (Statement of GZAC representative Mr. Chen Chen).

³⁹ Id. at 25 (Statement of eBRAM CEO Ms. Pui-Ki Emmanuelle Ta).

negotiation and mediation. Automatic transfer of case materials to the next stage and smart creation, online amendment, and online signing of settlement agreements foster efficiency and convenience.⁴⁰

E. ODR Design Must Be User-Centric

For ODR to assist in reducing the access to justice gap, it must be user-centric, including through procedural flexibility, efficiency, accessibility, affordability, useability, and capacity building.

a. Flexibility

A key aspect of user-centeredness is procedural flexibility. ODR must not place users in a technological straight jacket. As the UNCITRAL ODR Technical Notes recognize, ODR can assist “the parties in resolving the dispute in a simple, fast, flexible and secure manner, without the need for physical presence at a meeting or hearing.”⁴¹

With ODR, parties can communicate synchronously (meaning that the communication is happening in real-time, as in a videoconference call) or asynchronously (meaning that the parties are not interacting simultaneously, as through an electronic file transfer, email, or text message).

Under the UNCITRAL Technical Notes on ODR and the APEC ODR Model Rules, the parties communicate without the intervention of a neutral person during the negotiation stage; however, either party can request that the process moves to the next stage at any time. The APEC ODR Model Rules also provide that “these Rules shall govern the ODR proceedings subject to such modifications as the parties may agree”⁴²

Furthermore, under the APEC ODR Collaborative Framework, “partnering ODR providers are allowed flexibility to create and manage while still expected to be compliant with the framework.”⁴³ This provision was added to the Framework in response to arbitration surveys reporting user dissatisfaction with the “lack of creativity” shown by arbitrators and counsels in tailoring the proceedings structure to the case. It was felt that providing procedural flexibility and adaptability would have the greatest impact on the future direction of arbitration.⁴⁴

⁴⁰ The CIETAC Platform is available at (<https://casettle.odrcloud.cn/CIETAC.html>)

⁴¹ UNCITRAL ODR Technical Notes, para. 2.

⁴² APEC ODR Model Rules, Arts. 1(2), 6(3).

⁴³ APEC ODR Collaborative Framework, para. 1.3. See also APEC ODR Model Rule Art. 13(1) and UNCITRAL ODR Technical Notes, para. 49(a) (providing that subject to any applicable ODR rule, the neutral may “conduct the ODR proceedings in such a manner as he or she considers appropriate”).

⁴⁴ APEC Workshop on Building the APEC Online Dispute Resolution Collaborative Framework Pilot - Conclusions and Recommendations, endorsed at EC 2 August 2019.
http://mddb.apec.org/Documents/2019/EC/EC2/19_ec2_018.pdf.

Case Study: Under the APEC ODR Model Rules (Article 10), settlement agreements reached at any stage of the ODR Proceedings will be recorded on the ODR platform at which point the proceedings will automatically terminate. The Singapore Convention on Mediation⁴⁵ provides for expedited enforcement of mediated settlement agreements. However, *negotiated* settlement agreements fall outside the scope of the Convention. To protect against defaults in negotiated settlements, the eBRAM and CIETAC Rules expand on the APEC ODR Model Rules to say that if a settlement is reached before appointment of a neutral, the parties may request appointment a neutral to issue an award by consent, recording the parties' settlement. Additionally, because the Singapore Convention on Mediation has not yet been widely implemented in APEC economies, the eBRAM, CIETAC and GZAC Rules also provide that if the parties reach a settlement after appointment of a neutral, the settlement may be recorded in the form of an award by consent, if so requested by the parties. An award by consent generally has the same legal effect as an arbitral award and is enforceable under the New York Convention.⁴⁶ When entering into a negotiated or mediated settlement agreement, the parties may also include an ODR clause which would automatically refer any dispute relating to the settlement agreement to ODR under the APEC ODR Collaborative Framework.

b. Efficiency

Another characteristic of a user-centric ODR platform design is efficiency. The UNCITRAL ODR Technical Notes recognize that "ODR ought ... to be able to be used in a 'real world setting,' including that it should not impose ... delays and burdens."⁴⁷ The NCTDR/ICODR Standards state that "ODR services must be timely and use participant time efficiently."⁴⁸

Under UNCITRAL ODR Technical Notes and APEC ODR Collaborative Framework, the platform is efficient by design because it offers many possible solutions from which parties can select during the negotiation stage. The automated computer-led process relies on algorithms or AI to move the parties to the settlement.

⁴⁵ United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (Singapore Convention on Mediation), available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements. The Convention has been signed by a number of APEC economies, but only Singapore has implemented the Convention.

⁴⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1956) (New York Convention). The UNCITRAL Model Law on International Commercial Arbitration (1985 with 2006 amendments) (Art. 31) provides that a tribunal may "record the [parties'] settlement in the form of an arbitral award on agreed terms.... Such an award has the same effect as any other award on the merits of the case." The Model Law has been implemented by 17 APEC economies. For the Model Law and APEC economies that have implemented it see https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration. For the eBRAM APEC ODR Rules see <https://e Bram.org/uploads/rules/eBRAM%20APEC%20Rules.pdf?v=1.1> (Article 11). For the CIETAC Rules see <https://casettle.odrcloud.cn/CIETAC.html>. For the Guidance of the GZAC on the application of the APEC ODR Model Rules see <https://newodr.gzac.org/en/introduce/applicable/> (Article 11).

⁴⁷ UNCITRAL ODR Technical Notes, para. 9.

⁴⁸ NCTDR/ICODR ODR Standards, supra note 20.

Under the APEC ODR Model Rules, “if the parties have not settled their dispute by negotiation within [ten (10)] days], the case immediately moves to mediation, and a neutral is selected.” The APEC Model Rules also state, “The neutral, by accepting appointment, confirms that he or she can devote the time necessary to conduct the ODR proceedings diligently, efficiently, and in accordance with the time limits in the Rules.”⁴⁹

The UNCITRAL ODR Technical Notes state “While the process for appointment of a neutral for an ODR proceeding is subject to the same due process standards that apply to that process in an offline context, it may be desirable to use streamlined appointment and challenge procedures in order to address the need for ODR to provide a simple, time-, and cost-effective alternative to traditional approaches to dispute resolution.”⁵⁰ The APEC ODR Model Rules provide for streamlined appointment and procedures allowing each party three automatically accepted challenges to the appointment of a neutral within two days of the appointments.⁵¹

APEC partnering ODR providers also commit to an efficient process by providing integrated case management, including online case filing and payment. Users can manage their cases digitally, and sign, store, and access recorded agreements in a confidential online space.

In sum, the ODR process must be efficient and reach decisions promptly, or it will quickly lose credibility. As Colin Rule, the CEO of ODR.com, observed at the February APEC EC ODR Workshop:

*Time to decision is a key predictor of participant satisfaction: eBay found people were frustrated even if they won their dispute if it took a long period of time, as opposed to if they lost their dispute on day one. Technology can bring efficiency to resolve cases as quickly as possible.*⁵²

ODR Platforms should derive efficiency from modern technologies such as automated algorithms and AI, integrated case management systems, and recorded mediated settlement agreements to deliver fast and fair outcomes.

CASE STUDY

The platform of APEC-partnering ODR Provider GZAC has dealt with 331 domestic and international disputes totaling over five billion yuan (698 million USD), including cases in emerging industries such as e-commerce, live streaming, and intelligent vehicle

⁴⁹ APEC ODR Model Rules, Arts 6(4), 11(2). The Rules (Art. 6(5)) further provide that the parties may agree to a one-time extension of the deadline for reaching a negotiated settlement.

⁵⁰ UNCITRAL ODR Technical Notes, para. 50.

⁵¹ APEC ODR Model Rules, Arts. 11(4) and 11(5). The Rules (Art. 11(4)) further provide that either party may object at any time concerning “a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral.”

⁵² APEC EC Workshop Report on Implementing the APEC ODR Collaborative Framework, Feb. 2022 at 18 (Statement of ODR.com CEO Colin Rule), https://www.apec.org/docs/default-source/publications/2022/3/workshop-on-implementing-the-apec-odr-collaborative-framework/222_ec_workshop-on-implementing-the-apec-odr-collaborative-framework.pdf?sfvrsn=ad0fa23_2.

manufacturing. The average time to resolve a dispute is 37 days, with 62.84% of the disputes resolved during mediation.⁵³

c. Accessibility

By its online nature, ODR makes justice accessible to users anytime and anywhere. However, the UNCITRAL ODR Technical Notes state that “ODR ought to be able to be used in a ‘real world setting.’”⁵⁴ Accessibility in an online world includes not just geographical accessibility or financial accessibility but also digital literacy, digital accessibility, linguistic accessibility, and user capacity building.

Ensuring that ODR Platforms are mobile-friendly and do not require emails enables parties with a mobile phone and without computer access to participate in the ODR process. Voice-prompt technology can make ODR more accessible by helping overcome limitations in digital literacy and for those with some physical disabilities.

Furthermore, according to the APEC ODR Collaborative Framework and APEC ODR Model Rules:

- Any party may be represented by persons chosen by that party,⁵⁵
- The ODR provider shall identify available languages that the parties can select for the proceedings if a party indicates that it wishes to proceed in a language other than that chosen by the parties or by the neutral.⁵⁶

All relevant information should be available on the ODR administrator’s website in a user-friendly and accessible manner.

The APEC PPB Workshop Recommendations for Consumers’ E-Commerce advise that:

- The ODR system maintains a minimum 99% uptime—ODR systems should be available 24 hours a day, seven days a week.
- ODR complies with Web Content Accessibility Guidelines (WCAG 2.0) Level AA digital accessibility standards.⁵⁷

The NCTDR/ICODR ODR Standards add that “ODR must be easy for parties to find within a system and participate in, not limiting their right to representation. ODR should be available in communication channels accessible to all parties... and be easily accessed by people with different abilities.”⁵⁸

⁵³ Report on 2022 APEC Workshop on Providing Effective Dispute Resolution Mechanisms, supra note 7, at 25 (Statement of GZAC representative Mr. Chen Chen); email from Mr. Chen Chen November 25, 2022, updating statistics.

⁵⁴ UNCITRAL ODR Technical Notes, para. 9.

⁵⁵ APEC ODR Model Rules, Art.18.

⁵⁶ APEC ODR Model Rules, Art. 17.

⁵⁷ APEC PPD Recommendations for Consumers’ E-Commerce Dispute Resolution, supra note 16, at 4-5.

⁵⁸ NCTDR/ICODR ODR Standards, supra note 20.

As the COVID-19 pandemic continues to challenge the legal system, access to justice in an increasingly virtual world has become a prevalent issue. ODR has a unique opportunity to make justice more accessible to users.

d. Affordability

ODR must keep costs below the economic value under dispute. According to the UNCITRAL ODR Technical Notes, ODR processes must balance the value of procedural protections with their costs to offer an affordable process commensurate with the amount in dispute.⁵⁹

The APEC ODR Collaborative Framework and APEC ODR Model Rules provide for low-value cross-border disputes by requiring that:

- Fees must be reasonable and proportionate to the amount in dispute,⁶⁰
- There should be only one neutral to minimize costs.⁶¹

The NCTDR/ICODR ODR Standards state that ODR should “minimize costs to participants.”⁶² The APEC PPD Recommendations for Consumers’ E-Commerce Dispute Resolution suggest no cost to the consumer to file an ODR case.⁶³

CASE STUDY: THE THAI ARBITRATION CENTER

In 2020, the Thai Arbitration Center (THAC) implemented an ODR platform for: online negotiation, mediation, and arbitration of copyright, patent, and trademark infringements disputes; family law (including divorce and separation) disputes; and e-commerce disputes. The ODR platform brings time and cost savings to the parties. With 70 percent of the Thai population connected to the internet and Thailand ranking in the top 10 in the world on retail e-commerce growth, THAC aims for ODR to become the Thai people’s first choice for e-commerce dispute resolution. As a result, THAC offers attractive fees:

- Free Negotiation
- Mediation at 2,000 THB per case (about \$56 USD)
- Arbitration at 5,000 THB per case (about \$140 USD).⁶⁴

⁵⁹ UNCITRAL ODR Technical Notes, para. 9.

⁶⁰ APEC ODR Collaborative Framework paras.4.2, 6.2. Under the APEC ODR Collaborative Framework ODR providers must self-certify that their fees are reasonable and commensurate with the amount in dispute. It is a ground for removal of a provider for failure to “create a fee structure that ensures fees are affordable and commensurate with the amount in dispute.” APEC ODR Collaborative Framework, Removal Procedures, <https://www.apec.org/seli/removal-procedure>.

⁶¹ APEC ODR Model Rules, Art. 11.8; UNCITRAL ODR Technical Notes, para. 48(e).

⁶² NCTDR/ICODR ODR Standards, supra note 20.

⁶³ APEC PPD Recommendations for Consumers’ E-Commerce Dispute Resolution, supra note 16 at 4.

⁶⁴ Report on 2022 Workshop on Implementing the APEC ODR Collaborative Framework, supra note 52, at 26 (Statement of THAC Managing Director Pasit Asawawattanaporn); Thailand Questionnaire Response, supra note 8.

e. Usability

Usability is a quality attribute that assesses how easy it is to navigate user interfaces. Clarity is a core concept of usability. Users should be able to navigate intuitively through the different options and easily pursue their goals. To achieve clarity, ODR platforms should embrace usability starting with the initial design stage and enlist the input of a broad range of users from the beginning and throughout the platform's development.

Once the platform is up and running, usability testing helps to assess whether users can navigate through the dispute resolution stages as intended. It also helps to identify tasks or processes where users drop off or cannot complete a necessary step and recommend changes to improve ease of use.⁶⁵

Usability is paramount for ODR to effectively deliver justice to parties. This is particularly true for tribunals where parties have no alternative option to choose from and where courts are mandated to deliver equality, fairness, and access.

According to the National Center for State Courts (NCSC), making court proceedings accessible and usable is closely tied to making them just. As more and more courts implement digital and virtual processes, they must ensure the parties involved can successfully use them. Rigorous usability testing is essential to creating highly usable platforms.⁶⁶ In the case of facial recognition software used in ODR, the recognition software must include all skin tones and testing for that.

CASE STUDY: THE BRITISH COLUMBIA CIVIL RESOLUTION TRIBUNAL (CRT)

The CRT credits the human-centric design of its platform for its success. The CRT provides for online negotiation, mediation, and adjudication for small claims (up to \$5000 CAD), vehicle accidents, strata property (condominium), and societies and cooperative (housing) disputes. Use of ODR for all three phases is generally required, but accommodations can be made. CRT encourages people to speak for themselves during the ODR process. Most cases are resolved during the negotiation and conciliation stages, with only 25% of the cases being resolved by adjudication. In 2021/2022 the median time to resolution was 56 days. CRT surveys show that the vast majority (81%) of the participants would recommend CRT to others, 95% felt the CRT staff was professional, and 86% felt they were treated fairly.⁶⁷

⁶⁵ Stacy Butler, How to Evaluate the Litigant Experience as Courts Turn to Online Dispute Resolution (2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/01/25/how-to-evaluate-the-litigant-experience-as-courts-turn-to-online-dispute-resolution>

⁶⁶ Lise Embley, Hon. Constandinos Himonas, Stacy Butler, Usability and Court Dispute Resolution Platforms in NCSC, Trends in State Courts, at 75 (2021), https://www.ncsc.org/__data/assets/pdf_file/0020/66332/usability_and_court_dispute_Embley-Himonas-Butler.pdf.

⁶⁷ Civil Resolution Tribunal Annual Report 2021-22, (Appendix A), <https://civilresolutionbc.ca/wp-content/uploads/CRT-Annual-Report-2021-2022.pdf>.

Usability testing was done on the tribunal, its rules, the website content, e-mail templates, and the decisions at the end of the process. When the pandemic struck, CRT was primarily online and did not have to do much pivoting. But it also helped that CRT already had built-in accommodations for people with accessibility challenges, such as low income, mobility issues, health-care concerns, and mental health issues, which were more prevalent during the pandemic.

Former CRT Chair Shannon Salter advises, “Start with what you have.” She adds, “You don’t need to wait until there’s an enormous technology budget or until there’s a giant design review. Human-centered design can mean starting small. It can mean taking the existing forms that you know people have difficulty filling in and going outside into your court registry lineup and asking people, with a pencil and clipboard (or I guess in a pandemic, doing a virtual form of that), to fill in your forms and to provide feedback and then to design around what that feedback is.” She noted that it’s just one example, but if “you multiple that by a million different processes, there’s a huge opportunity to make all of this better for people.”⁶⁸

Shannon Salter identifies three best practices for courts or tribunals considering a human-centered design approach:

- First, assemble a multidisciplinary group of self-represented people and their advocates who are on the front lines, such as healthcare and mental health workers, mediators, and take a 360-degree approach to get the best ideas.
- Second, start with the people who face the most barriers before testing the legal stakeholders.
- Third, do not consider the justice system as necessarily court-based or, even more acutely, trial-centered.⁶⁹

f. Capacity Building

ODR has been hindered by lack of user familiarity and associated psychological barriers, including data privacy concerns surrounding APEC partnering ODR providers located in other economies. APEC has a crucial role to play in promoting ODR to MSMEs.

The APEC ODR Collaborative Framework states that APEC member economies should encourage businesses, especially MSMEs, to use the partnering ODR providers.⁷⁰ The APEC ODR website provides guidance on what businesses should know before selecting an ODR provider, along with a disclaimer.⁷¹

⁶⁸ Amanda Jerome, Human-centred design starts ‘with people who face the most barriers,’ B.C. tribunal chair says, *The Lawyers Daily*, Jan. 7, 2022, <https://www.thelawyersdaily.ca/articles/32575/human-centred-design-starts-with-people-who-face-the-most-barriers-b-c-tribunal-chair-says>.

⁶⁹ *Id.*

⁷⁰ APEC ODR Collaborative Framework, para. 6.1,

⁷¹ APEC Collaborative Framework for ODR of Cross-Border Business-to-Business Disputes, ODR Providers, <https://www.apec.org/seli/odr-providers>.

The SELI Administrative Implementation Work Plan for the APEC ODR Collaborative Framework provides the structure to enable collaboration between the EC and academic institutions from economies that have opted into the Collaborative Framework. Under the Work Plan, academics can assist economies, MSMEs and potential platform providers with local capacity building through workshops, webinars, and other events. The APEC EC can also call on its team of academic experts to help review ODR Providers' compliance with the Framework and Rules and help bring Providers into compliance where appropriate.⁷²

Multiple surveys show that micro enterprises tend to work without clear contracts and dispute resolution clauses, leaving them vulnerable in case of dispute. ODR can make transactions more efficient for those MSMEs, drive down risk and increase their competitiveness by lowering costs.⁷³ As an added benefit, ODR would help create a culture of contracts.

GZAC has held 61 seminars and press conferences to collect opinions and suggestions from scholars, e-commerce traders, and parties on how to improve the perception of its APEC-ODR platform.⁷⁴

eBRAM has provided Online Dispute Resolution training sessions to local legal professionals and jointly organised webinars with chambers of commerce to promote ODR to businesses in the APEC EC. It has also been engaged in advertising campaigns, research in the local community, and polling during webinars to raise awareness and promote the use of ODR. eBRAM created a dedicated webpage with ODR model clauses to encourage MSMEs to include an ODR Model Clause in their contracts. Businesses can copy the model clause in just one click. In addition, eBRAM Board of Directors and Management Team contributed thought-leadership articles in notable publications to advocate the benefit of ODR in the international arena.⁷⁵

Viet Nam recently held training sessions and an ODR pilot for Vietnamese MSME business leaders. The ODR pilot used online negotiation, mediation, and arbitration processes to resolve sample disputes from late delivery, payment, and quality issues. Training funds were provided by the Australian Department of Foreign Affairs and Trade, and ODR use during the pilot was facilitated by Resolve Dispute Online (Australia) and the Vietnam International Arbitration Centre (VIAC). Before the training, Vietnamese MSMEs surveyed favored negotiation as a means of resolving disputes. The use of arbitration and the courts were unpopular because they were too costly for MSMEs. Only a third of the participants believed ODR would help resolve their disputes. After the training, most of the MSMEs believed ODR would be important to resolve their disputes.⁷⁶

⁷² SELI Administrative Implementation Work Plan for the APEC ODR Collaborative Framework, Part IIC, endorsed by the EC at EC 1, 2021, http://mddb.apec.org/Documents/2021/EC/EC1/21_ec1_012.pdf.

⁷³ Report of 2018 Workshop for Developing an APEC Collaborative Framework for ODR, *supra* note 28 at 8.

⁷⁴ Report on 2022 Workshop on Implementing the APEC ODR Collaborative Framework, *supra* note 52 at 19 (GZAC Representative Mr. Chen Chen).

⁷⁵ *Id* at 19 (eBRAM CEO Ms. Pui-Ki Emmanuelle Ta).

⁷⁶ *Id* at 23 (Mr. Duong Nguyen, Viet Nam representative to the EC and the leader of the Vietnamese initiative to promote ODR capacity building for MSMEs).

Indonesia has held public engagements on ODR. Indonesia received strong support from its stakeholders— policymakers, academicians, law practitioners, and business entities including MSMEs—for its implementation of ODR. Stakeholders universally believe that ODR will bring substantial advantages for all parties, especially for MSMEs. Currently, Indonesia is also undertaking an assessment of its readiness to implement ODR and to opt into the ODR Collaborative Framework. It will also host an APEC Workshop on ODR in 2023.⁷⁷

II. Best Practices – Basic Principles Applying to ODR Providers and Neutrals

ODR’s use of technology raises ethical considerations. The UNCITRAL Technical Notes on ODR, therefore, emphasize “impartiality, independence, efficiency, effectiveness, due process, fairness, accountability, and transparency” as fundamental guiding principles.⁷⁸

In establishing the APEC ODR Collaborative Framework, economies concluded that ODR providers were responsible for process issues, including (1) accountability; (2) due process; (3) fairness; (4) transparency; (5) neutral appointment and selection; and (6) the performance capabilities of the ODR platform.⁷⁹ The following sub-sections consider the UNCITRAL ODR Technical Notes, the APEC ODR Model Rules, the NCTDR/ICODR ODR Standards,⁸⁰ and existing practices of partnering APEC ODR providers to set forth ethical principles to guide ODR providers and neutrals.

A. Accountability

ODR Platforms Should Be Auditable, and the Audit Made Available to Users.

The UNCITRAL ODR Technical Notes recognize accountability as a fundamental principle underpinning any ODR process.⁸¹

Under the APEC ODR Collaborative Framework, ODR providers must ask the parties to complete a brief and optional questionnaire asking, at a minimum, “As the primary party accessing the system:

- a) Do you think the process was fair or impartial?
- b) Do you think the dispute was handled in a reasonable timeframe?
- c) Do you think the neutral handled your case with dignity, fairness, and impartiality?
- d) Do you think the system was easy to use?

⁷⁷ Id. at 22 (Mrs. Netty Muharni, Indonesian Representative to the EC and the Assistant Deputy Minister for Regional and Subregional Cooperation).

⁷⁸ UNCITRAL ODR Technical Notes, para. 4.

⁷⁹ Report of 2018 Workshop for Developing an APEC Collaborative Framework for ODR, supra note 28 at 6.

⁸⁰ NCTDR/ICODR ODR Standards, supra note 20.

⁸¹ UNCITRAL ODR Technical Notes, para. 7.

e) Would you recommend ODR to others?”

ODR Providers must collate and submit questionnaire responses to the APEC EC.⁸²

The APEC ODR Collaborative Framework enlists academic experts to review ODR Providers’ compliance with the Framework and APEC ODR Model Rules and help bring Providers into compliance where necessary.⁸³ For example, the Singapore Management University law school reviewed each ODR provider listed on the APEC website for user-centeredness of the platform, including:

1. Efficiency of the Dispute Resolution process
2. Cost
3. User Interface
4. Linguistic Accessibility & Capabilities
5. Technical Support & Feedback Collection
6. User Capacity-Building

All APEC ODR providers that have partnered with APEC agreed to participate in the study. The study was presented at the APEC ODR Workshop in Tokyo on December 7-9, 2022.⁸⁴

The NCTDR/ICODR ODR Standards also emphasize accountability:

“ODR systems must be continuously accountable to the institutions, legal frameworks, and communities that they serve. ODR platforms must be auditable, and the audit must be made available to users. This must include human oversight of i) traceability of the originality of documents and of the path to the outcome when artificial intelligence is employed, ii) determination of the relative control given to human and artificial decision-making strategies, iii) outcomes, and iv) the process of ensuring availability of outcomes to the parties.”⁸⁵

B. Competency

ODR Providers Should Ensure Neutrals Have the Skills to Mediate and Arbitrate a Dispute and Manage the Technology.

Competence in an online ODR environment is broader than offline. A neutral must be competent in the assistance they provide to negotiating parties and in using the ODR technology.

The UNCITRAL ODR Technical Notes recommend that the ODR Administrator ensure competency through:

⁸² APEC ODR Collaborative Framework, paras. 4.3, 4.5.

⁸³ See APEC ODR Collaborative Framework, Removal Procedures, supra note 60.

⁸⁴ Ashraff Jinnah, Ben Edwards, Itay Limocy, Miran Faiza Khan, UX Review of APEC Approved Online Dispute Resolution Providers, December, 2022 (Singapore Management University).

⁸⁵ NCTDR/ICODR ODR Standards, supra note 20.

- [Implementation] of comprehensive policies governing the selection and training of neutrals.
- An internal oversight/quality assurance process... to ensure that a neutral conforms with the standards it has set for itself.
- [Ensuring] that neutrals have the relevant professional experience and dispute-resolution skills to enable them to deal with the dispute in question. However, subject to any professional regulation, ODR neutrals need not necessarily be qualified as a lawyer.⁸⁶

Under the APEC ODR Collaborative Framework, a provider may be removed from the list of partnering providers for failure to “create a roster of neutrals and ensure their adequate training.”⁸⁷ APEC lead academic institutions may be requested to assist in “training and building a local network of neutrals and experts in participating economies.”⁸⁸

The NCTDR/ICODR ODR Standards state that: “ODR providers must have the relevant expertise in dispute resolution, legal, technical execution, language, and culture required to deliver competent, effective services in their target areas.”⁸⁹

C. Security / Confidentiality

ODR Systems Should Be Created in a Secure Manner with Built-in Encryption and Security for Communications. ODR Providers Should Maintain Appropriate Cybersecurity and Data Protection Protocols. Users Must Be Informed About Unintended Breaches of Security Promptly Along with the Steps Taken to Prevent Reoccurrence.

According to the UNCITRAL ODR Technical Notes, the ODR platform should generate, send, receive, store, exchange or otherwise process communications “in a manner that ensures data security.” The UNCITRAL ODR Technical Notes further state that ODR proceedings are subject to the same confidentiality requirements applicable to dispute resolution offline.⁹⁰

The APEC ODR Collaborative Framework requires that all partnering ODR providers commit to keeping all information confidential and maintaining secure databases and websites.

Partnering ODR Provider eBRAM, for example, includes within its platform an authentication system to verify the identity of any party who registers. All documents exchanged through the platform are saved on highly secure cloud storage, using blockchain technology, to preserve file and meeting integrity. Data exchanged on the eBRAM ODR platform is encrypted during transmission and cloud storage. eBRAM also

⁸⁶ UNCITRAL ODR Technical Notes, paras 15-16, 47.

⁸⁷ APEC ODR Collaborative Framework, Removal Procedures, supra note 60.

⁸⁸ Id.

⁸⁹ NCTDR/ICODR ODR Standards, supra note 20.

⁹⁰ UNCITRAL ODR Technical Notes, paras. 26, 53.

enlists external, certified security experts to conduct privacy impact assessments and total system audit on its ODR platform.⁹¹

Under the Collaborative Framework, failing to keep all information confidential and maintain secure databases and websites is grounds for removal.⁹²

The APEC PPD Recommendations for Consumers' E-Commerce Dispute Resolution state that:

- "All personally identifiable information is encrypted and kept confidential."
- "Users are informed of data breaches within two weeks of the event."⁹³

The NCTDR/ICODR ODR Standards also mandate security standards:

"ODR providers must make every genuine and reasonable effort to ensure that ODR platforms are secure and data collected, and communications between those engaged in ODR are not shared with any unauthorized parties. Disclosures of breaches must be communicated along with the steps taken to prevent reoccurrence."⁹⁴

The NCTDR/ICODR ODR Standards further address confidentiality:

"ODR providers must make every genuine and reasonable effort to maintain the confidentiality of party communications in line with policies that must be articulated to the parties regarding i) who will see what data, ii) how and to what purposes that data can be used, iii) how data will be stored, iv) if, how, and when data will be destroyed or modified, and v) how disclosures of breaches will be communicated and the steps that will be taken to prevent reoccurrence."⁹⁵

D. Equality

ODR Providers Must Treat All Parties Equally, and Each Party Must Be Given a Full Opportunity to Present Its Case.

The UNCITRAL Model Law on International Commercial Arbitration, which was implemented by 17 of the 21 APEC economies, states that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."⁹⁶

⁹¹ Report on 2022 APEC Workshop on Providing Effective Dispute Resolution Mechanisms, supra note 7, at 25 (Statement of eBRAM CEO Ms. Pui-Ki Emmanuelle Ta).

⁹² APEC ODR Collaborative Framework, Removal Procedures, supra note 60.

⁹³ APEC PPD Recommendations for Consumers' E-Commerce Dispute Resolution, supra note 16, at 5-6.

⁹⁴ NCTDR/ICODR ODR Standards, supra note 20.

⁹⁵ Id.

⁹⁶ UNCITRAL Model Law on International Commercial Arbitration, Art. 18, supra note 46.

Both the UNCITRAL ODR Technical Notes and the APEC ODR Model Rules require that the neutral “treat both parties equally” throughout the proceedings.⁹⁷

The NCTDR/ICODR ODR Standards also state:

“ODR providers must treat all participants with respect and dignity. ODR must seek to enable often silenced or marginalized voices to be heard and strive to ensure that offline privileges and disadvantages are not replicated in the ODR process. ODR must provide access to process instructions, security, confidentiality, and data control to all parties. ODR must strive to ensure on an ongoing basis that no process or technology incorporated into ODR provides any party with a technological or informational advantage due to its use of ODR. Bias must be proactively avoided in all processes, contexts, and regarding party characteristics. ODR system design must include proactive efforts to prevent any artificial intelligence decision-making function from creating, replicating, or compounding bias in process or outcome. Human oversight is required in ODR system design and auditing to identify bias, make findings transparent to ODR providers and users, and eliminate bias in ODR processes and outcomes.”⁹⁸

E. Fairness and Impartiality

The ODR Administrator Should Adopt a Code of Ethics for its Neutrals to Guide Neutrals as to Conflicts of Interest and Other Rules of Conduct and Adopt Policies Dealing with Identifying and Handling Conflicts of Interest.

The UNCITRAL ODR Technical Notes recognize fairness and due process as principles that underpin any ODR proceeding. The UNCITRAL ODR Technical Notes further declare that “the same ... due process standards that apply to dispute resolution proceedings in an offline context [also apply in an online context], in particular independence, neutrality, and impartiality.”⁹⁹

To enhance independence, the UNCITRAL ODR Technical Notes recommend that the ODR Administrator adopt the following:

- A code of ethics for its neutrals that guides neutrals as to conflicts of interest and other rules of conduct, and
- Policies dealing with identifying and handling conflicts of interest.¹⁰⁰

Impartiality and Independence are also enshrined in the APEC ODR Model Rules. The APEC ODR Model Rules (following UNCITRAL ODR Technical Notes) provide in Article 11(3):

⁹⁷ UNCITRAL ODR Technical Notes, Art. 49(d); APEC ODR Model Rules Art. 13(2).

⁹⁸ NCTDR/ICODR ODR Standards, *supra* note 20.

⁹⁹ UNCITRAL ODR Technical Notes, paras. 7, 53.

¹⁰⁰ UNCITRAL ODR Technical Notes, paras. 13-14.

“The neutral shall, at the time of accepting his or her appointment, declare his or her impartiality and independence. The neutral, from the time of his or her appointment and throughout the ODR proceedings, shall, without delay, disclose to the ODR provider any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The ODR provider shall promptly communicate such information to the parties.”¹⁰¹

The APEC ODR Model Rules further provide in Article 13(2) (again following the UNCITRAL ODR Technical Notes):

“The neutral, in exercising his or her functions under the Rules, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall remain at all times wholly independent and impartial and shall treat both parties equally.”¹⁰²

The APEC ODR Model Rules also follow the UNCITRAL Arbitration Rules and contain a Model Statement of Independence:

“I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and any other neutrals, any such circumstances that may subsequently come to my attention during this ODR proceeding.”¹⁰³

Under the APEC ODR Collaborative Framework, “Failure to create a mechanism to ensure neutrals are impartial and independent from the parties who selected them” is grounds for removal for the ODR provider.¹⁰⁴

The NCTDR/ICODR ODR Standards also state:

“Fair and Impartial: ODR must treat all parties equitably and with due process, without bias or benefits for or against individuals, groups, or entities. Conflicts of interest of providers, participants, and system administrators must be disclosed in advance of the commencement of ODR services. The obligation to disclose such circumstances shall be a continuing obligation throughout the ODR process.”¹⁰⁵

¹⁰¹ APEC ODR Model Rules, Art. 11(3), following UNCITRAL ODR Technical Notes para. 48(b).

¹⁰² APEC ODR Model Rules Art. 13(2), following UNCITRAL ODR Technical Notes para. 49 (c)-(d).

¹⁰³ APEC ODR Model Rules (Appendix); UNCITRAL Arbitration Rules (as revised in 2010) (Annex) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf>.

¹⁰⁴ APEC ODR Collaborative Framework, Removal Procedures, *supra* note 60.

¹⁰⁵ NCTDR/ICODR ODR Standards, *supra* note 20.

F. Legality

ODR Providers Must Abide By, Uphold, and Disclose to the Parties the Relevant Laws and Regulations Under Which the Process Falls.

Under the APEC ODR Collaborative Framework, listed ODR providers are governed by the relevant laws and regulations of the respective participating economies. In most APEC economies, the UNCITRAL Model Law on International Commercial Arbitration provides the legal framework for online arbitral proceedings.¹⁰⁶ In addition, if a listed ODR provider is not in compliance with any part of the APEC ODR Collaborative Framework and Model Procedural Rules, APEC may remove the ODR provider from its list of partnering ODR providers.¹⁰⁷

The UNCITRAL Model Law on International Commercial Arbitration and the APEC ODR Model Rules provide the parties flexibility by allowing them to choose the rules of law applicable to the substance of the dispute, the place of arbitration, and the language of the proceedings.¹⁰⁸ The APEC ODR Model Rules further state, “These Rules shall govern the ODR proceedings ..., except that where any of these Rules is in conflict with a provision of the law applicable to the ODR proceedings from which the parties cannot derogate, that provision shall prevail.”¹⁰⁹

The NCTDR/ICODR ODR Standards state that “Legal: ODR providers must abide by, uphold, and disclose to the parties relevant laws and regulations under which the process falls.”¹¹⁰

G. Transparency

ODR Platforms Should (1) Publish Anonymized Data and Statistics on Outcomes in ODR Processes to Enable Parties to Assess Its Overall Record, Consistent with Applicable Principles of Confidentiality and (2) Provide All Relevant Information on Its Website in a User-Friendly and Accessible Manner.

According to the UNCITRAL Technical Notes on ODR, transparency underpins any ODR process.¹¹¹ In an e-commerce context, transparency must be balanced against confidentiality. The UNCITRAL ODR Technical Notes calls for ODR platforms to “publish anonymized data or statistics on outcomes in ODR processes, to enable parties to assess its overall record, consistent with applicable principles of confidentiality.” It also calls for “all relevant information to be available on the ODR administrator’s website in a user-friendly and accessible manner.”¹¹²

¹⁰⁶ UNCITRAL Model Law on International Commercial Arbitration, *supra* note 46.

¹⁰⁷ APEC ODR Collaborative Framework, Removal Procedures, *supra* note 60.

¹⁰⁸ UNCITRAL Model Law on International Commercial Arbitration, *supra* note 46, Arts. 20, 22, 28(1); APEC ODR Model Rules, Arts. 8(11), 16, 17.

¹⁰⁹ APEC ODR Model Rules, Art. 1(2).

¹¹⁰ NCTDR/ICODR ODR Standards, *supra* note 20.

¹¹¹ UNCITRAL ODR Technical Notes, para. 7.

¹¹² UNCITRAL ODR Technical Notes, paras 11-12.

Under the APEC ODR Collaborative Framework, ODR providers must gather basic information on their ODR success rate and submit that information to the EC:

- a. The number of ODR disputes initiated;
- b. The number of ODR disputes that were abandoned;
- c. The number of ODR disputes that were resolved through: (1) the Negotiation Stage, (2) the Mediation Stage, or (3) the Arbitration Stage;
- d. The number of counterclaims initiated;
- e. The time to resolution, defined by the total number of business days between the date of initiation and the date of final award;
- f. The number of disputes resolved through a money award and identification of the phase in which the resolution occurred and the amount of the award; and
- g. The number of counterclaims resolved through a money award and identification of the phase in which the resolution occurred and the amount of the award.¹¹³

The NCTDR/ICODR ODR Standards provide that:

“ODR providers must explicitly disclose in advance and in a meaningful and accessible manner: i) the form and enforceability of dispute resolution processes and outcomes and ii) the risks, costs including for whom, and benefits of participation. Data on ODR must be gathered, managed, and presented in ways to ensure it is not misrepresented or out of context. The sources and methods used to gather any data that influence any decision made by artificial intelligence must be disclosed to all parties. ODR that uses artificial intelligence must publicly affirm compliance with jurisdictionally relevant legislation, regulations, or in their absence, guidelines on transparency and fairness of artificial intelligence systems. ODR must clearly disclose the role and magnitude of technology’s influence on restricting or generating options and in final decisions or outcomes. Audits of ODR systems and platforms must identify metrics used to assess system performance, making the accuracy and precision of these metrics known and accessible to any ODR system operator and user. Users must be informed in a timely and accessible manner of any data breach and the steps taken to prevent reoccurrence.”¹¹⁴

¹¹³ APEC ODR Collaborative Framework, para. 4.3.

¹¹⁴ NCTDR/ICODR ODR Standards, supra note 20.

III. Best Practices – ODR for Business-to-Consumer Transactions

Background

During the negotiations leading to the adoption of the UNCITRAL ODR Technical Notes, two differing views had to be reconciled. The European Union opposes pre-dispute binding arbitration to preserve the traditional right of the consumer to go to court, while the United States and other economies believe that courts are not suited to low-value cross-border consumer e-commerce disputes. As a result, the UNCITRAL ODR Technical Notes do not call for arbitration in the third stage of the ODR dispute resolution process.

The APEC ODR Collaborative Framework excludes consumer transactions in keeping with the approach of many private international law instruments.¹¹⁵ It does provide for arbitration in the third and final stage because:

An ODR platform, with binding arbitration as a “backstop,” serves as a strong incentive to move the parties to voluntary resolution....[U]nder ODR, most cases will be resolved amicably through negotiation or facilitated settlement. If not resolved amicably, the parties need the option of online arbitration.¹¹⁶

On courts the view was that:

Domestic courts of member economies do not work well for cross-border disputes involving MSMEs. Domestic courts are too tied to geography, jurisdiction, and in-person enforcement. Even if special domestic courts were created or systems were made more efficient, the costs of local legal practitioners and travel plus culture and language barriers make access to redress a fiction for MSMEs transacting online with foreign companies.¹¹⁷

Most small business-to-business (B2B) disputes involve small businesses that have not received payment.¹¹⁸ However, most business-to-consumer (B2C) e-commerce disputes involve goods or services that were not received or do not conform to what was ordered.¹¹⁹ In most B2C disputes, the business is paid at the time of the order, and the consumer is the

¹¹⁵ As was pointed out when the APEC ODR Collaborative Framework was adopted, “many key private international law texts that underpin the international legal framework for developing ODR exclude consumers, including the UN Convention on Contracts for the International Sale of Goods, the UN Convention on the Use of Electronic Communications in International Contracts, the Hague Convention on Choice of Court Agreements, the Hague Principles on Choice of Law in International Commercial Contracts, and the UNIDROIT Contract Principles.” Report of 2018 Workshop for Developing an APEC ODR Collaborative Framework, *supra* note 28 at 11. Additionally, the Singapore Convention on Mediation, *supra* note 45, excludes consumers (Art.1(2)(a)).

¹¹⁶ Report of 2018 Workshop for Developing an APEC Collaborative Framework for ODR, *supra* note 28 at 11.

¹¹⁷ *Id* at 2.

¹¹⁸ See Federation of Small Businesses, Tied Up, Unraveling the Dispute Resolution Process for Small Businesses (2016) (“Disputes cost small businesses in England and Wales at least £11.6bn a year, with nearly 72 per cent of small business legal problems relate to late or non-payment issues.”); European Commission, Study on the use of Alternative Dispute Resolution for Business to Business disputes at 6-7, 124, (71 per cent of small business disputes involved payments). <https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/06/ADR-Final-Report-151012-1.pdf>.

¹¹⁹ See Ron Brand, Online Dispute Resolution (2019) at 31-32.

https://scholarship.law.pitt.edu/cgi/viewcontent.cgi?article=1456&context=fac_articles.

party ultimately seeking a remedy. Barring a consumer from pre-dispute binding arbitration in cross-border transactions may prevent the consumer from securing an effective remedy since businesses are unlikely to agree to ODR after the dispute arises, as shown by the EU experience below.¹²⁰

Consumers were initially excluded from the APEC ODR Collaborative Framework partly because the value of the dispute in B2C cases is typically small, and most e-commerce disputes involve B2B.¹²¹ That situation is changing. In June 2022, seven out of the top 10 economies for retail e-commerce sales growth were APEC economies, with an average growth rate projected at over 20 percent.¹²²

APEC economies will want to ensure that consumers' cross-border electronic transactions are adequately protected through an effective dispute-resolution process. Consumers can benefit enormously from access to competitively priced products in the global online marketplace. The retail digital economy also provides APEC MSMEs an opportunity to expand their customer base beyond domestic borders and build back better after the pandemic.

A. Enhance e-Platforms and e-Stores With ODR

A number of e-platforms in APEC successfully offer ODR for B2B and B2C disputes including:

- eBay resolves some 60 million disputes per year, and 90 percent of those disputes are resolved with software only, meaning that the parties worked out an agreement without the involvement of a third party;¹²³
- Alibaba provides timely and cost-effective online dispute resolution with trading partners, resolving 80% of complaints facilitated by AI only.¹²⁴

In fact, the ODR design offered by eBay and Alibaba served as models for developing the UNCITRAL ODR Technical Notes.

¹²⁰ See Notes 136-139 *infra* and accompanying text.

¹²¹ Business to Consumer (B2C) were initially excluded from the APEC ODR Collaborative Framework for three practical reasons: "First, the amounts at dispute in B2C cases are typically very small, and outcomes are difficult to enforce cross border. Second, the vast majority of e-commerce disputes involve B2B. UNCTAD has estimated that worldwide B2B e-commerce was worth some \$19.9 trillion in 2015, while B2C e-commerce was worth only \$2.2 trillion. Third, applicable laws for the protection of consumers vary widely within APEC." Report of 2018 Workshop for Developing an APEC ODR Collaborative Framework for ODR, *supra* note 28 at 10-11.

¹²² According to eMarketer: Singapore ranked first in the world in 2022 with 36% retail e-commerce growth; Indonesia second with 34% growth; the Philippines third with 25.9% growth; Australia sixth with 20% growth; Malaysia seventh with 18.3% growth; Thailand eighth with 18% growth; and Mexico ninth with 18% growth. eMarketer, Top 10 economies ranked by retail sales growth, June 2022, <https://www.insiderintelligence.com/content/top-10-countries-retail-ecommerce-growth>.

¹²³ Report of 2022 Workshop on Implementing the APEC ODR Collaborative Framework, *supra* note 52 at 18 (ODR.com CEO Colin Rule).

¹²⁴ Workshop on ASEAN Online Dispute Resolution, Role of ODR in successful conduct of E-Commerce and Cross-Border Trade, November 9, 2022 (Prof. Yongmin Bian, University of International Business and Economics, China and an APEC EC lead academic).

The International Standards Organization working group on online dispute resolution (ISO/TC321/WG 3) is developing standards for using ODR, including on e-platforms.¹²⁵

B. Enhance Domestic Small Claims Tribunals With ODR

In 2007, the European Union established the European Small Claims Procedure (ESCP) for cross-border litigation to provide a fast and inexpensive judgments in cross-border commercial disputes under 5000 Euros, including consumer disputes. The recognition and enforcement of a ESCP judgment in any EU member economy was also established.¹²⁶ However, several studies show that few use the ESCP procedure. Some commentators have called for establishing a European Online Platform for Small Claims to provide inter alia mediation and arbitration.¹²⁷

Establishing a similar APEC-wide network of small claims courts with authority to enforce judgments across borders would be challenging since APEC has no authority to issue binding regulations on economies. In cross-border consumer disputes in APEC, a foreign e-commerce supplier is unlikely to be amenable to suit in the jurisdiction of the consumer or have assets in that jurisdiction that can be used to provide an effective remedy or come from an economy that would recognize and enforce a judicial judgment issuing from the consumer's home jurisdiction (or at a cost that is not prohibitive to the consumer).¹²⁸

¹²⁵ See ISO/TC 321/Working Group 3, Online Dispute Resolution, *supra* note 21.

¹²⁶ Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007, as amended by Reg. 2015/2421, Establishing a European Small Claims Procedure in cross-border litigation. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32015R2421>. Consumers engaging in transactions with vendors within the European Union are also able to enforce judgments cross-border under the (recast) Brussels I Regulations (Regulation (EU) No 1215/2012).

¹²⁷ LV Mesquita, CM Cebola, European Small Claims Procedure: An Effective Process? A Proposal for an Online Platform, No2(No14) Access to Justice in Eastern Europe 7-21. DOI: 10.33327/AJEE-18-5.2-a000206 2022 https://ajee-journal.com/upload/attaches/att_1652690562.pdf ("bearing in mind the weaknesses of the ESCP, ... an online platform incorporating alternative dispute resolution mechanisms is the best option to promote access to justice"). See also M Velicogna, Cross-border dispute resolution in Europe: looking for a new "normal", *Oñati Socio-Legal Series* Volume 12, Issue 3 (2022), 556–581, <https://opo.iisj.net/index.php/osls/article/view/1365/1627> (noting generally that the European courts and the EU ODR platform do not function well in cross-border disputes).

¹²⁸ It should be noted that the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH Judgement Convention) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> will enter into force in September 2023. The Convention provides a complement to the New York Convention by providing rules under which civil and commercial judgments (including consumer e-commerce judgements) rendered by the courts of one Contracting Party are recognized and enforced in the other Contracting Parties.

The HCCH Judgments Convention follows EU law by protecting the consumer as the weaker party and generally "restricts the circulation of judgments against a consumer ... to those given in the [court] of that person's habitual residence absent express consent to the jurisdiction of another court by the consumer ... directed at that court." Francisco Garcimartín and Geneviève Saumier, Explanatory Report, Hague Judgements Convention (2020) at 108. <https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf>. However, the enforcement of consumer e-commerce judgements is not likely to improve even after the Convention enters into force. Under the Article 2, paragraph 3 exclusion of arbitration and related proceedings, "a requested [Party] may refuse under its national law or other international instruments, to recognize or enforce a judgment given in another [Contracting Party] if the proceedings in the [court] of origin were contrary to an arbitration agreement, even if the court of origin ruled on the validity of the arbitration agreement." Explanatory Report at 69. With regard to choice of court agreements, under Article 7(1)(d) of the

However, several APEC economies have successfully implemented ODR for their domestic small claim tribunals. The example of CRT in British Columbia is discussed above.¹²⁹

In the United States, courts that use ODR for family disputes, workplace disputes, landlord-tenant, debt collection, or small claims report expedited timelines of 4-5 days.¹³⁰

China is also making widespread use of ODR in courts since the pandemic. Before the pandemic, the government had established internet courts in Hangzhou, Guangzhou, and Beijing. These courts are reporting excellent results. For example, for the Hangzhou internet court:

- 90% of cases were filed online
- 100% heard online with the parties' agreement
- Online hearings took an average of 28 minutes
- The whole proceedings took an average of 38 days.

These courts use technology for case management (e.g., computerization of documents and processes) and to facilitate access to justice (e.g., special programs for parties that are not represented by lawyers).¹³¹ Several other APEC economies are considering enhancing their judicial systems with ODR for consumers.¹³²

C. Enhance Domestic Dispute Resolution with ODR Platforms

Several APEC economies have implemented domestic ODR platforms allowing businesses to agree to use ODR in advance. In Chile, in 2020, the Santiago Chamber of Commerce launched the B2C platform Resolución en Línea. Local businesses sign up voluntarily to offer ODR to their customers. So far:

Convention, "the court addressed [may] refuse to give effect to a judgement given by a court when the proceedings in the [court] of origin were contrary to a choice of court agreement." Explanatory Report at 121-122. Additionally, the Convention must be widely implemented by economies to have an effect. No APEC economy has implemented the Convention. See Hague Judgements Convention Status Table, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>. The New York Convention, on the other hand, has been implemented by 171 economies, including all APEC economies. See New York Convention, Status, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.¹²⁹ See notes 67-69 supra and accompanying text.

¹³⁰ Report on 2022 Workshop on Implementing the APEC ODR Collaborative Framework, supra note 52 at 18 (ODR.com CEO Colin Rule).

¹³¹ Id. at 18 (Prof. Yun Zhao, Head of the Department of Law at the University of Hong Kong, and an APEC EC lead academic).

¹³² For example, Russia has legislation pending that would provide ODR in courts for consumer cases. In the fall of 2022, the Moscow city consumer website was also launched. The service helps citizens learn about their rights as consumers of goods and services and make a claim or file a lawsuit. The website contains featured articles, instructions, videos, and online courses. Another popular feature is the "Electronic Assistant", which is a consumer protection lawsuit constructor. It allows users to easily submit a claim or file a suit in court using provided templates. The Electronic Assistant also can recommend a responsible authority or court to approach to resolve issues. The Consumer portal is part of the digital urban ecosystem. Since its launch in October, sixty thousand users have visited. See: Russian Response to EC Questionnaire, supra note 8.

- 169 companies have subscribed to the platform (62% MSMEs)
- Over 400 cases have been resolved
- The average claim value was USD 150
- The dispute settlement rate in 2022 was 66%, with almost all disputes resolved during the algorithm-assisted negotiation stage (99%)
- 50% of settlements were reached in less than 48 hours.¹³³

In Quebec, the Office of Consumer Protection provides free ODR to consumers and merchants through its ODR system “Parle Consommation.” Businesses sign up voluntarily to offer ODR (negotiation and mediation) to their customers. The platform was launched in 2016 and reports the following results:

- over 120 participating merchants
- over 5500 cases processed
- disputes settled within 25 business days
- a dispute settlement rate of more than 70%
- an average settlement value of over \$2000
- a user satisfaction rate of nearly 90% (even though the settlement rate was only 70%)
- uses AI to provide an effective translation service.

The process is roughly 12 times cheaper and faster than the traditional court process in Quebec.¹³⁴

Mexico’s Federal Consumer Protection Agency (PROFECO) launched a public ODR platform (“Concilianet”) in 2008. Participating Mexican businesses are listed on the PROFECO website. Before Concilianet, it took 120 days for consumer disputes to be resolved. The number dropped to 24 days with Concilianet. During COVID-19, the time increased to 47 days, still less than before Concilianet. In 2021, 10,341 claims were handled through Concilianet, with over 90% of the claims successfully resolved.¹³⁵

D. Enhance Cross-Border Dispute Resolution with ODR Frameworks

a. EU ODR Platform

¹³³ APEC Workshop on Implementing the APEC ODR Collaborative Framework, supra note 52 at 27-28. Email from Mr. Benjamin Astete-Heimpell, November 22, 2022, updating statistics.

¹³⁴ Quebec, Office of Consumer Protection, What is Parle Consommation, <https://www.opc.gouv.qc.ca/en/opc/parole/description/>; Email from Jean-Francois Roberge, February 8, 2022, providing additional statistics.

¹³⁵ APEC PPD Recommendations on Promoting Consumer Protection in the Dispute Resolution, supra note 16 at 10-11; PROFECO, Avance Y Resultados 2021, at 20, https://www.gob.mx/cms/uploads/attachment/file/735901/10_PI_PROFECO_AyR21.pdf; Que es Concilianet, <https://concilianet.profeco.gob.mx/Concilianet/>

In 2013, the EU adopted a directive on ADR for consumers that generally precludes pre-dispute binding arbitration in EU consumer cases.¹³⁶ An EU-wide ODR platform was subsequently

launched in 2016.¹³⁷ All EU online retailers and traders are obliged to provide an easily accessible link to the ODR platform and an e-mail address for the ODR platform to contact them. Participation in ODR or ADR is voluntary.

In 2020 the EU ODR platform had:

- 3.3 million visitors
- 17,461 formal claims, 50 % of which involved cross-border trade.

Only 1% of traders agree to ADR or ODR after the dispute arises, according to the 2020 figures. Half of the traders engage in informal negotiations with consumers on or off the platform.¹³⁸

The European Commission recently observed in calling for a review of the operation of the EU ODR Platform:

“Ensuring that consumers can easily solve their disputes with traders across borders in the EU is a pre-requisite for a well-functioning Single Market. Data shows that consumers are generally not willing to go to court to resolve low-value disputes... Despite a high visiting rate (over 2 million people per year since 2016), the Commission’s Online Dispute Resolution (ODR) platform, which aimed to facilitate the uptake of ADR procedures for digital markets, is hardly used, with less than 400 cases eventually processed by ADR entities across the EU/EEA per year. Sweeps carried out by consumer authorities keep finding that the majority of EU online traders do not comply with the requirement to include the link to the ODR platform on their website, either because they are not aware of the requirement or because they do not intend to use it anyway and want to avoid confusing their users.... [T]he workflow of the current ODR platform seems to be outdated and inefficient as an ADR entity can only intervene after the trader agrees to enter into an ADR process.”¹³⁹

b. The ASEAN ODR Regional Network

¹³⁶ Directive 2013/11 on alternate dispute resolution for consumer disputes, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>.

¹³⁷ Regulation No. 524/2013 on online dispute resolution for consumer disputes, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>.

¹³⁸ EU, Functioning of the EU ODR Platform, December 2021, <https://ec.europa.eu/info/sites/default/files/2021-report-final.pdf>.

¹³⁹ Consumer Rights, Adapting Out of Court Mechanisms to Digital Markets – Call for Evidence for an Impact Assessment (2022), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13536-Consumer-rights-adapting-out-of-court-dispute-resolution-to-digital-markets_en.

ASEAN issued Guidelines on ADR for Consumer Protection in October 2021¹⁴⁰ and Guidelines for ODR in July 2022.¹⁴¹ The Guidelines for ODR recommend two modes of government-led recourse (negotiation and mediation) for B2C disputes but note that “the rules of procedure for the ODR system procedures could foresee ... more complex and stricter requirements, for example, arbitration.”¹⁴² The ultimate goal is the establishment of the ASEAN ODR Regional Network, providing for “more effective resolution of cross-border consumer disputes that may otherwise not be adequately resolved due to limitations of jurisdictional reach and enforcement of decisions beyond [domestic] borders.”¹⁴³

The ASEAN ADR Guidelines for Consumer Protection provide helpful guidance for establishing cross-border mechanisms for ODR of B2C disputes. The Guidelines recommend allowing the consumer in B2C e-commerce to agree to the future use of ODR, consistent with applicable legal requirements. The Guidelines state the following:

Importance of a contractual ADR clause: Unlike domestic consumer disputes, the issue of litigation is much more complex where cross-border disputes are concerned. In such situations, access to litigation in a domestic court is often not so clear-cut, as the issue of which court has jurisdiction over the subject matter of the dispute, or is the appropriate forum for deciding the dispute, is a complex one that is governed by the principles of private international law. Indeed, to add to that complexity, each [economy’s] rules of private international law are different and thus the same issue of whether a domestic court can or should exercise jurisdiction over a dispute is often treated differently in different [economies]. Consequently, the process of commencing litigation in respect of a cross-border dispute is often a lengthy and complicated process spanning several years, involving parallel litigation in multiple courts and very substantial legal costs even in the preliminary phase of establishing the appropriate domestic forum for the litigation of the international dispute. Most of these problems can be fixed if parties were to enter into a contractual ADR clause. This would take the dispute entirely out of any domestic litigation situation and allow the dispute to be resolved by ADR, thereby avoiding the bulk of the conflicts of laws problems. ...

“Parties may agree to proceed to arbitration after a dispute has already arisen. However, in such a situation, since the dispute has already arisen, a party who has a weak legal case may not be willing to participate in arbitration and would simply avoid any form of dispute resolution premised on a finding of law.”¹⁴⁴

In Principle 7 on Legality, the ASEAN ADR Guidelines for Consumer Protection further state that economies “shall ensure that in ADR procedures which are aimed at resolving the dispute by imposing a solution on the consumer, the solution imposed shall not result in the consumer

¹⁴⁰ ASEAN Guidelines for ADR for Consumer Protection, supra note 17.

¹⁴¹ ASEAN Guidelines for ODR, supra note 18.

¹⁴² Id., para. 23.

¹⁴³ Id., para. 83.

¹⁴⁴ ASEAN Guidelines on ADR for Consumer Protection, supra note 17 at 15, 34-35.

being deprived of the protection afforded to him by the mandatory provisions of the law of the [economy] of the applicable law.”¹⁴⁵

c. Application of the APEC ODR Collaborative Framework to Consumers

While the APEC ODR Collaborative Framework excludes consumers, the approach taken in the APEC ODR Model Rules is substantially like the ASEAN ADR Guidelines for Consumer Protection. The APEC ODR Model Rules encourage the parties to agree to the future use of ODR in the dispute resolution clause and provide for agreement to use ODR post-dispute.¹⁴⁶ The APEC Rules contain a model ODR clause that is similar to the ASEAN ADR Guidelines model clause.¹⁴⁷ Article 1(2) of the APEC ODR Model Rules also expressly provides that “These Rules shall govern the ODR proceedings ...except that where any of these Rules conflict with a provision of the law applicable to the ODR proceedings from which the parties cannot derogate, that provision shall prevail.”¹⁴⁸ Thus, the APEC ODR Model Rules bind the parties to the extent that domestic law allows and cannot override applicable mandatory law at the domestic level (which could include applicable consumer protection laws concerning pre-dispute binding arbitration).

The APEC ODR Collaborative Framework could potentially be extended to consumers if the ongoing ODR pilot is successful. Generally, B2C disputes would not involve any issue concerning the use of pre-dispute binding arbitration since (1) most APEC economies permit pre-dispute binding arbitration and (2) most cases will be submitted by consumers against businesses since the businesses will have already been paid.¹⁴⁹ By bringing a claim, the consumer would be agreeing to arbitration post-dispute. In the unlikely event that a claim is submitted by a business against a consumer from a jurisdiction that prohibits pre-dispute binding arbitration, the neutral could determine whether the ODR arbitration clause is binding.¹⁵⁰

Conclusion

ODR e-justice is an essential component of economic growth. It can help expand markets across borders. The APEC ODR Collaborative Framework brings effective dispute-resolution remedies to the millions of small businesses and consumers who do not have any recourse.

¹⁴⁵ Id. at 24-25.

¹⁴⁶ APEC ODR Model Rules, Art. 15,

¹⁴⁷ APEC ODR Model Rules, Appendix.

¹⁴⁸ APEC ODR Model Rules, Art. 1(2).

¹⁴⁹ See Notes 118-120 and accompanying text.

¹⁵⁰ Moreover, consumers in jurisdictions where pre-dispute arbitration agreements are not considered binding would not be bound by any award under their national legislation (failing a post-dispute agreement to arbitrate). In this regard, Article 36(1)(b) of the UNCITRAL Model Law on International Commercial Arbitration, supra note 46 and Article V(2)(b) of the New York Convention, supra note 46, both provide that the economy in which recognition or enforcement is sought need not recognize or enforce an arbitral award if the award would be contrary to its own public policy.

Best practices in designing an ODR platform include removing the barriers preventing parties from using ODR. All communications should occur via an ODR platform that uses advanced technology and algorithmic tools to help the parties find a resolution without a neutral third party. The platform should follow a user-centric design and ensure procedural flexibility, efficiency, accessibility, affordability, and usability. Best practice principles for ODR platform providers and neutrals include accountability, competency, security and confidentiality, equality, fairness and impartiality, legality, and transparency.

Several B2C e-commerce ODR systems have been implemented and could serve as models that APEC economies could consider to protect consumers' electronic transactions. These systems include e-commerce platform ODR, domestic small claims tribunal ODR, and domestic governmental ODR platforms. If the APEC ODR Collaborative Framework is successful, those models could serve as the inspiration to extend the Framework to cross border B2C e-commerce transactions.

ODR and the APEC ODR Collaborative Frameworks can make a difference for people in APEC and worldwide. Working together, APEC Economies can build ODR that is the cornerstone for the next global justice system.