

APEC ODR Framework and COVID-19 ODR Scheme

Dr. James Ding

*Commissioner
Inclusive Dispute Avoidance and Resolution (IDAR) Office
Department of Justice
Hong Kong Special Administrative Region of the People's Republic of China*

*Chair
APEC Economic Committee*

HCCH Third Meeting of the Experts' Group on the Tourists and Visitors (ODR) Project

6-9 October 2020

Overview of ODR Initiatives

APEC

- APEC Collaborative Framework for ODR of Cross-Border Business-to-Business Disputes (APEC ODR Framework)

Hong Kong, China

- COVID-19 ODR Scheme (Scheme)

APEC ODR Framework



Asia-Pacific
Economic Cooperation

- ▶ An APEC-sponsored initiative to use ODR to help global businesses, in particular **micro, small and medium-sized enterprises (MSMEs)** to resolve **business-to-business (B2B) cross border disputes**.
- ▶ Endorsed by the APEC Economic Committee (EC) in August 2019, including its ***Model Procedural Rules***.
- ▶ A framework for business, in particular MSMEs in participating economies, to provide **technology-assisted dispute resolution** through **negotiation, mediation and arbitration** for B2B claims.
- ▶ **Rationale:** lack of effective/efficient means to resolve cross border commercial disputes for MSMEs; traditional means of dispute resolution is lengthy, costly and with uncertainty over enforceability of outcomes.
- ▶ **Objective:** to promote B2B cross border confidence by providing quick electronic resolution and enforcement of disputes across borders, languages and different legal jurisdictions.

APEC ODR Framework - Background

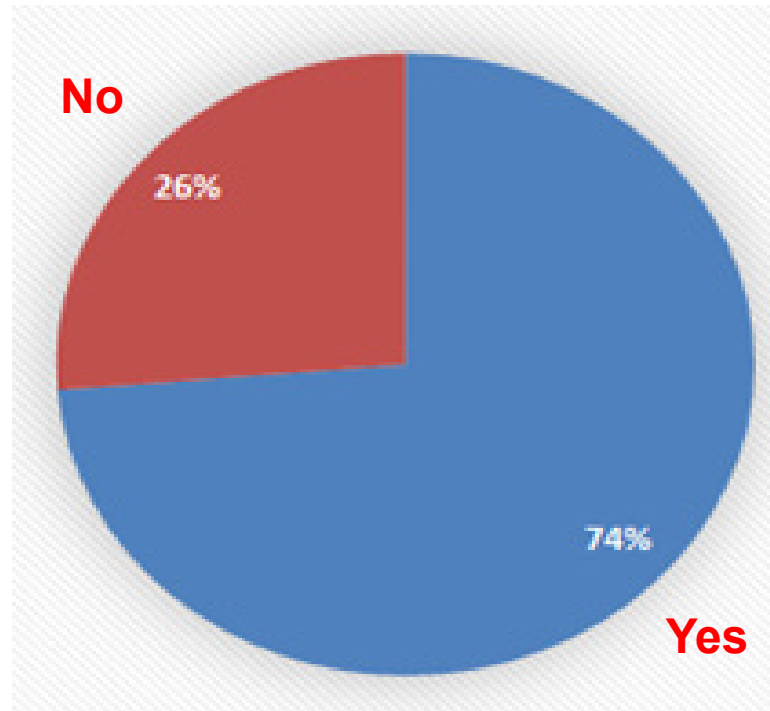
What are the three main obstacles or challenges your organisation faces when seeking to resolve cross border commercial disputes?



Questionnaire from APEC EC to APEC Business Advisory Council (ABAC) and member economies in 2017

APEC ODR Framework - Background (cont'd)

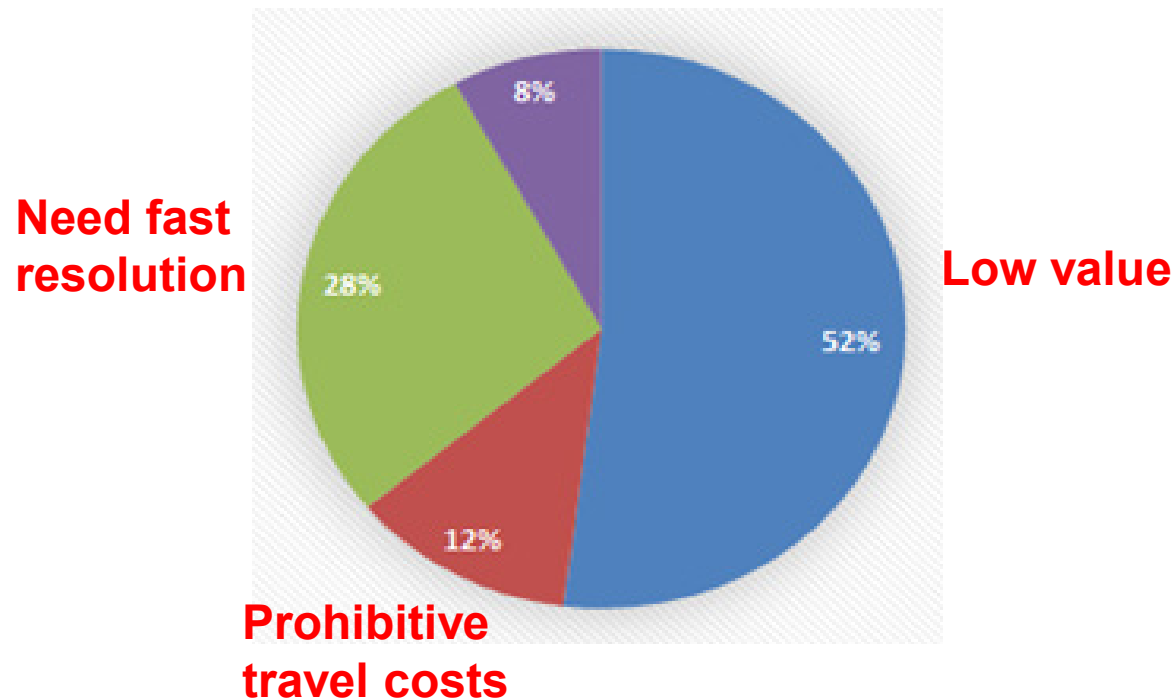
Would you like to have the option of using ODR to resolve disputes?



Questionnaire from APEC EC to ABAC and member economies in 2017

APEC ODR Framework - Background (cont'd)

What types of dispute are best suited to ODR?



Questionnaire from the APEC EC to ABAC and member economies in 2017

APEC ODR Framework - Background (cont'd)

How important do you think ODR mechanisms are for the growth of the digital economy?

	Not at all/ Slightly important	Important/ Moderately important	Very important
All	11.4%	62.3%	22.2%
North America	20.6%	45.5%	23.5%
Northeast Asia	11.4%	65.1%	20.8%
Oceania	16.5%	64.7%	14.1%
Pacific South America	8.7%	69.6%	15.2%
Southeast Asia	8.5%	61.7%	27.9%
Large Business	20.8%	57.3%	22.0%
MSMEs	10.3%	61.8%	25.7%

*2017 Asia-Pacific Policy Community Survey by Pacific Economic Cooperative Council:
disaggregated result*

APEC ODR Framework - Background (cont'd)

- ▶ **One of the greatest challenges faced by MSMEs** when trading across borders is returns and **dispute resolution**, with **94%** of them reporting that was a problem. (*“Driving Economic Growth Through Cross-Border E-Commerce in APEC: Empowering MSMEs and Eliminating Barriers”* published by ABAC in November 2019)
- ▶ Another study on the use of ADR for business to business disputes in the European Union reported that **over 35% of cross-border disputes involving MSMEs remain unresolved** with the average value of the dispute being some **US\$50,000**. (*“Study on the use of Alternative Dispute Resolution for Business to Business disputes in the European Union”* published by Ecorys, jointly with the ADR Center S.p.a. in October 2012)

APEC ODR Framework - Scope

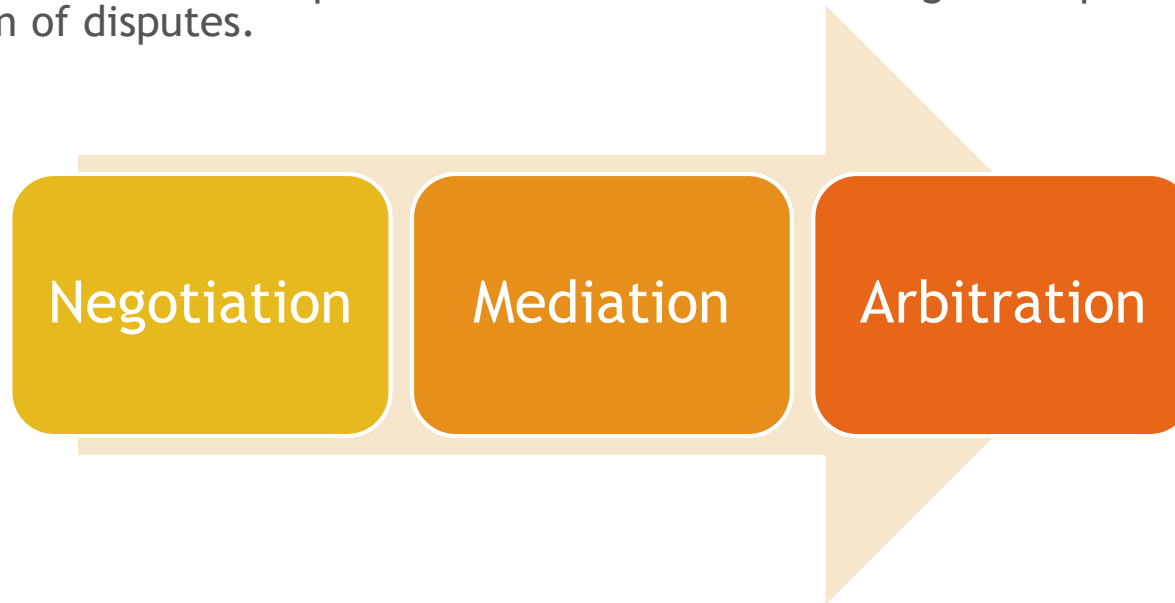
The *APEC ODR Framework* applies to disputes which are:

- ▶ **Business-to-business**;
- ▶ **Cross-border**;
- ▶ **Low value** (as may be defined by the participating economies);
and
- ▶ Involving **businesses in participating economies**, provided that the parties have consented to resolve their disputes under the *APEC ODR Framework*.

(Paragraphs 1.1 and 1.2 of APEC ODR Framework)

APEC ODR Framework - ODR Proceedings

- ▶ Governed by the *Model Procedural Rules*, subject to such modifications as the parties may agree.
- ▶ Participating APEC ODR providers operating under the APEC ODR Framework agree to use the *Model Procedural Rules*.
- ▶ Not intended to interfere with the operation by participating economies of their own ADR systems.
- ▶ Adopts a **multi-tiered** dispute resolution mechanism designed to provide quick resolution of disputes.



APEC ODR Framework - ODR Proceedings (cont'd)

Commencement of ODR Proceedings

- ▶ **Notice:** ODR proceedings shall be deemed to commence when the Claimant communicates to the ODR provider a notice (Notice) and the ODR provider notifies the Respondent availability of the Notice (*Article 4 of Model Procedural Rules*).
- ▶ **Response:** The Respondent shall communicate to the ODR provider a response to the Notice (Response) **within [7 calendar days]** of being notified of the availability of the Notice (*Article 5 of Model Procedural Rules*).

APEC ODR Framework - ODR Proceedings (cont'd)

3 Stages of the Dispute Resolution Mechanism

▶ (i) Negotiation Stage:

▶ Commences upon:

- ▶ communication of a Response by the Respondent to the ODR provider, and notification thereof to the Claimant (where the Response does not contain any counterclaim); or
- ▶ communication of a response to the Response by the Claimant to the ODR provider, and notification thereof to the Respondent (where the Response contains a counterclaim).

(Article 6(1) of Model Procedural Rules)

- ▶ Parties shall settle their dispute by negotiation **within [10 calendar days]** of commencement of the negotiation stage, and may agree to a **one-time extension of no more than [10 calendar days]** of the deadline for reaching settlement, failing which the mediation stage shall commence *(Articles 6(4) and (5) of Model Procedural Rules)*.

APEC ODR Framework - ODR Proceedings (cont'd)

▶ (ii) Mediation Stage:

- ▶ Upon commencement of the mediation stage, the ODR provider shall promptly **appoint a neutral** to mediate the dispute who would assist the parties to reach a binding settlement agreement (*Article 7(1) and (2) of Model Procedural Rules*).
- ▶ Parties shall settle their dispute by mediation **within [10 calendar days]** of being notified of the appointment of the neutral, failing which the proceedings shall move to the final (arbitration) stage (*Article 7(3) of Model Procedural Rules*).

APEC ODR Framework - ODR Proceedings (cont'd)

▶ (iii) Arbitration Stage:

- ▶ Upon commencement of the arbitration stage, the neutral shall fix a **date for any final communications to be made**; such date shall **not be later than [10 calendar days]** from the expiry of the mediation stage (*Article 8(1) of Model Procedural Rules*).
- ▶ Each party bears the burden of proving the facts relied on to support its claim or defence (*Article 8(2) of Model Procedural Rules*).
- ▶ The neutral shall evaluate the dispute based on information submitted by the parties and **render an award** promptly, preferably **within [10 calendar days]** from a specified point in proceedings as determined by the ODR provider (*Articles 8(3) and (7) of Model Procedural Rules*).
- ▶ The award shall be communicated to the parties by the ODR provider and **recorded on the ODR platform** (*Article 8(4) of Model Procedural Rules*).
- ▶ The award shall be **final and binding** on the parties (*Article 8(9) of Model Procedural Rules*).

APEC ODR Framework - ODR Proceedings (cont'd)

Other Circumstances

- ▶ Parties may **proceed directly to the mediation stage** without going through the negotiation stage under the following circumstances:
 - ▶ where the **Respondent does not communicate a Response to the ODR provider** in the prescribed form and within the fixed time limit, then the parties shall proceed to the mediation stage after the expiration of the period for communicating a Response (*Articles 6(1) and (3) of Model Procedural Rules*); or
 - ▶ upon commencement of the negotiation stage, **one or both parties request that the process move to the mediation stage** or **a party elects not to engage in the negotiation stage** (*Article 6(3) of Model Procedural Rules*).
- ▶ The ODR proceedings may be modified with the parties' agreement (*Article 1(2) of the Model Procedural Rules*).

APEC ODR Framework - Other Matters

▶ Applicable law and jurisdiction:

- ▶ The neutral shall apply the rules of law **designated by the parties** as applicable to the substance of the dispute. Failing such designation, **the neutral shall apply the law which it determines to be appropriate** (*Article 8(11) of Model Procedural Rules*).

▶ Enforcement:

- ▶ Member economies are invited to support and develop **private international law instruments** and/or enter into **bilateral agreements** enabling the cross-border recognition and enforcement of awards (*para 7.1 of APEC ODR Framework*).

▶ Neutrals:

- ▶ Appointed by the ODR provider, with opportunities for parties to object (*Article 11 of Model Procedural Rules*).
- ▶ **One neutral** to conduct the entire ODR proceedings (*Article 11(8) of Model Procedural Rules*).

▶ Fees:

- ▶ Any fees charged under the *APEC ODR Framework* should be **affordable and commensurate with the amount in dispute** (*para 4.2 of APEC ODR Framework*).

APEC ODR Framework - Looking Ahead

1. Opting in by APEC member economies

- ▶ As at 1 October 2020, **China, Singapore, the USA and Japan**, as well as **Hong Kong, China**, have opted into the *APEC ODR Framework*.
- ▶ A number of other APEC member economies are undergoing internal procedures with a view to opting into the APEC ODR Framework in the very near future.

APEC ODR Framework - Looking Ahead (cont'd)

2. Listing of ODR providers from APEC member economies

- ▶ **A list of independent ODR providers** willing to undertake the terms of the *APEC ODR Framework* will be maintained on APEC EC's website (<https://www.apec.org/Groups/Economic-Committee>).
- ▶ Each ODR provider will **provide its own ODR platform** for the resolution of disputes under the *APEC ODR Framework*.
- ▶ To-date, a number of ODR providers have expressed interest in participating in the pilot:
 - ▶ Fairway Resolution
 - ▶ Arbitration and Mediation Center, Chamber of Commerce Chile
 - ▶ the Thai Arbitration Center
 - ▶ CIETAC
 - ▶ the Mediation Center of CCPIT
 - ▶ eBRAM International Online Dispute Resolution Centre Limited
 - ▶ JAMS



Development of ODR in Hong Kong, China



- ▶ The Government of the Hong Kong Special Administrative Region of the People's Republic of China (HKSAR) has always encouraged and supported the development of ODR in the HKSAR, including the development of an ODR platform.
- ▶ The Department of Justice of the HKSAR has been working closely with eBRAM International Online Dispute Resolution Centre Limited (**eBRAM Centre**), a local non-governmental organisation founded by members from major professional bodies of Hong Kong's legal and IT sectors, on the development of an **efficient, cost-effective and secure platform** for **online deal-making and dispute resolution**.
- ▶ Developments of ODR in the HKSAR have been in line with the developments under APEC.

COVID-19 ODR Scheme

- ▶ Introduced by the HKSAR Government in April 2020, in anticipation of an upsurge of disputes arising from or relating to the COVID-19 pandemic.
- ▶ Aims to provide a **speedy and cost-effective means** for the **general public and businesses in the HKSAR** to resolve global and local **COVID-19 related disputes of low value**.
- ▶ **In line with the developments under the APEC ODR Framework**, without limiting to B2B disputes.
- ▶ **eBRAM Centre** has been engaged as the service provider of the Scheme.

COVID-19 ODR Scheme - Scope

- ▶ **Disputes arising out of or in relation to COVID-19** directly or indirectly;
- ▶ Either one of the disputing parties must be a **HKSAR resident or company**; and
- ▶ Claim amount must **not be more than HK\$0.5 million** (approximately US\$65,000).
- ▶ Does not cover disputes the subject matter of which are not arbitrable under the laws of the HKSAR.

COVID-19 ODR Scheme - ODR Proceedings

- ▶ Governed by a set of procedural rules (*eBRAM Rules*), subject to such modifications as the parties may agree and eRRAM Centre may accept. eBRAM Rules are **largely consistent with the Model Procedural Rules** under the *APEC ODR Framework*.
- ▶ To commence proceedings under *eBRAM Rules*:
 - ▶ (i) the parties are required to **enter into an ODR Agreement**; and
 - ▶ (ii) each party is required to pay **an online registration fee of HK\$200** (equivalent to approximately US\$26).
(*Article 4 of eBRAM Rules*)

COVID-19 ODR Scheme - ODR Proceedings (cont'd)

- ▶ The **ODR Agreement** shall include:
 - ▶ (a) The name and contact details (including Electronic Address) of the Claimant and its representative (if any);
 - ▶ (b) The name and contact details (including Electronic Address) of the Respondent and its representative (if any) known to the Claimant, and proof of authorization of representation;
 - ▶ (c) The grounds on which the claim is made and brief details of the nature of the dispute;
 - ▶ (d) Any solutions proposed to resolve the dispute;
 - ▶ (e) The parties' preferred language of Proceedings;
 - ▶ (f) The waiver by the relevant party the part of its claim or counterclaim which exceeds HK\$500,000; and
 - ▶ (g) The signature or other means of identification and authentication of the parties and/or the parties' representatives.

(Article 4.4 of eBRAM Rules)

COVID-19 ODR Scheme - ODR Proceedings (cont'd)

- ▶ Proceedings are commenced when the parties have been notified by eBRAM Centre that the ODR Agreement is available on its platform. *(Article 4.3 of eBRAM Rules)*
- ▶ Respondent must upload its response to the claim and its grounds (and all documents and evidence as far as possible) **within 3 calendar days**.
- ▶ If there is a counterclaim, the Claimant has **3 calendar days** thereafter to respond to the counterclaim. *(Article 5 of eBRAM Rules)*
- ▶ Adopts a **three-tiered** dispute resolution mechanism, consistent with the mechanism under the *APEC ODR Framework*, with each tier to be conducted within a limited time frame.



COVID-19 ODR Scheme - ODR Proceedings (cont'd)

▶ Negotiation Stage

- ▶ If no settlement by negotiation **within 3 calendar days** (subject to **extension for up to 3 days**), the mediation stage of the proceedings shall commence immediately. (*Article 6 of eBRAM Rules*)

▶ Mediation Stage

- ▶ Following appointment of a mediator, the mediator will communicate with the parties through the eBRAM platform to attempt to reach settlement. If settlement is reached, the parties execute the settlement agreement electronically.
- ▶ If no settlement **within 3 calendar days**, the arbitration stage of the proceedings shall commence immediately. (*Article 7 of eBRAM Rules*)

▶ Arbitration Stage

- ▶ Following appointment of an arbitrator, the arbitrator shall notify the parties of a deadline (**no later than 1 month from the arbitrator's appointment**) by which all communications and submissions should be made.
- ▶ The arbitrator shall resolve matters of jurisdiction and arbitrability (if any) and shall resolve the dispute on the information provided by the parties and render a final and binding award **within 7 calendar days from the filing of the last submissions**. There is no avenue of appeal. (*Article 8 of eBRAM Rules*)

COVID-19 ODR Scheme - ODR Proceedings (cont'd)

- ▶ For disputes the **subject matter of which are not arbitrable** under the laws of the HKSAR, parties may still attempt to resolve their disputes under the negotiation stage and the mediation stage. However, if the parties fail to settle their disputes under these two stages, upon expiry of the mediation stage:
 - ▶ parties may elect to **terminate the proceedings**; or
 - ▶ if the parties fail to agree on the arbitrability of the dispute, the proceedings shall nonetheless proceed to the arbitration stage, and **the issue shall be determined by the neutral** appointed to conduct the arbitration proceedings.

(Article 7.3 of the eBRAM Rules)

COVID-19 ODR Scheme - Other Matters

- ▶ **Applicable law and jurisdiction:** the laws of the HKSAR.
- ▶ **Neutrals:**
 - ▶ Appointed by the **parties' agreement**: at the commencement of each of the mediation stage and arbitration stage, eBRAM Centre shall generate a list of 5 names from whom the parties may agree to appoint as the neutral to conduct the relevant proceedings. Should the parties fail to agree on such appointment, eBRAM Centre shall appoint the neutral (*Articles 7.1 and 8.1 of eBRAM Rules*).
 - ▶ **Each stage** of the proceedings (i.e. mediation stage and arbitration stage) shall be conducted by **one neutral** (*Article 11.1 of eBRAM Rules*).
 - ▶ **Fees** of mediators and arbitrators are **covered by funding support** provided by the HKSAR Government.
- ▶ **Fees:** each of the disputing parties are only required to pay **an online registration fee of HK\$200** (equivalent to approximately US\$26).
- ▶ **Settlement:** The parties may settle at any stage, the terms of which can be uploaded to the eBRAM Platform and will have the effect of terminating the proceedings, and the Neutral can draw up the settlement agreement for enforcement.

COVID-19 ODR Scheme - Features

- ▶ Parties are only required to pay an online registration fee of HK\$200 (equivalent to approximately US\$26) each, with the HKSAR Government covering the fees of the Neutrals, meaning that the Scheme is largely free of cost to the parties, enhancing **access to justice**.
- ▶ **No physical hearing venue is needed**. Disputes are resolved online and remotely.
- ▶ There are **strict deadlines** and limited opportunities for the parties to delay the process, as compared to conventional dispute resolution methods.
- ▶ Strict deadlines encourage parties to **reach a settlement** and **minimises legal costs** (if any).
- ▶ The 3 stages are designed to focus the parties' minds on **settlement at an early stage**.
- ▶ Also, would apply to **tourists** if a dispute arises out of or is related to COVID-19.
- ▶ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) applies to the HKSAR.

COVID-19 ODR Scheme - Looking Ahead

- ▶ The Scheme will be **independently operated** by eBRAM Centre (https://ebram.org/covid_19_odr.html).
- ▶ **Around 160 mediators and arbitrators** have been enlisted on the panel of neutrals.
- ▶ The Scheme was **launched on 29 June 2020** and has commenced processing applications since September 2020.

Thank You!