

An AIAC Webinar Series (4 June 2020) -
Confessions of a Shopaholic: Dispute Resolution and E-Commerce

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Creating statutory or treaty-based ODR or ADR schemes for e-commerce disputes?

1. Good afternoon from Hong Kong! First, I would like to thank Diana and the AIAC for inviting me to speak at this webinar and it is my honour to be virtually sitting alongside with my fellow distinguished panelists. Bahari highlighted some challenges of dispute resolution for e-commerce and Joe introduced the benefits of ODR and how it would work for e-commerce disputes.
2. In the next 10 minutes or so, I hope to share with you the ODR initiative in APEC and the latest developments on ODR in Hong Kong, which may provide some insights on the challenges or need for any statutory or treaty-based ODR schemes for e-commerce.
3. As early as 2017, in APEC, we started asking the question - could modern technology help the businesses, especially micro-, small- and medium-sized enterprises (MSMEs), in their dispute resolution? This is not a novel idea. Indeed, the United Nations Commission on International Trade Law (UNCITRAL) has started a project for online dispute resolution since 2010 and developed a “technical note” on ODR in 2016. The work of UNCITRAL on ODR provided some useful insights and guidance to the Economic Committee’s Friends of Chair group, namely, Strengthening Economic and Legal Infrastructure which was studying the significant hurdles faced by MSMEs when it comes to access to justice in cross border transactions. For instance, we found that, according to a study by the APEC Business Advisory Council, 94% of MSMEs reported that dispute resolution was one of

the greatest challenges they face when trading across borders. Another study reported that as many as 35% of cross-border disputes involving MSMEs remain unresolved, with the average value of the dispute being some USD50,000.

4. Since then, a work plan has been developed to promote the use of modern technology for electronic contract management and ODR. Numerous meetings and workshops were held to develop an ODR framework and model procedural rules. In August 2019, the Economic Committee finally endorsed the APEC Collaborative Framework on ODR of Cross-Border B2B Disputes with a set of Model Procedural Rules, which is designed to aid small businesses to overcome hurdles for accessing justice in cross-border transaction disputes.
5. Now, some of you may ask whether the APEC framework is a treaty-based scheme among the APEC economies. The answer is no. The APEC framework is a voluntary opt-in framework in which member economies are free to opt-in or not.
6. Basically, the idea is that the APEC ODR framework creates a framework for businesses (particularly MSMEs) to provide ODR through negotiation, mediation, and arbitration for business-to-business disputes. APEC would not set up its own ODR platform (there were discussion but it was quickly decided that that would not be practicable due to manpower and financial constraints), instead, APEC would encourage MSMEs to resolve low-value disputes using these ODR service providers from member economies which have opted into the Framework since the member economies and their ODR service providers would have agreed to follow the Framework and the model rules designed to resolve low value cross border B2B disputes. As of today, China; Hong Kong, China; Japan; Singapore and the United States have opted into the framework, while a number of economies are actively considering the possibility of joining.
7. At this point, maybe some of you would be under an impression that the ODR initiative has come on easy in APEC. The truth is that it has

travelled quite a long way before reaching today's success. As I just mentioned, UNCITRAL started the work from 2010 but even after years and years of prolonged discussions, it had been proven too difficult, if not impossible, to come to a consensus on a treaty or even model law of some sorts for the use of ODR. In the end, the Technical Notes on ODR prepared by the working group was adopted by UNCITRAL as a rather loose set of non-binding note about ODR.

8. Learning from the experience from UNCITRAL, the APEC delegates decided to adopt a more flexible approach in creating the framework for members economies to opt-in. Therefore, it is limited to business to business disputes as the UNCITRAL lesson was that consumer disputes could be sensitive and controversial given the varying level of consumer protection law in different jurisdictions which is virtually impossible to harmonise in the foreseeable future. In fact, the framework is not intended to interfere with the domestic law or operation by participating economies of their own ADR systems. Moreover, unlike some proponents for bilateral arbitration treaty, the APEC ODR Framework does not replace the use of traditional litigation or alternative dispute resolution means, but it merely opens up an additional cost-effective and speedy option which would be particularly useful for MSMEs.

9. In order to address any potential issues that could arise from the implementation of the framework and to catch up with modern technology (including use of AI, 5G or other developments), APEC members agreed on implementing the framework on an pilot basis, which means the whole project will be subject to review, therefore providing rooms for improvement. In fact, the beauty of the APEC Framework is its flexibility, when developing the framework, there were discussion on whether we need to define ODR or some technical components, but after discussion among experts, it is considered undesirable since technology changes so fast. The pilot period would also allow governments, businesses (especially MEMEs) and ODR service providers enough time and space to promote and familiarise with the use of ODR through capacity building workshops, seminars and policy discussions in the first two years.

10. In light of the above, it seems that the APEC approach would be more preferable to a treaty-based scheme, especially in our fast-changing world and the emerging new technology. The success of the APEC ODR framework shows that even without a treaty, there can still be concerted efforts and consensus in a multilateral setting for more access to justice and trade growth.
11. The APEC Framework is not only a success of its own, it has also provided stimulus to ODR development in individual member economies. For instance, the Government of Hong Kong noted the development of the ODR framework in APEC and its benefits for businesses especially even in times where face-to-face meetings or physical hearings are neither encouraged nor allowed, and in anticipation of an upsurge of disputes arising from or in connection with Covid-19, the Government recently introduced the “COVID-19 ODR Scheme” operated independently by eBRAM Centre.
12. The Scheme is in line with the APEC ODR framework and aims to provide the general public and businesses, particularly MSMEs, speedy and cost-effective means to resolve low value disputes (below HKD500,000). The structure of the Scheme resembles that of the APEC ODR framework in that ODR is provided through the three stages of negotiation, mediation, and arbitration while it is not limited to business to business disputes. It is not based on statute or legislation but is solely based on the consensus of the parties to disputes, respecting full party autonomy. It is expected that the Scheme will be launched later this month.
13. In short, I would like to say that the experience of APEC and Hong Kong shows that it does not need a treaty or statute for ODR of e-commerce. In fact, to catch up with modern technology, it may not be desirable to build ODR based on statute or treaty, which as we know, are difficult to change quickly in order to adapt to the constant changes in modern technology and the needs in the fast developing digital economy.
14. Thank you.