



**Asia-Pacific
Economic Cooperation**



**APEC Workshop for Developing a Collaborative Framework
for Online Dispute Resolution (ODR)**

Japan International Dispute Resolution Center, Osaka, Japan

8 – 9 November 2018

Program

Masters of Ceremony:

Miss Queenie HO, Government Counsel, Department of Justice, Hong Kong, China

Mr. Ben FORD, Financial Economist, Office of Investment Affairs, State Department, USA

Day 1 - 8 November 2018

09:00-09:15	Registration
<i>1st Session</i>	<i>Opening and the Collaborative Framework for APEC ODR</i>
09:15-09:30	Opening Remarks Mr. Jun ARAI, Vice Governor of Osaka Prefecture, Japan Ms. Karen KELLEY, U.S. Consul-General in Osaka, USA
09:30-09:35	Photo-taking session
9:35-10:40	Collaborative Framework — Overview and Pilot Co-Moderators: Dr. James DING, APEC Economic Committee Strengthening the Economic and Legal Infrastructure (SELI) Convenor and Mr. Michael DENNIS, Attorney Advisor, State Department, USA Commentators: i) Prof. Anjanette Raymond, Indiana University, USA ii) Mr. Rhys WEST, Chief Executive, Fairway Resolution, New Zealand iii) Mr. Ranse HOWELL, Director of International Operations, Judicial Arbitration and Mediation Services (JAMS), USA iv) Ms. NGUYEN Minh Thao, Director, Department for Business Environment and Competitiveness, Central Institute for Economic Management, Viet Nam v) Ms. Nevena JEVRENOVIC, Co-Chair, Accord Project-Dispute Resolution



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10:40-11:10	Open Discussion
11:10-11:25	Coffee Break
11:25-12:25	<p>Collaborative Framework — Procedural Rules and Standards</p> <p>Co-Moderators: Mr. Michael DENNIS, Attorney Advisor, State Department, USA and Prof Yoshihisa HAYAKAWA, Rikkyo University, Japan</p> <p>Commentators:</p> <ul style="list-style-type: none"> i) Prof. Vikki ROGERS, IACCM, USA ii) Mr. Daniel LAM, CEO, eBRAM Centre, Hong Kong, China iii) Mr. Mark WALTER, Senior Principal Global Practice Specialist, DAI iv) Ms. Phenix TSE, Legal Expert, UNCITRAL Regional Center for Asia and the Pacific
12:25-12:55	Open Discussion
12:55-14:15	Lunch (hosted by Japan International Dispute Resolution Center)
<i>2nd Session</i>	<i>Voices from Businesses and ODR Service Providers</i>
14:15-15:00	<p>Getting businesses involved in the Collaborative Framework</p> <p>Moderator: Mr. David DODWELL, Executive Director, Hong Kong APEC Trade Policy Group, Hong Kong, China</p> <p><i>Speakers:</i></p> <ul style="list-style-type: none"> i) Mr. Masaharu ONUKI, President, GBC Office Onuki (Member of Osaka Chamber of Commerce and Industry), Japan ii) Mr. Paul SANTOS, Chairman of Philippine Retailers Association, the Philippines iii) Mrs. Laura AGUILERA, Head of the Department of Studies, Arbitration and Mediation Center of the Santiago's Chamber of Commerce, Chile
15:00-15:15	Questions and Answers
15:15-15:30	Coffee Break



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15:30-16:45	<p>Practical and Institutional Perspective (Software and Hardware) Co-moderators: Mr. Nick CHAN, Chairman, eBRAM Centre, Hong Kong, China and Prof. Andy LEE, President, Beijing eBridgeChina Research Institute, China</p> <p><i>Speakers:</i></p> <ul style="list-style-type: none"> i) Prof. Jean-Francois ROBERGE, University of Sherbrook, Canada ii) Mr. Eiichiro MANDAI, CEO and Founder, ODR Room Network, Japan iii) Dr. Frank TONG, Director of Research and Technology Development, Logistics and Supply Chain MultiTech R&D Centre Limited, Hong Kong, China iv) Ms. MJ CARTWRIGHT, CEO, Matterhorn by Court Innovations, USA v) Mr. Larry BRIDGESMITH, Co-Founder and CEO, DASH, USA
16:45-17:00	Questions and Answers
18:00-20:00	Welcome Dinner (by invitation)

Day 2 – 9 November 2018

09:00-09:15	Registration
3rd Session	<i>ODR in Courts and experience sharing by APEC economies</i>
9:15-10:30	<p>ODR in Courts Moderator: Ms Phenix TSE, Legal Expert, UNCITRAL Regional Center for Asia and the Pacific</p> <p><i>Speakers:</i></p> <ul style="list-style-type: none"> i) Mr. Hisanaga KAWAMURA, Counsellor, Cabinet Secretariat, Japan ii) Prof. ZHAO Yun, The University of Hong Kong, Hong Kong, China iii) Mr. Alex SANCHEZ, Manager and Mediator, and Ms. Veronica Cravener, Supervisor, Small Claims and Dispute Resolution, Franklin County Municipal Court, Ohio, USA iv) Ms. Shannon SALTER, Chair, Civil Resolution Tribunal, BC, Canada



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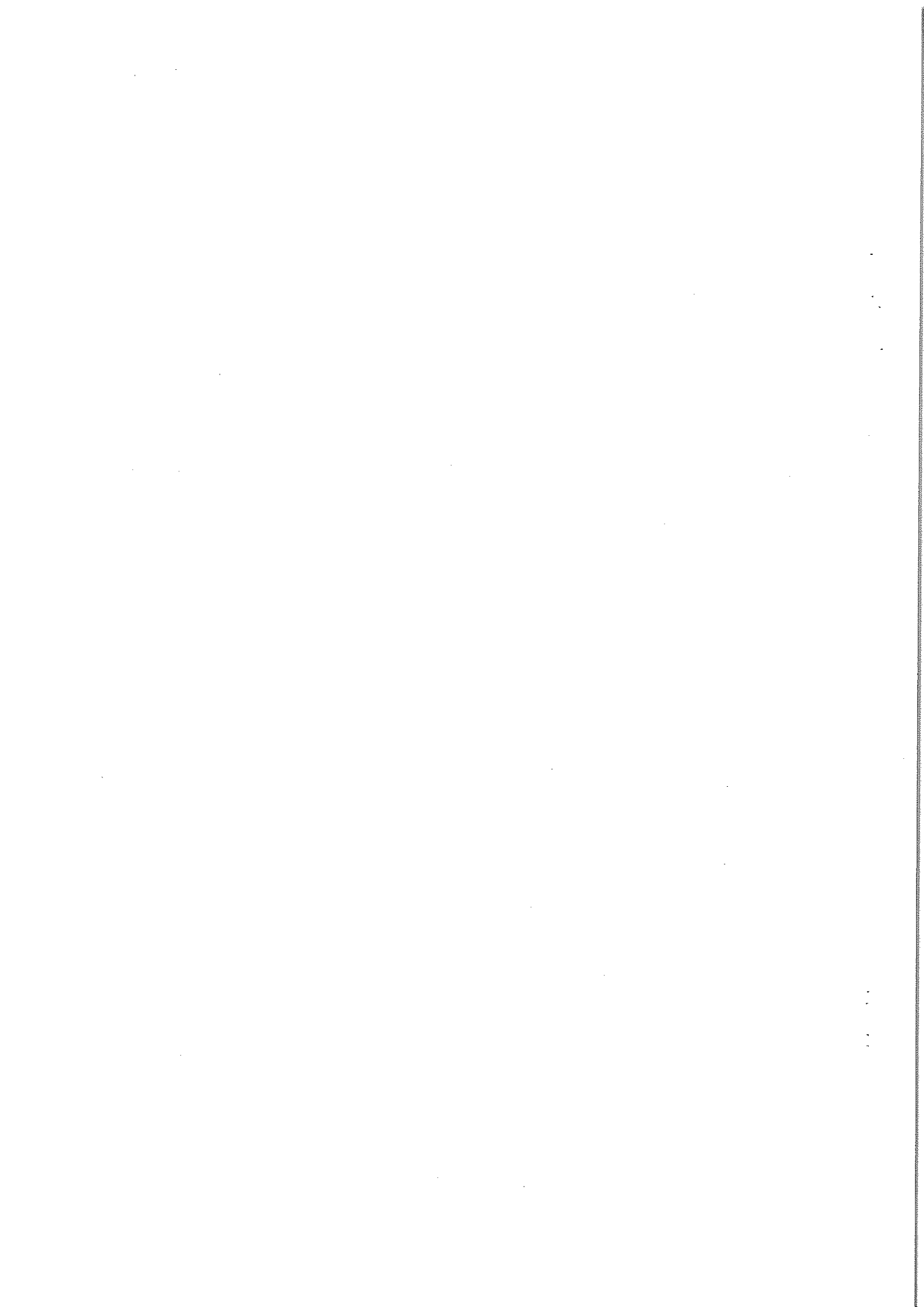
10:30-11:00	Open Discussion
11:00-11:15	Coffee Break
11:15-12:30	<p>Experience Sharing on use of ODR: Opportunities and Challenges</p> <p>Moderator: Mr. Israel FIERRO, Economic Advisor for International Finance, Ministry of Finance, Chile</p> <p>Speakers:</p> <ul style="list-style-type: none">i) Ms. NGUYEN Minh Thao, Director, Department for Business Environment and Competitiveness, Central Institute for Economic Management, Viet Namii) Mr. Pasit ASAWAWATTANAPORN, Managing Director, Thailand Arbitration Centre, Thailandiii) Prof. Tsisana SHAMLIKASHVILLI, Center for Mediation and Law, Russiaiv) Justice Takdir RAHMADI, Supreme Court of Indonesia and Dr. Yetty Komalasari DEWI, University of Indonesia, Indonesiav) Ms Sabiha SHIRAZ, Deputy Executive Director, Singapore Mediation Centre, Singaporevi) Mr. Rhys WEST, Chief Executive, Fairway Resolution, New Zealand and Mr. Colin RULE, Vice President, Tyler Technologies, USA
12:30-12:45	Questions and Answers
12:45-14:00	Lunch (hosted by Japan International Dispute Resolution Center)



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<i>4th Session</i>	<i>Way Forward and Closing</i>
14:00-15:30	<p>Panel discussion on rules, oversight and other issues for the Collaborative Framework</p> <p>Moderator: Mr. Larry BRIDGESMITH, Co-Founder and CEO, DASH, USA</p> <p>Panel of Experts:</p> <ul style="list-style-type: none">i) Mr. Daniel LAM, CEO, eBRAM Centre, Hong Kong, Chinaii) Mr. Eiichiro MANDAI, CEO and Founder, ODR Room Network, Japaniii) Prof. Vikki ROGERS, IAACM, USAiv) Prof. Anjanette RAYMOND, Indiana University, USAv) Mr. Ranse HOWELL, Director of International Operations, Judicial Arbitration and Mediation Services (JAMS), USAvi) Prof. Andy LEE, President, Beijing eBridge China Research Institute, China
15:30-15:45	Questions and Answers
15:45-16:00	Coffee Break
16:00-16:45	<p>Conclusions and Recommendations</p> <p>Co-moderators: Dr. James DING, SELI Convenor, Mr. Michael DENNIS, Attorney Advisor, State Department, USA and Prof Yoshihisa HAYAKAWA, Rikkyo University, Japan</p>
16:45-17:00	<p>Closing Remarks</p> <p>Mr. Michael DENNIS, Attorney Advisor, State Department, USA</p> <p>Prof Yoshihisa HAYAKAWA, Rikkyo University, Japan</p> <p>Dr. James DING, SELI Convenor</p>



APEC Draft Collaborative Framework for Online Dispute Resolution of Cross-Border E-Commerce Business to Business Disputes

1. Purpose

1.1 This Collaborative Framework for Online Dispute Resolution of Cross-Border E-Commerce Business to Business Disputes (“ODR Framework”) establishes an APEC-sponsored initiative to use online dispute resolution (ODR) help global businesses (in particular, micro-, small-, and medium-sized enterprises (MSMEs)) resolve business-to-business (B2B) cross-border disputes focusing on low value disputes (as may be defined by the participating economies). The ODR Framework is designed to promote B2B cross border confidence by providing quick electronic resolution and enforcement of disputes across borders, languages, and different legal jurisdictions.

1.2. The ODR Framework creates an APEC wide electronic system for MSMEs in participating economies to provide ODR through negotiation, mediation, and arbitration for business-to-business claims. Under this ODR Framework, a business may file a cross-border complaint online against a business in another participating economy. During the first phase of the procedure, the businesses are allowed to exchange information and proposals, and negotiate a binding settlement of their dispute, through electronic means (“Negotiation Phase”). If the parties cannot reach a binding agreement by amicable negotiations, the relevant ODR provider will appoint a qualified online dispute resolution (ODR) neutral to mediate the dispute (and if possible reach a binding settlement agreement) (“Mediation Phase”) or to arbitrate the dispute (and issue a binding award) (“Arbitration Phase”). [The ODR process or portions of the process could be automated, subject to party agreement.]

1.3. The ODR Framework is designed to be inexpensive for MSMEs. It is also structured so that partnering ODR providers are allowed flexibility of creation and management, while still expected to be compliant with the framework.

(Participating economies could operate the ODR Framework initially as a pilot project for a limited period to time, with the structure of the project affected by the funding available. At the end of that period, participating economies would decide whether to continue, modify, or terminate the pilot project.)

2. Model Rules

2.1 Participating APEC ODR providers operating under the ODR Framework agree to use the attached Procedural Rules for the resolution of claims handled pursuant to the ODR Cooperative Framework. The ODR Framework is not intended to interfere with the operation by participating economies of their own arbitration and alternative dispute resolution systems.

WORKING DRAFT (for discussion purpose only)

3. SELI and Central Website

3.1 APEC economies participating in the ODR Framework intend to join a cross-border network that resolves low value disputes by implementing agreed reciprocal procedures, in accordance with the Procedural Rules.

3.2 The APEC Economic Committee (EC) Friends of Chair Group on Strengthening the Economic and Legal Infrastructure (SELI) should endeavor to ensure that the participating ODR providers maintain secure websites and databases for storing information related to the resolution of claims.

3.3 SELI will use its best efforts to assist the APEC Secretariat in maintaining a list on the EC website of ODR providers from participating APEC economies that have agreed to process claims using ODR, as provided in the attached Rules.

4. Partnering ODR Providers

4.1 SELI will maintain a list of independent ODR providers willing to undertake dispute resolution under the terms of this ODR Framework on the APEC website. Before incorporating an ODR provider into its list, SELI will require that an ODR provider submit a written undertaking of its commitment to comply with the Procedural Rules and the terms of the ODR Framework.

4.2 Each ODR Provider will provide its own ODR platform for the resolution of disputes under the ODR Framework. Any fees charged under the ODR Framework should be affordable and commensurate with the amount in dispute.

4.3 ODR providers are encouraged to gather the following aggregate information, and submit that information to SELI by the end of each June and December:

- a. number of ODR disputes initiated;
- b. number of those ODR disputes that were abandoned;
- c. number of those ODR disputes that were resolved through (a) the Negotiation Phase and (b) the Mediation Phase;
- d. number of those disputes that were resolved through the Arbitration Phase;
- e. [number of those disputes in which an amount of money was awarded to a party whether as a claim by the Claimant or as a counterclaim by the Respondent (“Counterclaimant”);
- f. average ratio of the amounts awarded to the amount demanded by the Claimant /Counterclaimant compared to the amounts paid by a settlement agreement in (a) Negotiation Phase, and (b) Mediation Phase;
- g. average ratio of amounts demanded by Claimants/ Counterclaimants compared to the amounts awarded by an arbitral award in the Arbitration Phase;
- h. the range and average of awards of amounts of money in favor of Claimants/Counterclaimants in each of the (a) Negotiation Phase, (b) Mediation Phase and (c) Arbitration Phase;

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- i. number of disputes resulting in a respondent to a claim/counterclaim being required to undertake some corrective action (other than to pay an amount of money) and the types of corrective actions involved in such disputes.
- j. the range of times and average time that passed from the date of the ODR provider's receipt of a claim until the (a) agreement of a negotiated settlement in the Negotiation Phase, (b) a binding settlement agreement in the Mediation Phase or (c) an Arbitration Award in the Arbitration Phase, and in the case of abandoned cases from receipt of a complaint until the claim/counterclaim is abandoned.
- h. the costs charged to the parties.]

4.4 At the end of each individual dispute resolution proceeding, the ODR provider will ask the parties to complete a feedback questionnaire about the quality of the service received from the ODR provider and appointed neutral.

4.5 If an ODR provider appears not to be in compliance with the Procedural Rules, SELI should give written notification to the ODR provider of such apparent noncompliance and give it an opportunity to provide a written explanation of any such issues and to remedy them in 30 days, or as soon thereafter as possible for good cause shown. If the ODR provider fails to meet these requirements, SELI may remove the ODR provider from its official list. The relevant APEC member economies should also take appropriate action in accordance with the economy's laws and regulations.

5. Confidentiality and Reporting Requirements

5.1 ODR providers should treat all information submitted by businesses as confidential

5.2 SELI should make best efforts to aggregate data received from ODR Providers and submit a report by end of March every year to the EC.

6. Participating Businesses

6.1 APEC member economies should encourage businesses, especially MSMEs, to use participating ODR providers for low value claims mediation and arbitration.

6.2 Businesses may be charged a reasonable fee by the ODR provider.

7. Enforcement of Arbitration Awards and Agreements

7.1 An ODR Arbitration Award is final and binding on all parties, however it is subject to review, setting aside recognition and enforcement in accordance with applicable law (domestic or foreign).

7.2 APEC member economies may enter into bilateral agreements to enforce arbitration awards in accordance with the ODR Framework, including requesting assistance from payment networks or referring cases to collection agencies.

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7.3 With the exception of paragraph 6.1 above, no review of the merits of the Arbitration Award is allowed.

(Participating economies may also involve private organizations (such as private "Trustmark" organizations) in enforcement of awards.)

8. Development of Cross-border Cooperative Legal Framework

8.1 Although ODR laws and practices do not need to be strictly identical throughout APEC, member economies should support the development and recognition of private international law instruments relevant to ODR, including:

- (a) the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- (b) the 2006 UNCITRAL Model Law on International Commercial Arbitration;
- (c) the 2005 UN Convention on the Use of Electronic Communications in International Contracts; and
- (d) the 1996 UNCITRAL Model Law on E-Commerce.

(Participating economies may also assist ODR providers with locating neutrals willing to provide their services.)

**Model Procedural Rules
for the
APEC Collaborative Framework for Online Dispute Resolution**

I. Introductory rules

Article 1 - Scope of application

1. The Rules shall apply to business-to business disputes (B2B) where the parties to a sales or service contract have agreed that disputes relating to that transaction, so long as the dispute falls within the scope of the Rules. The rules do not cover consumer transactions.

Comment: Based on UNCITRAL Arbitration Rules, Article 1(1) and SELI ODR Work Plan (limiting scope to business-to-business transactions). See also UNCITRAL ODR Technical Notes: “The Technical Notes are intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications.”

2. 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.

Comment: The Rules should not be interpreted to limit otherwise applicable mandatory rules of domestic and international law. Based on UNCITRAL Arbitration Rules, Article 1(3).

Article 2 - Definitions

“For purposes of these Rules:

ODR

1. ‘ODR’ or online dispute resolution is a mechanism for resolving disputes through the use of electronic communications and other information and communication technology.

Comment: Based on UNCITRAL ODR Technical Notes, para. 24.

2. ODR administrator’ means the entity that administers and coordinates ODR proceedings under these Rules, including where appropriate, by administering an ODR platform.

Comment: Based on UNCITRAL ODR Technical Notes, para. 27.

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3. *'ODR platform' means a system for generating, sending, receiving, storing, exchanging or otherwise processing communications under these Rules.*

Comment: Based on UNCITRAL ODR Technical Notes, para. 26.

4. *'Claimant' means any party initiating ODR proceedings under the Rules.*

Comment: Based on UNCITRAL ODR Technical Notes, para. 25.

5. *'Respondent' means any party to whom the notice is directed.*

Comment: Based on UNCITRAL ODR Technical Notes, para. 25.

[6. *'Neutral' means an [individual] that assists the parties in settling or resolving the dispute.*]

Comment: Based on UNCITRAL ODR Technical Notes, para. 26.

[7. *'Consumer transaction' means a contract concluded primarily for personal, family or household purposes.*]

Comment: Based on UN Convention on the Use of Electronic Communications in International Contracts, Article 2(1)(a) and UN Convention on Contracts for the International Sale of Goods, Article 2(a).

8. *'Communication' means any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means.*

Comment: Based on UNCITRAL ODR Technical Notes, paragraph 29.

9. *'Electronic address' means an information system, or portion thereof, designated by the parties to the online dispute resolution process to exchange communications related to that process."*

Comment: See UN Convention on the Use of Electronic Communications in International Contracts, Article 4; UNCITRAL Model Law on E-Commerce, Article 2. See also UNCITRAL ODR Technical Notes, paragraph 30.

Article 3 - Communications

1. *All communications in the course of ODR proceedings shall be communicated to the ODR administrator via the ODR platform. The electronic address of the ODR platform shall be designated in the dispute resolution clause. Each party shall [designate] [provide the ODR administrator with] [a designated] electronic address.*

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Comment: Based on UNCITRAL ODR Technical Notes, paragraph 30 (“It is desirable that all communications in ODR proceedings take place via the ODR platform. Consequently, both the parties to the dispute, and the ODR platform itself, should have a designated “electronic address.”).

2. A communication shall be deemed to have been received when, following communication to the ODR administrator in accordance with paragraph 1, the ODR administrator notifies the parties of its availability, in accordance with paragraph 4.

Comment: Based on UNCITRAL ODR Technical Notes, Para. 31. (“In order to avoid loss of time, it is desirable that a communication be deemed to be received by a party when the administrator notifies that party of its availability on the platform; deadlines in the proceedings would run from the time the administrator has made that notification.”). See UNCITRAL Arbitration Rules, Article 2.

3. The ODR administrator shall promptly acknowledge receipt of any communications by a party or the neutral [at their electronic addresses].

4. The ODR administrator shall promptly notify a party or the neutral of the availability of any communication directed to that party or the neutral at the ODR platform.

5. The ODR administrator shall promptly notify all parties and the neutral of the conclusion of the negotiation stage of proceedings and the commencement of the mediation stage of proceedings; the expiry of the mediation stage of proceedings; and, if relevant, the commencement of the arbitration stage of proceedings.”

Comment: Articles 3(3)-3(5) are based on the UNCITRAL ODR Technical Notes paragraph 32 (“To enhance efficiency it is desirable that the ODR administrator promptly: (a) Acknowledge receipt of any communication by the ODR platform; (b) Notify parties of the availability of any communication received by the ODR platform; and (c) Keep the parties informed of the commencement and conclusion of different stages of the proceedings.”).

II. Commencement of ODR Proceeding

Article 4A - Notice

1. The claimant shall communicate to the ODR administrator a notice in accordance with paragraph 4. The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

Comment: Based on UNCITRAL ODR Technical Notes, paragraphs. 33 and 36.

2. The ODR administrator shall promptly notify the respondent that the notice is available at the ODR platform.

Comment: Based on UNCITRAL ODR Technical Notes, para. 31(b).

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3. ODR proceedings shall be deemed to commence when, following communication to the ODR administrator of the notice pursuant to paragraph 1, the ODR administrator notifies the parties of the availability of the commencement notice at the ODR platform.

Comment: Based on UNCITRAL ODR Technical Notes, para. 34.

4. The notice shall include:

(a) The name and [designated] electronic address of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;

(b) The name and electronic address of the respondent and of the respondent's representative (if any) known to the claimant;

(c) The grounds on which the claim is made;

(d) Any solutions proposed to resolve the dispute;

(g) The claimant's preferred language of proceedings;

(h) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.

Comment: Based on UNCITRAL ODR Technical Notes, paragraph 33 ("In order that an ODR proceeding may begin, it is desirable that the claimant provide to the ODR administrator a notice containing the following information:

(a) The name and electronic address of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;

(b) The name and electronic address of the respondent and of the respondent's representative (if any) known to the claimant;

(c) The grounds on which the claim is made;

(d) Any solutions proposed to resolve the dispute;

(e) The claimant's preferred language of proceedings; and

(f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.").

See also UNCITRAL Arbitration Rule, Article 3.

Article 4B - Response

1. The respondent shall communicate to the ODR administrator a response to the notice in accordance with paragraph 2 within [seven (7)] calendar days of being notified of the availability of the notice on the ODR platform. [The response should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.]

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2. *The response shall include:*

(a) *The name and [designated] electronic address of the respondent and the respondent's representative (if any) authorized to act for them respondent in the ODR proceedings;*

(b) *A response to the grounds on which the claim is made;*

(c) *Any solutions proposed to resolve the dispute;*

(d) *the signature or other means of identification and authentication of the respondent and/or the respondent's representative.*

(e) *Notice of any counterclaim containing the grounds on which the counterclaim is made.*

Comment: Based on UNCITRAL ODR Technical Notes paragraph 35: "It is desirable that the respondent communicate its response to the ODR administrator within a reasonable time of being notified of the availability of the claimant's notice on the ODR platform, and that the response include the following elements:

(a) The name and electronic address of the respondent and the respondent's representative (if any) authorized to act for the respondent in the ODR proceedings;

(b) A response to the grounds on which the claim is made;

(c) Any solutions proposed to resolve the dispute;

(d) The signature or other means of identification and authentication of the respondent and/or the respondent's representative; and

(e) Notice of any counterclaim containing the grounds on which the counterclaim is made."

See also UNCITRAL Arbitration Rules, Article 4.

3. *The respondent may provide, at the time it submits its notice, any other relevant information, including information in support of its response, and also information in relation to the pursuit of other legal remedies."*

Comment: Based on UNCITRAL ODR Technical Notes, para. 36.

III. Stages of ODR Proceeding

Article 5 - Negotiation Stage

1. *If the response does not include a counterclaim, the negotiation stage shall commence upon communication of the response to the ODR administrator, and notification thereof to the claimant. If the response does include a counterclaim, the negotiation stage shall commence upon communication of the response by the claimant to that counterclaim and notification thereof to the respondent, or after the expiration of the response period set out in article 4C, paragraph 2, whichever is earlier.*

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2. *The negotiation stage of proceedings shall comprise negotiation between the parties via the ODR platform.*

3. *If the respondent does not communicate to the ODR administrator a response to the notice in accordance with the form contained in article 4B, paragraph 3, within the time period set out in article 4B, paragraph 1, or where one or both parties request that the process move to the mediation stage of the proceedings, or a party elects not to engage in the negotiation stage of proceedings, then the mediation stage of ODR proceedings shall immediately commence.*

4. *If the parties have not settled their dispute by negotiation within [ten (10)] calendar days of submission of the commencement of the negotiation stage of proceedings, the mediation stage of ODR proceedings shall immediately commence.*

5. *The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However, no such extension shall be for more than [ten (10)] calendar days.”*

Comment: Based on UNCITRAL ODR Technical Notes, Section VII — Negotiation
“37. The first stage may be a negotiation, conducted between the parties via the ODR platform.
38. The first stage of proceedings may commence following the communication of the respondent’s response to the ODR platform and:
(a) Notification thereof to the claimant; or
(b) Failing a response, the lapse of a reasonable period of time after the notice has been communicated to the respondent.
39. It is desirable that, if the negotiation does not result in a settlement within a reasonable period of time, the process proceed to the next stage.”

Article 6 -- Mediation Stage

1. *Upon commencement of the mediation stage of ODR proceedings, the ODR administrator shall promptly appoint a neutral in accordance with article 9 and shall notify the parties (i) of that appointment in accordance with article 9(1)[, and (ii) of the deadline for the expiry of the mediation stage under paragraph (3)].*

2. *Following appointment, the neutral shall communicate with the parties to attempt to reach a settlement agreement.*

3. *If the parties have not settled their dispute by mediation within [ten (10)] calendar days of being notified of the appointment of the neutral pursuant to article 9(1) the ODR proceedings shall move to the final (arbitration) stage of proceedings pursuant to draft article 7(Guidance of ODR Administrator).*

Comment: Based on UNCITRAL ODR Technical Notes, Section VIII — Facilitated settlement, paras. 40-44 (“The second stage of ODR proceedings may be facilitated settlement, whereby a neutral is appointed and communicates with the parties to try to achieve a settlement. That stage may commence if negotiation via the platform fails for any reason (including non-participation

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or failure to reach a settlement within a reasonable period of time), or where one or both parties to the dispute request to move directly to the next stage of proceedings. Upon commencement of the facilitated settlement stage of proceedings, it is desirable that the ODR administrator appoint a neutral, and notify the parties of that appointment, and provide certain details about the identity of the neutral as described in paragraph 46 below. In the facilitated settlement stage, it is desirable that the neutral communicate with the parties to try to achieve a settlement. If a facilitated settlement cannot be achieved within a reasonable period of time, the process may move to a final stage.”)

Article 7 -- Arbitration Stage

1. At the expiry of the mediation stage, the neutral shall proceed to communicate a date to the parties for any final communications to be made. Such date shall be not later than [ten (10)] calendar days from the expiry of the Mediation stage.

Comment: Based in part on UNCITRAL ODR Technical Notes, Section IX – Final Stage and UNCITRAL Arbitration Rules, Article 17. Note the ODR Technical Notes do not expressly discuss the arbitration stage. See paragraph 2.

2. Each party shall have the burden of proving the facts relied on to support its claim or defence.

Comment: Based on UNCITRAL Arbitration Rules, Article 27(1).

3. The neutral shall evaluate the dispute based on the information submitted by the parties[, and having regard to the terms of the agreement,] and shall render an award. The ODR administrator shall communicate the award to the parties and the award shall be recorded on the ODR platform.

4. The award shall be made in writing and signed by the neutral, and shall indicate the date on which it was made and the place of arbitration.

Comment: Based on UNCITRAL Arbitration Rules, Article 34(3); UNCITRAL Model Law on International Commercial Arbitration 31(1).

4 bis. The requirement in paragraph 3 for:

(a) The award to be in writing shall be met where the information contained in the award is accessible so as to be usable for subsequent reference; and

(b) The award to be signed shall be met where data is used to identify the neutral and to indicate his or her approval of the information contained in the award.

5. The award shall state brief grounds upon which it is based [unless the parties have agreed that no reasons are to be given.]

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Comment: Based on UNCITRAL Arbitration Rules, Article 34(3); UNCITRAL Model Law on International Commercial Arbitration 31(3).

6. *The award shall be rendered promptly, preferably within [ten (10)] calendar days [from a specified point in proceedings].*

6. *bis. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.*

Comment: Based on UNCITRAL Arbitration Rules, Article 34(5).

7. *The award shall be final and binding on the parties. The parties shall carry out the award without delay.*

Comment: Based on UNCITRAL Arbitration Rules, Article 34(2).

8. *In all cases, the neutral shall decide in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances, and shall take into account any usage of trade applicable to the transaction.*

Comment: Based on UNCITRAL Arbitration Rules, Article 35(3); UNCITRAL Model Law on International Commercial Arbitration 28(4).

9. *The neutral shall apply the rules of law designated by the parties as applicable to the dispute. Failing such designation, the neutral shall apply the law which it determines to be appropriate.*

Comment: Based on UNCITRAL Arbitration Rules, Article 35(1); UNCITRAL Model Law on International Commercial Arbitration 28(1). SELI could also consider establishing substantive rules to be used in the ODR proceedings.

10. *The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the neutral to do so.*

Comment: Based on UNCITRAL Arbitration Rules, Article 35(2); UNCITRAL Model Law on International Commercial Arbitration, Article 28(3).

Article 7 (bis) -- Correction of award

“Within [five (5)] calendar days [after the receipt of the award], a party, with notice to the other party, may request the neutral to correct in the award any error in computation, any clerical or typographical error, [or any error or omission of a similar nature]. If the neutral considers that the request is justified, he or she shall make the correction [including a brief statement of reasons therefor] within [two (2)] calendar days of receipt of the request. Such corrections shall be recorded on the ODR platform and shall form part of the award. The neutral may within [five

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(5)] calendar days after the communication of the award make such corrections on its own initiative.

Comment: Drawn from UNCITRAL Arbitration Rule 38; UNCITRAL Model Law on International Commercial Arbitration, Article 33.

Article 8 -- Settlement

If settlement is reached at any stage of the ODR proceedings, the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.

IV. Appointment, Powers, and Functions of the Neutral

Article 9 - Appointment of Neutral

1. The ODR administrator shall appoint the neutral promptly following commencement of the mediation stage of proceedings. Upon appointment of the neutral, the ODR administrator shall promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.

Comment: Based on UNCITRAL ODR Technical Notes, para. 46. (“To enhance efficiency and reduce costs, it is preferable that the ODR administrator appoint a neutral only when a neutral is required for a dispute resolution process in accordance with any applicable ODR rules. At the point in an ODR proceeding at which a neutral is required for the dispute resolution process, it is desirable that the ODR administrator “promptly” appoint the neutral (i.e., generally at the commencement of the facilitated settlement stage of proceedings). Upon appointment, it is desirable that the ODR administrator promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.”)

2. 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.

Comment: Based on UNCITRAL ODR Technical Notes, paragraph 48(a) (“The neutral’s acceptance of his or her appointment operates to confirm that he or she has the time necessary to devote to the process”).

3. 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 administrator, any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The ODR administrator shall promptly communicate such information to the parties.

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Comment: Based on UNCITRAL ODR Technical Notes, paragraph 48(b) (“The neutral be required to declare his or her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to his or her impartiality or independence”).

4. Either party may object to the neutral’s appointment within [two (2)] calendar days (i) of the notification of appointment without giving reasons therefor; or (ii) of 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, setting out the fact or matter giving rise to such doubts, at any time during the ODR proceedings.

Comment: See UNCITRAL ODR Technical Notes, paragraph 48(c) (“The ODR system provides parties with a method for objecting to the appointment of a neutral”).

5. Where a party objects to the appointment of a neutral under paragraph 4(i), that neutral shall be automatically disqualified and another appointed in his or her place by the ODR administrator. Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR administrator will be final, subject to paragraph 4(ii). Alternatively if no challenges are made within [two (2)] days of any notice of appointment, the appointment will become final, subject to paragraph 4(ii).

6. Where a party objects to the appointment of a neutral under subparagraph 4(ii) above, the ODR administrator shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced.

Comment: Based on UNCITRAL ODR Technical Notes, para. 48(d) (“In the event of an objection to an appointment of a neutral, the ODR administrator be required to make a determination as to whether the neutral shall be replaced”)

8. Either party may object, within [three (3)] calendar days of the final appointment of the neutral, to the provision by the ODR administrator to the neutral of information generated during the negotiation stage. Following the expiration of this [three-day] period and in the absence of any objections, the ODR administrator shall convey the full set of existing information on the ODR platform to the neutral.

9. The number of neutrals shall be one.

Comment: Based on UNCITRAL ODR Technical Notes, para. 48(e) (“There be only one neutral per dispute appointed at any time for reasons of cost efficiency.”)/

Article 10 – Resignation or Replacement of Neutral

If the neutral resigns or otherwise has to be replaced during the course of ODR proceedings, the ODR administrator shall appoint a neutral to replace him or her pursuant to article 9. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.

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Comment: Adapted from UNCITRAL Arbitration Rule 14(1). See also UNCITRAL ODR Technical Notes, para. 48(g): “If the neutral resigns or has to be replaced during the course of the ODR proceedings, the ODR administrator be required to appoint a replacement, subject to the same safeguards as set out during the appointment of the initial neutral.”

Article 11 -- Power of the Neutral

1. *Subject to the Rules, the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.*
2. *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.*
3. *Subject to any objections under article 9, paragraph 8, the neutral shall conduct the ODR proceedings on the basis of all communications made during the ODR proceedings[, the relevance of which shall be determined by the neutral. The ODR proceedings shall be conducted on the basis of these materials only unless the neutral decides otherwise.*
4. *At any time during the proceedings the neutral may request or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine.*
5. *The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, the dispute resolution clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A determination by the neutral that the contract is null shall not automatically entail the invalidity of the dispute resolution clause.*
6. *The neutral, after making such inquiries as he or she may deem necessary, may, in his or her discretion, extend any deadlines under these Rules.*

Comment: Adapted from UNCITRAL Arbitration Rule 17 and UNCITRAL ODR Technical Notes, paragraph 49 (“In respect of the powers of the neutral, it is desirable that:

- (a) Subject to any applicable ODR rules, the neutral be enabled to conduct the ODR proceedings in such a manner as he or she considers appropriate;
- (b) The neutral be required to avoid unnecessary delay or expense in the conduct of the proceedings;
- (c) The neutral be required to provide a fair and efficient process for resolving disputes;
- (d) The neutral be required to remain independent, impartial and treat both parties equally throughout the proceedings;

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- (e) The neutral be required to conduct proceedings based on such communications as are before the neutral during the proceedings;
- (f) The neutral be enabled to allow the parties to provide additional information in relation to the proceedings; and
- (g) The neutral be enabled to extend any deadlines set out in any rule.”)

V. General Provisions

Article 12 -- Deadlines

The ODR administrator, or, if relevant, the neutral, shall notify parties of all relevant deadlines during the course of proceedings.

Comment: See UNCITRAL Arbitration Rule 17(2).

Article 13 - Dispute resolution clause

The ODR platform and ODR administrator shall be specified in the dispute resolution clause. [In the event that the ODR provider fails to be available, the parties agree to the use of an approved APEC ODR Provider and platform.]

Comment: UNCITRAL ODR Technical Notes, para. 28 (“In order to enable ODR communications, it is desirable that both the ODR administrator and the ODR platform be specified in the dispute resolution clause.”) See Annex.

Article 14 - Place of Arbitration

If the parties have not determined the place of arbitration, the ODR administrator shall select the place of Arbitration, such place to be selected from among the list set out in the Appendix.

Comment: Adapted from UNCITRAL Arbitration Rules, Article 18; UNCITRAL Model Law on International Commercial Arbitration 20.

Article 15 - Language of proceedings

The ODR proceedings shall take place in the language of the agreement to submit disputes to ODR under the Rules. In the event that a party indicates in a notice or response that it wishes to proceed in another language, the ODR administrator shall identify available languages that the parties can select for the proceedings, and the ODR proceedings shall be conducted in the language or languages that the parties select.

Comment: Drawn from UNCITRAL Arbitration Rules, Article 19 and UNCITRAL ODR Technical Notes, para. 51. The Technical Notes state: “Technology tools available in ODR can offer a great deal of flexibility regarding the language used for the proceeding. Even where an ODR agreement or ODR rules specify a language to be used in proceedings, it is desirable that a

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party to the proceedings be able to indicate in the notice or response whether it wishes to proceed in a different language, so that the ODR administrator can identify other language options that the parties may select.” See also UNCITRAL Model Law on International Commercial Arbitration Article 22.

Article 16 – Representation

A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons and the authority to act must be communicated to the other party by the ODR administrator.

Comment: Drawn from UNCITRAL Arbitration Rule 5.

Article 17 - Exclusion of liability

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR administrator and neutral based on any act or omission in connection with the ODR proceedings under the Rules.

Comment: Based on UNCITRAL Arbitration Rule 16.

Article 18 - Allocation of Costs

The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the ODR Provider/arbitrator may apportion each of such costs between the parties in the award if it determines that apportionment is reasonable, taking into account the circumstances of the case.

Comment: Adapted from UNCITRAL Arbitration Rule 42. Do we need definition of costs? See UNCITRAL Rule 40(2).

Article 19 - Fees of ODR proceedings

The fees of ODR proceedings shall be reasonable in amount, and made available to the parties in advance of proceedings.

Comment: Adapted from UNCITRAL Arbitration Rule 41(1). See also UNCITRAL ODR Technical Notes para. 9: “ODR ought to be simple, fast and efficient, in order to be able to be used in a “real world setting”, including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.”

MODEL PROVISIONS

Model ODR Clause for Contracts

Any dispute, controversy or claim arising hereunder and within the scope of the APEC ODR Rules providing for an online dispute resolution process ending in a binding arbitration, shall be settled by arbitration in accordance with the APEC ODR Rules presently in force.

Note. Parties should consider adding:

- (a) *The ODR Provider shall be ... [Name of Institution]*
- (b) *The number of neutrals shall be one.*
- (c) *The place of arbitration shall be ... [Town and Country]*
- (d) *The language used in the arbitration proceeding shall be ...*

In the event that the designated ODR provider or platform fails to be available, the parties agree upon the use of ODR and shall agree to the use of an approved APEC ODR Provider and platform

Model Statement of Independence pursuant to Article 11 of the Rules

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.

Comment: Drawn from UNCITRAL Arbitration Rules, Annex.