

DEVELOPING A COOPERATIVE APEC ODR FRAMEWORK: ACCELERATING JUSTICE, ACCELERATING TRADE

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DEVELOPING A COOPERATIVE APEC ODR FRAMEWORK

iPhone Case Study



349	China	11	Vietnam	2	Brazil
139	Japan	7	Mexico	2	Costa Rica
60	USA	6	Indonesia	2	Austria
42	Chinese Taipei	6	Israel	2	Netherlands
32	Republic of Korea	5	France	1	Canada
21	Malaysia	5	Czech Republic	1	Portugal
24	Philippines	3	Belgium	1	Spain
21	Thailand	3	Italy	1	Morocco
17	Singapore	3	Ireland	1	Puerto Rico
13	Germany	3	UK	1	Malta
				1	Hungary

DEVELOPING A COOPERATIVE APEC ODR FRAMEWORK

1. **APEC ODR Based on UNCITRAL instruments**
2. **Why ODR Matters in APEC**
3. **Where ODR Stands Today in APEC**
4. **APEC EC Work Plan For Developing ODR**
 - a. Harmonizing Law Using Existing Instruments
 - b. Building a Sustainable ODR Platform
 - c. Harmonizing ODR Rules
 - d. Building Capacity



APEC ODR FOLLOWS UNCTRAL TEXTS

ODR = ADR Enhanced by Technology



APEC ODR FOLLOWS UNCITRAL TEXTS

ODR Saves Time and Costs

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

Technical Notes on Online Dispute Resolution of United Nations Commission on International Trade Law (UNCITRAL), para. 2, *Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17)*, annex 1, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/048/29/PDF/V1604829.pdf?OpenElement>.



United Nations
UNCITRAL

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

APEC ODR FOLLOWS UNCITRAL TEXTS

GA Endorses UNCITRAL ODR Notes

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

- * “reflect the principles of impartiality, independence, efficiency, effectiveness, due process, fairness, accountability and transparency.”
- * “are expected to contribute significantly to the development of systems to enable the settlement of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications.”
- * “will significantly assist all States, in particular developing countries and States whose economies are in transition, online dispute resolution administrators, online dispute resolution platforms, neutrals and the parties to online dispute resolution proceedings in developing and using online dispute resolution systems.”

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WHY ODR MATTERS?

Global Trade Flows



APEC's total trade increased more than seven times to \$22 trillion between 1989 and 2013.

WHY ODR MATTERS?

Explosion of Internet Economy

- * “Electronic commerce has rapidly developed over the past decade, based largely on the exponential diffusion of the Internet, increased broadband access and the rise of mobile commerce throughout the world.”

Report of 2010 UNCITRAL Colloquium on ODR, UN Doc. A/CN.9/706, para 8

- * 3.7 billion people now connected to the Internet.
- * According to UNCTAD global B2B e-commerce worth \$19.9 trillion.

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



Digital highway provides MSMEs unprecedented access to international markets

Source: <http://www.internetworldstats.com/stats.htm>

WHY ODR MATTERS?

Many E-Commerce Disputes Unresolved

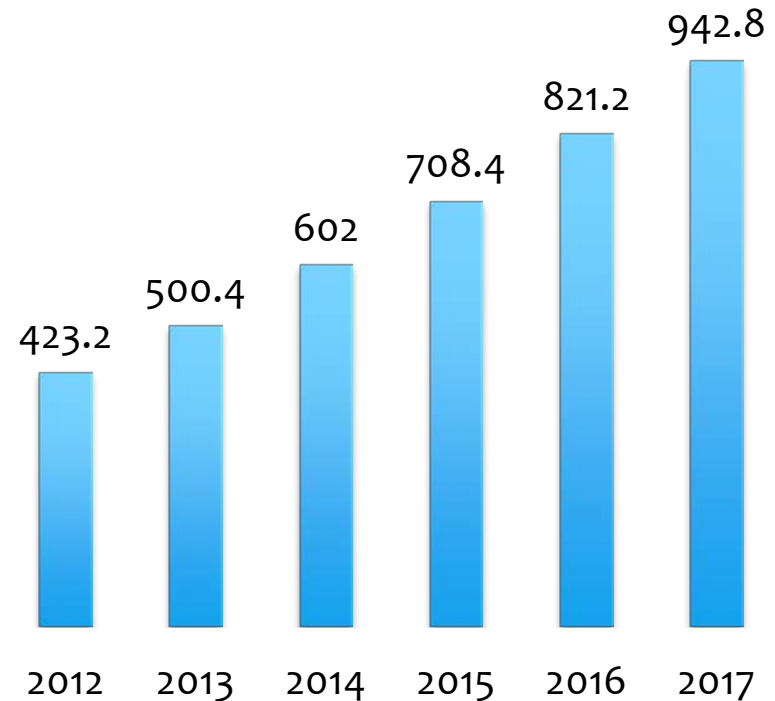
- * 3% to 5% of all transactions, online and offline, result in a dispute.

See Ethan Katsh & Colin Rule, *What We Known and Need to Know About Online Dispute Resolution*, 67 S.C. L. Rev. 329, 333 (2016).

- * According to EU, for B2B –
 - * 28% of MSMEs involved in disputes over 3 year period.
 - * Businesses involved in disputes had on average 6 disputes with other businesses.
 - * Average value of cross-border dispute €44,300
 - * **Over 35% of cross border disputes unresolved.**

European Commission, Study on the use of Alternative Dispute Resolution for Business to Business disputes at 6, 123,125 <http://www.adrcenterinternational.com/wp-content/uploads/2015/01/ADR-Final-Report-151012.pdf> (based in part on Flash Eurobarometer 347 (interviews with 11,000 businesses including MSMEs)); European Commission, *Business Disputes Keep Businesses from Doing Business*, at 4.

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



Colin Rule, *Redesigning ODR Processes for the Future*, at 6.

WHY ODR MATTERS?

Disputes a Major Problem for MSMEs

- APEC MSMEs account for 95% of businesses and are increasingly global. APEC Iloilo Initiative (2015).
- Digital technology provides MSMEs unprecedented access to international trade via the global supply chain but MSMEs often find themselves caught in middle of supply chain disputes.
- Dispute resolution considered to be on the of the greatest barriers for MSMEs trading across borders in APEC. Driving Economic Growth Through Cross-Border E-Commerce in APEC: Empowering MSMEs and Eliminating Barriers at 35, 69. <http://ncapec.org/docs/ABAC%20Documents/USC%20Marshall%20ABAC%202015%20MSMEs.pdf> (interviews with 506 business executives plus 244 survey responses).

**RAW MATERIALS
SUPPLIER**

SME

**BUYING
ORGANIZATION**

WHY ODR MATTERS?

MSME BY DEFINITION UNDERDOG

Majority of B2B of disputes involving small businesses concern payments, since contracts use deferred payment terms.

Some 55% of small businesses face liquidity problems.

Study on the use of Alternative Dispute Resolution for Business to Business disputes, supra at 12, 124

Speedy dispute resolution is “essential for small enterprises, which may lack the resources to stay in business while awaiting the outcome of a long court dispute.” WB Doing Business 2016, APEC at 88



"Rest assured. We believe in fighting tooth and nail for the underdog... Right up until the moment his money runs out!"

WHY ODR MATTERS?

Disputes Keep Small Businesses from Doing Business

- * Unresolved disputes often lead to damaged client relationships and hurt sales.
- * Especially serious for small businesses as they have fewer clients.



WHY ODR MATTERS?

Traditional Justice Not an Option

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

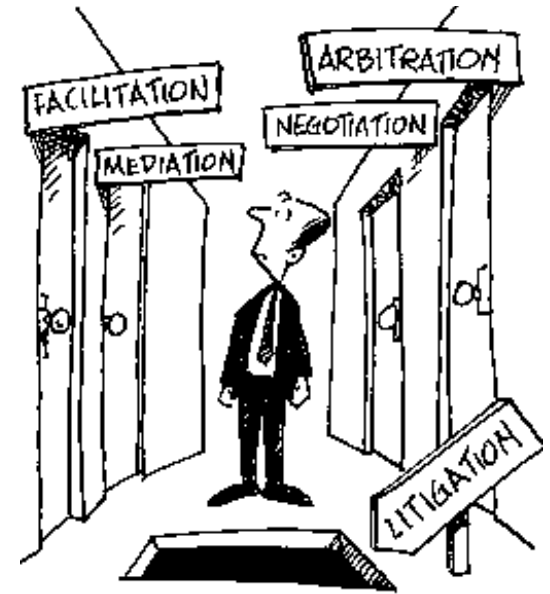
Secretariat Note, Selected legal issues impacting microfinance, April 2012, UN Doc. A/CN.9/756, para. 24 citing UNDP, Commission on Legal Empowerment of the Poor, Making the Law work for Everyone, available at: www.undp.org/legalempowerment).

- * APEC EODB indicator for Enforcing Contracts measures time, cost and procedural efficiency for resolving commercial *domestic* lawsuits.

- * 446.2 days on average to enforce contracts in APEC.

- * 33.9 percent of claim on average taken by **administrative fees**. APEC's Ease of Doing Business 2016 Assessment. APEC Policy Support Unit; World Bank Doing Business, APEC 2017 at 254-55.

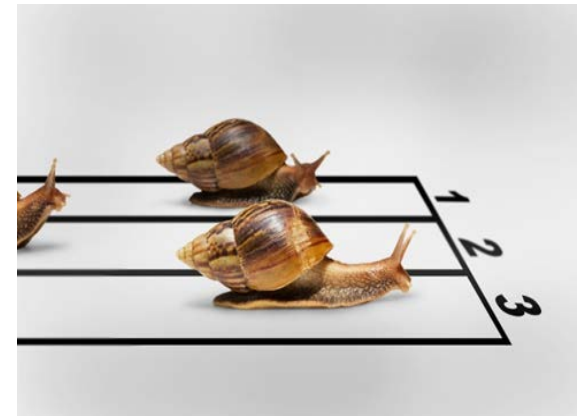
- * In cross-border disputes, traditional judicial relief not only slow but creates jurisdictional, choice of law, and enforcement difficulties.



WHY ODR MATTERS?

Arbitration Too Slow, Expensive

- * In cross border trade, arbitration is predominant form of international dispute resolution.
- * But arbitration often too expensive/slow for e-commerce/supply chain disputes.
- * ODR relies on same legal framework as offline dispute resolution and arbitration, but is much faster.
- * ODR should use same standards as arbitration: fairness, due process, transparency, and accountability. UNCITRAL ODR Technical Notes, *supra*, paras. 4, 53.



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WHERE ODR STANDS TODAY

Private Sector

- * ODR in the global marketplace is a dynamic but fragmented field.
- * So far, none of these initiatives has resulted in widespread use of ODR in B2B disputes involving supply chains/MSMEs.
- * Emerging ODR systems for e-commerce are B2C focused.



WHERE ODR STANDS TODAY

Government Initiatives

- * **Mexico:** Concilianet provides government-run ODR platform for B2C. Participation is mandatory for domestic vendors.

Available at http://www.profeco.gob.mx/Folletos/Queja_ing.pdf



- * **Republic of Korea:** e-commerce dispute resolution committee mediates disputes in e-commerce transactions between consumers & providers.

Available at <https://www.ecmc.or.kr/>



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

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



- * **China:** e-courts offered in Hangzhou Province (home of Alibaba) for e-shopping, copyright, and online financial services disputes (since August 2015). All materials filed online; courtroom replaced by three-way video conference.

Available at http://www.chinadaily.com.cn/bizchina/2015-12/12/content_22708965.htm



WHERE ODR STANDS TODAY

Regional Organizations

- * Proposed OAS ODR regional platform would establish model law/cooperative framework and procedural rules to govern ODR proceedings including arbitration of disputes for B2C.

* Available at http://www.oas.org/dil/esp/CIDIPVII_proteccion_al_consumidor_united_states_guia_legislativa_anexo_A.pdf

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

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



Organization of
American States



- * EU ODR regional platform allows submission of B2C complaints within EU via online form.
- * EU refers complaint to competent national ADR entity, which provides online mediation/arbitration.
 - Regulation No. 524/2013 on online dispute resolution for consumer disputes, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>.
 - See also Directive 2013/11 on alternate dispute resolution for consumer disputes, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>

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APEC EC ODR WORK PLAN

A. Harmonizing Law Using Existing Instruments

- * Effective use of ODR across APEC requires adoption of relevant laws and treaties by member economies:
 1. **New York Convention** implemented by 20 APEC member economies;
 2. **UNCITRAL Model Law on International Commercial Arbitration** (revised in 2006) followed by 18 APEC economies;
 3. **UNCITRAL Model Law on Electronic Commerce** followed in 14 APEC economies;
 4. **UN Convention on the Use of Electronic Communication in International Contracts** ratified by 2 APEC economies;
 5. **UN Convention on Contracts for the International Sales of Goods (CISG)** ratified by 13 APEC member economies.

- * “In Writing” must include electronic communications.

A. HARMONIZING LAW

New York Convention

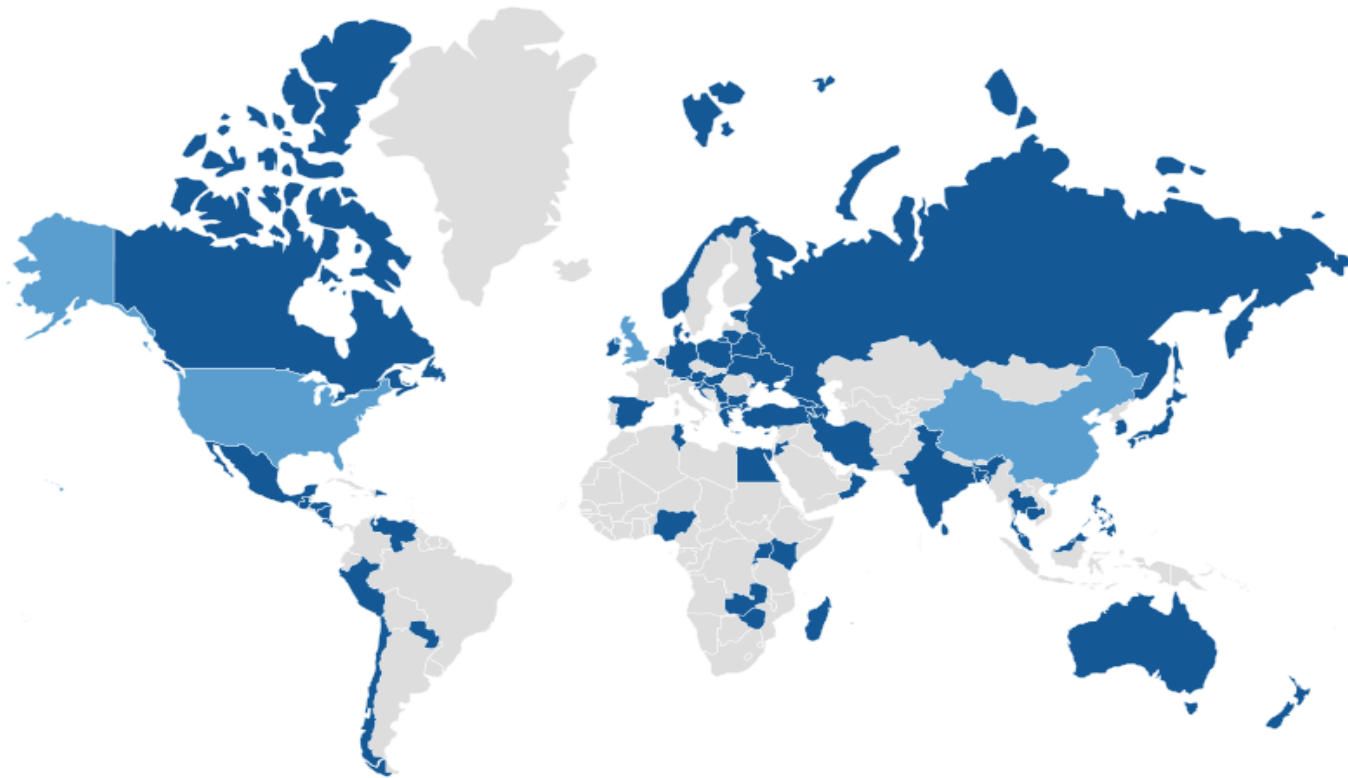
New York Arbitration Convention Status: 2011



157 Parties

A. HARMONIZING LAW

UNCITRAL Model Law on International Commercial Arbitration



Legislation based on Model Law



Legislation based on Model Law adopted only in certain subnational jurisdictions

A. HARMONIZING LAW

APEC Implementation of Existing Instruments

	NY Convention	ML on Arbitration	ML on Electronic Commerce	Convention on Use of Electronic Comm'	CISG
Australia	√	√	√	--	√
Brunei	√	√	√	--	--
Canada	√	√	√	--	√
Chile	√	√	--	--	√
China	√	√	√	√	√
Hong Kong	√	√	√	--	--
Indonesia	√	--	--	--	--
Japan	√	√	--	--	√
Malaysia	√	√	√	--	--
Mexico	√	√	√	--	√

A. HARMONIZING LAW

APEC Implementation of Existing Instruments

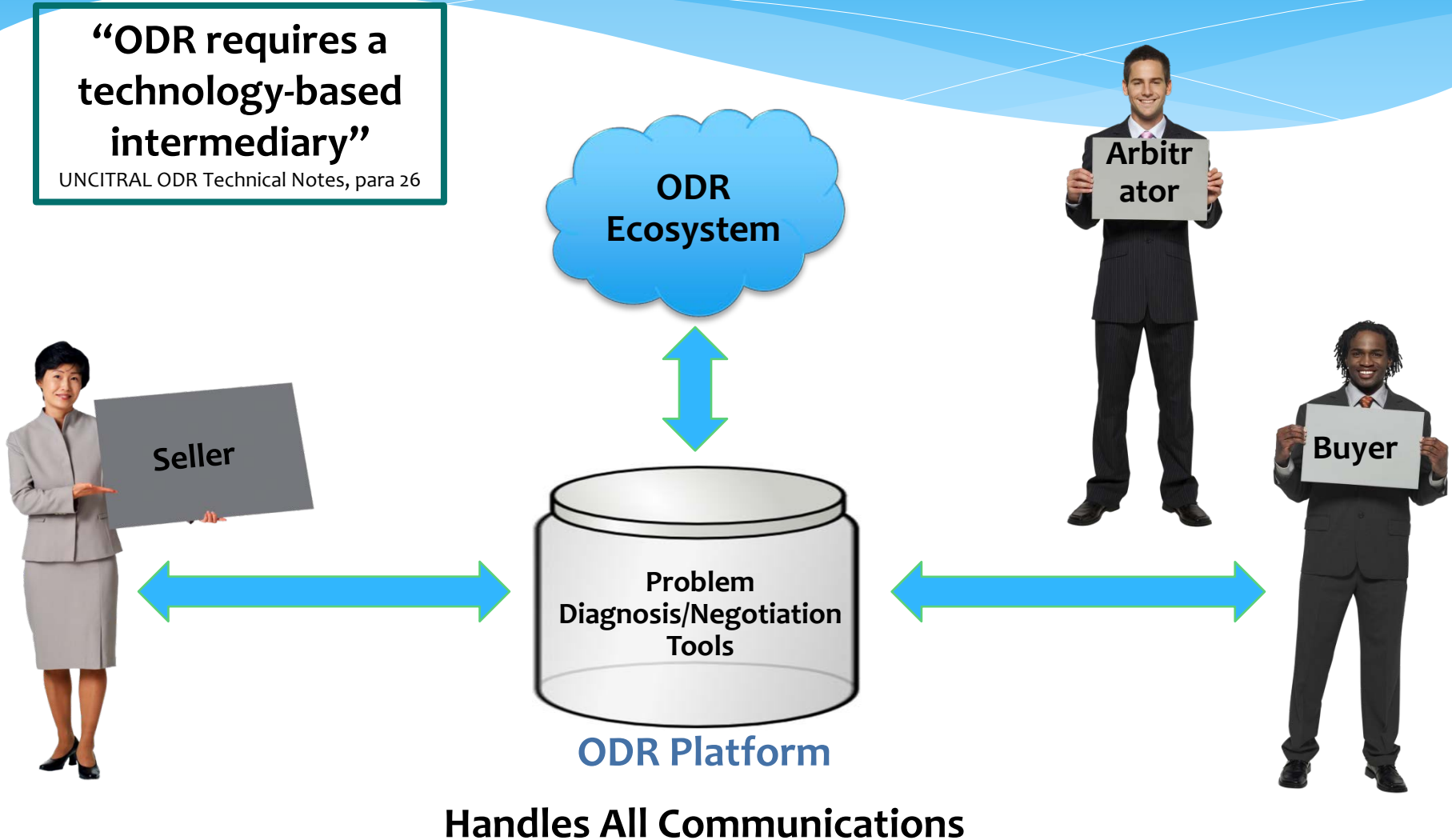
	NY Convention	ML on Arbitration	ML on Electronic Commerce	Convention on the Use of Electronic Communication	CISG
New Zealand	√	√	√	--	√
New Guinea	--	--	--	--	--
Peru	√	√	--	--	√
Philippines	√	√	√	--	--
Rep. Korea	√	√	√	--	√
Russia	√	√	--	√	√
Singapore	√	√	√	√	√
Chinese Taipei	√	√	--	--	--
Thailand	√	√	√	--	--
USA	√	√	√	--	√
Vietnam	√	--	√	--	√

APEC EC WORK PLAN

B. Building A Sustainable ODR Platform

“ODR requires a technology-based intermediary”

UNCITRAL ODR Technical Notes, para 26



APEC EC ODR WORK PLAN

B. Building A Sustainable ODR Platform

Common technological platform needed to offer ODR as a solution.

All communications in ODR proceedings should take place via the ODR platform.

The ODR platform should meet the highest standards of data security, privacy, integrity, and preservation as well as fraud detection and prevention.



APEC EC ODR WORK PLAN

C. Harmonizing ODR Rules

- * “Efforts have remained disjointed, i.e. applying different standards of due process to participants, largely addressing only domestic online disputes, failing to offer effective enforcement mechanisms, and are often not readily apparent options to buyers compared to mainstream litigation and ADR.”
- * “... why it is crucial that a global harmonizing instrument or set of principles be created ... to support online dispute resolution systems that can handle cross-border disputes across the commercial spectrum...”

Note supporting work on online dispute resolution by UNCITRAL, Institute of International Commerce sponsored by 35 organizations).

- * “The General Assembly recommends that all States and other stakeholders use the Technical Notes in designing and implementing online dispute resolution systems for cross-border commercial transactions.” GA Resolution 71/138, supra.



APEC EC ODR WORK PLAN

C. Harmonizing Rules: Accelerating Justice

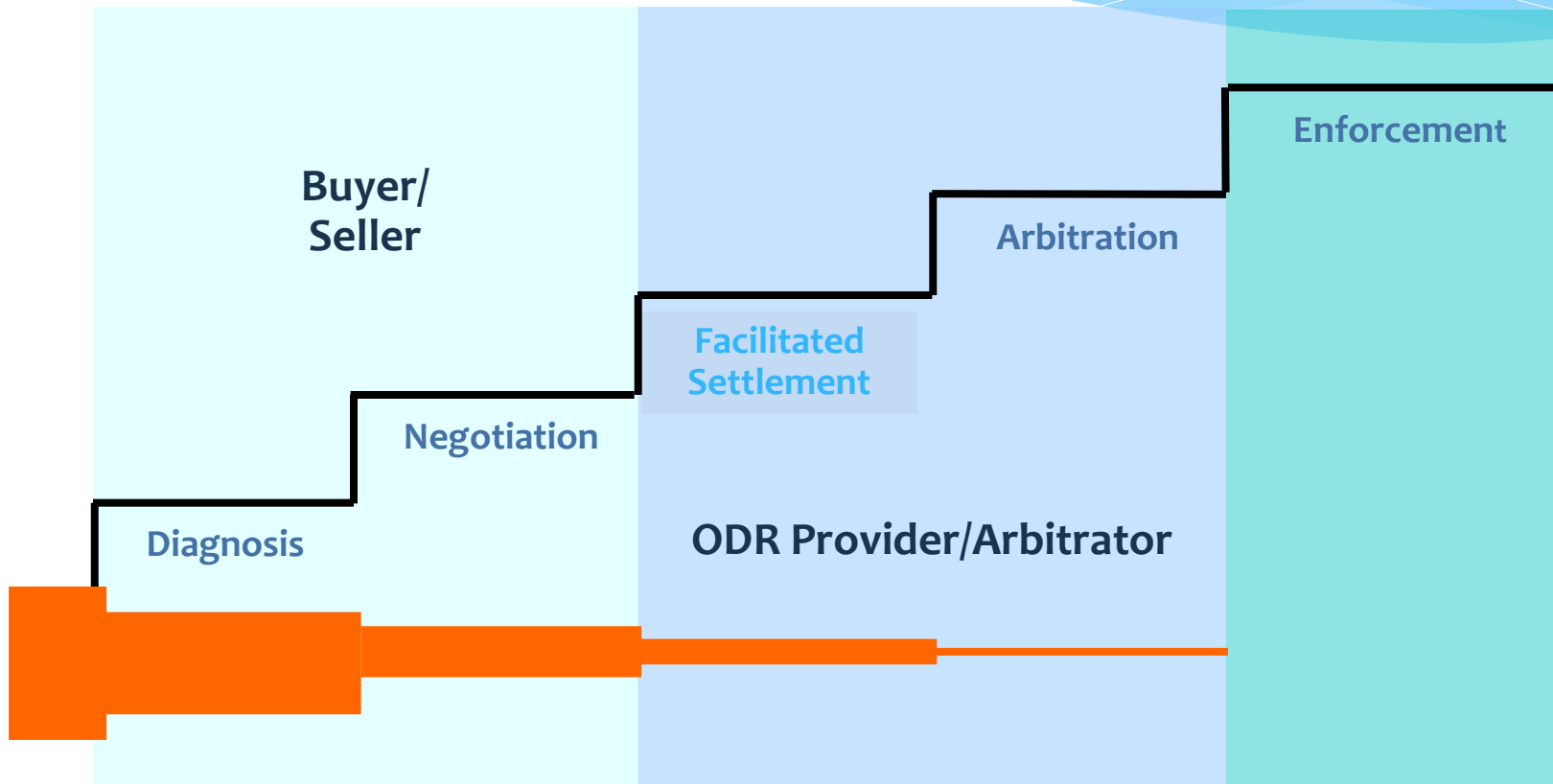
- * **APEC rules should provide fast-track ODR procedures that comply with due process requirements.**
- * Major challenge to building an ODR system for low-value disputes involving supply chain/MSMEs is cost.
- * By making the ODR process more structured, easier, faster, and less expensive to complete ODR improves redress and access to commercial justice.
- * Accelerates Justice, Accelerates Trade



APEC EC ODR WORK PLAN

C. Harmonizing Rules: ODR Phases

Each phase acts like a filter, resolving a percentage of disputes

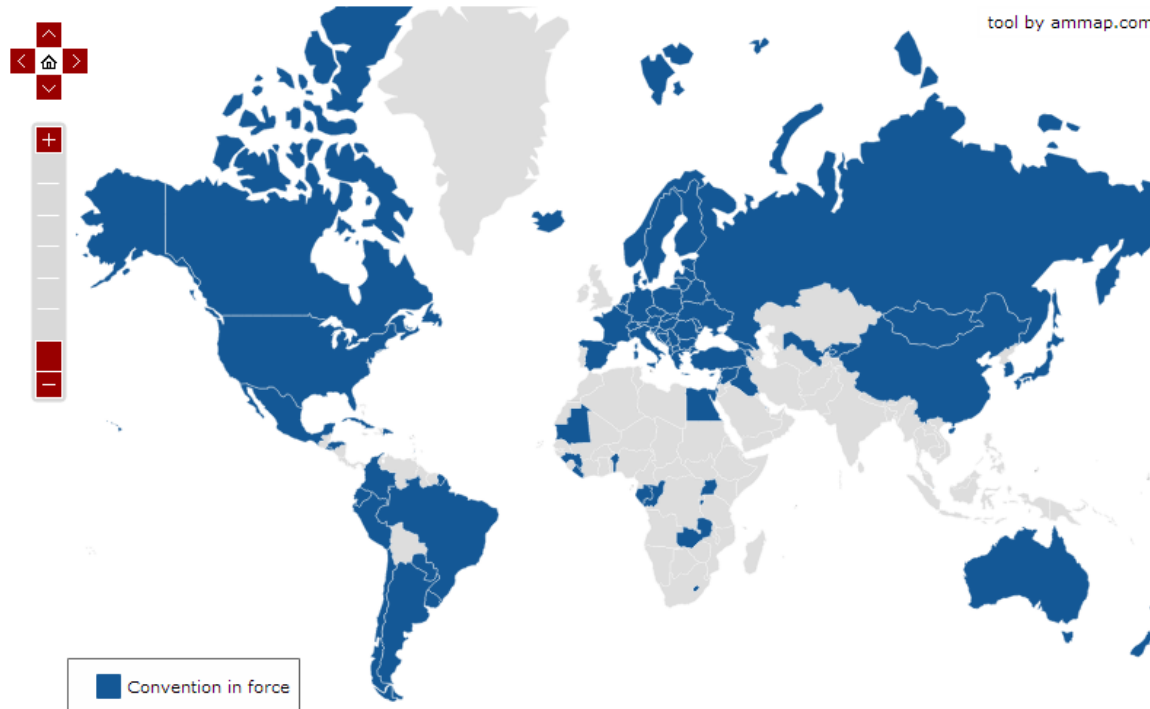


APEC EC ODR WORK PLAN

C. Harmonizing Rules: Applying CISG

Status map

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)



Estimates show share in cross-border trade of 85 contracting parties to the CISG represents over 75% of total volume of international trade.

APEC EC ODR WORK PLAN

D. Building Capacity

- * Key implementation issue is getting businesses to agree to ODR.
- * Requires businesses to understand and trust ODR.

APEC could take the lead in explaining ODR to private sector, governments, and legal community and build capacity by leveraging support from trade associations and chambers, donors, law facilities and corporate social responsibility programs.



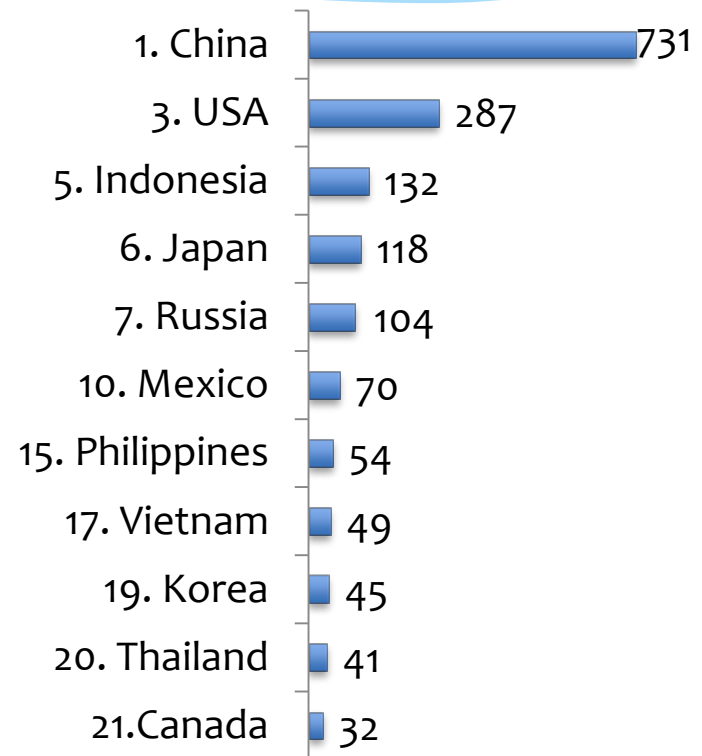
APEC EC ODR WORK PLAN

D. Building Capacity

- * 3.7 billion people now connected to the Internet.
- * 7 billion people (95% of the global population) live in area covered by a mobile-cellular network. Mobile-broadband networks (3G or above) reach 84% of the global population.
- * 11 out of the top 21 economies for internet use are APEC economies.

Top 20 Countries with the Highest Number of Internet Users,
<http://www.internetworldstats.com/top20.htm>.

Internet Users
(in millions)



Source: <http://www.internetworldstats.com/stats.htm>

APEC EC ODR Work Plan

Conducting Research – ABAC Survey

- Continue to promote harmonization of the relevant laws for ODR using existing international instruments
- Cross-APEC collaboration (with e.g. ABAC, ECSG, SMEWG, GOS, TELWG)
- **Conduct relevant research/information gathering**
- Design ODR platform
- Develop ODR procedural rules
- Build a pilot in conjunction with platform host
- Capacity building
- **Leverage private sector and academic community support**



CONCLUSION

Implementation of a Cooperative APEC ODR Framework will:



Promote and maintain strong relations with business partners in global supply chain



Provide MSMEs with opportunity to compete and flourish in supply chain



Build capacity for economic growth based on trade, not aid



Empower women to participate more fully in the global chain



Accelerate and extend real access to justice for all



Thank You

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