

Updates from the 'Fifth Phase' of ODR: The Singapore and APEC Experience

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Developments in online dispute resolution (ODR) are quickening apace as the legal world awakens to the ex of online and AI-assisted processes in the provision of legal services. Outdated regulatory frameworks are being updated and new regulatory frameworks are being designed in order to keep up with the demand for flexible, low-cost, and accessible dispute resolution that is afforded by the use of ODR. This article will provide a brief dispatch from the 'fifth phase' of ODR development: new technological advances and emerging regulations.¹ It will begin by reviewing the ODR landscape in Singapore and explore some of the attendant contextual issues accompanying the development of ODR laws and processes. It will then briefly explore the current initiative underway in the Asia Pacific Economic Community (APEC) Economic Committee to draft and implement a regional set of ODR rules. The article will conclude with a look at the potential impact of the Singapore Convention on Mediation on the development of ODR.

ODR Landscape in Singapore

The Government of Singapore has widely embraced ODR and the technologies which enable it. Indeed, ODR processes are being explored or actively implemented by the judiciary, the administrative wing of the government, and by ADR providers throughout Singapore. This movement presents a leap forward in affordability, access to justice, and integration of technology in legal services. It also presents questions as to the extent to which technology may be supplanting the existing functions of the courts.

ODR processes are implemented by the Singapore [State Courts](#) through a number of specialized tribunals: the Small Claims Tribunal (SCT), the Community Dispute Resolution Tribunal (CDRT) and the Employment Claims Tribunal (ECT), all of which operate under the umbrella of the [Community Justice and Tribunals System](#) (CJTS). Through these services, individuals or corporate entities may complete questionnaires designed to help them determined whether their claims fall within the jurisdiction of the tribunal and what kind of dispute resolution is most suitable for their dispute. From there, litigants are guided through court registration, filing instructions, form submissions, scheduling court dates, and in the case of the SCT and the ECT, even e-negotiation and e-mediation (ECT only) services if the parties agree to settle their dispute.

¹ Nadja Alexander, *The Hong Kong Mediation Manual (2nd Ed., 2014)*, 434: 'The regulation phase: Regulation has long been an issue in ODR. Since 2008 there has been considerable progress in international regulatory initiatives to address quality assurance, standards and the need for a global regulatory framework for ODR.'

The [Supreme Court](#) and State Courts implement the [eLitigation](#) (for civil matters) and the [Integrated Case Management System](#) (ICMS, for criminal matters), which are online filing and repository systems making Singapore one of the foremost paperless court systems in the world. The eLitigation system is a full-service online court registrar through which judges and parties may request and receive official service, draft motions and orders, schedule hearings, and submit and review evidence. In addition, the State Courts permit parties to attend hearings through Skype or videoconferencing software in some circumstances.²

The Courts of the Future Taskforce, an initiative launched by the Judiciary in 2016, has undertaken to develop a number of initiatives aimed at providing litigants with self-help solutions including the development of a fully-integrated ODR platform for motor vehicle accidents.³ The [Family Justice Courts](#) are examining opportunities to develop an ODR platform for child maintenance claims⁴, and the Ministry of Manpower is also exploring the use of an ODR platform for some types of disputes. Online dispute resolution processes in Singapore thus far are limited to civil matters, but the Courts of the Future Taskforce is exploring the use of outcome assessment technology in criminal litigation as well.⁵

Beyond the courtroom, the [Singapore Mediation Centre](#) (SMC) has launched its own [ODR pilot platform](#), providing online mediation services for claims under SGD 60,000 in value. Parties may utilise a chat function within the platform to communicate with one another and with the mediator in real time, or asynchronously if the parties are not simultaneously using the platform. Mediators may schedule joint mediation sessions with in-platform videoconference or audio tools. Parties convey or draft settlement offers within the platform, and settlement agreements are submitted for registry online. In addition to the online ADR services available and soon-to-be available through the courts, more law firms and legal service providers in Singapore are implementing ODR systems to serve their clients. Major firms such as WongPartnership LLP, Dentons Rodyk & Davidson LLP, and Clifford Chance have all incorporated AI systems for due diligence and document review.⁶ In addition, the Singapore Ministry of Law, the Law Society of Singapore, and Enterprise Singapore took up a joint effort in 2017 small- and medium-sized firms to embrace some basic ITC systems by subsidizing the cost of buying and leasing software.⁷

ODR Regulatory and Ethical Considerations in Singapore

There are several key issues in the Singapore context when it comes to ODR. First, there is the implementation of the various platforms and processes, and the policy considerations that come along with each of the those. Courts in Singapore have embraced ADR as a means of easing caseloads and reducing court backlogs, and indeed since 1994 have utilized court-annexed mediation and required lawyers to counsel their clients on the use of ADR to resolve disputes before proceeding with litigation. As ODR processes begin to supplement and in some cases replace the function of human lawyers, judges, and clerks, issues arise as to how this may impact the trust Singaporeans have thus far placed in the judiciary. Will Singaporeans

² State Court Practice Directions, Part V.

³ One Judiciary Annual Report (2018), 6.

⁴ One Judiciary Annual Report (2018), 111.

⁵ One Judiciary Annual Report (2018), 61.

⁶ State of Legal Innovation in APAC Report (2019), 90.

⁷ State of Legal Innovation in APAC (2019), 89.

accessing ODR systems through the Community Justice Resolution Tribunals feel that the court and the ODR platform are one and the same? Will technology errors or malfunctions be attributed to incompetence on the part of the court? Will Singaporeans feel that an ODR system has provided the same measure of due process and procedural justice that a human magistrate, judge, or mediator would have provided?

Related to these issues are ethical considerations that lawyers must undertake in the provision of ODR services. Legal frameworks in Singapore governing ODR are still in a state of development, and some gaps exist as to the conduct of legal professionals and the provision of legal services in an online environment. Which disputes are appropriate for ODR, and which should be settled in-person? How should lawyers do business online when providing ADR services? How does provision of ODR differ from traditional, face-to-face ADR? What kind of security, data privacy, and identity verification is needed in order to ensure client safety and satisfaction?

And finally, present in nearly all dialogues taking place around the world when it comes to the ongoing development of ODR is the issue of consumer protection. Consumers represent a class of users facing unique barriers to justice when a transaction – particularly an electronic transaction – with a merchant goes wrong. How can ODR increase access to justice for consumers while guaranteeing some measure of due process, and without excluding consumers from access to courts if they wish to use traditional recourse in Singapore?

The User Experience of Justice and ODR

The various ODR processes currently being operated and developed by the courts in Singapore represent a co-option of ADR processes that might otherwise take place outside the courtroom altogether. Thus, the Singapore courts have embraced online ADR processes and in doing so have provided their official endorsement of the procedural justice provided by e-negotiation and e-mediation when it comes to certain disputes and some subject matter. Singapore policymakers view the incorporation of legal technology and ODR services into traditional forms of justice as a vital step towards increasing access to justice for Singaporean individuals, entities, and small and medium enterprises.⁸ On the other hand, this merging of ADR, ODR, and the courts also represents a merging of the third party (the courts) with the theoretical fourth party (technology) as more and more of the courts' existing functions are absorbed by online processes. Insofar as parties or litigants ultimately perceive the third and fourth parties as the same thing, there may be long-lasting ramifications regarding access to justice, particularly as court processes and online processes facilitated by technology become indistinguishable. Disputants who have trouble navigating eLitigation or utilizing the e-negotiation or e-mediation tools in the CJTS may attribute their difficulties not to the technology present but to the competence of the court itself, which in turn could reduce community, stakeholder, and user trust in both the ODR mechanism and the court function itself.⁹ Nonetheless, it is a stated goal of the Singapore judiciary to inspire public trust in the competence of the courts, and therefore it is likely that as ODR processes continue to develop, the courts of Singapore will work diligently to ensure that ODR services are of the highest quality.¹⁰

⁸ Legal Technology Vision (2017), 4.

⁹ Quek (2019), 11-14.

¹⁰ One Judiciary Annual Report (2018), 58.

Regulating the Practice and Ethics of ODR

Regarding the question of ethics and the provision of ODR legal services, Singapore has taken a few steps to address online and technology-assisted processes, but further updates are needed. The emerging technologies that make ODR possible promise to transform the practice of law and the provision of legal services in Singapore in many ways. There are several start-ups in Singapore developing legal technology improvements for ADR service providers. Large law firms and multinational companies are also acquiring new systems and showing an interest in implementing innovative technology solutions for their clients. The Singapore government has led from the top-down by establishing a national platform for action on development and implementation legal technology. As yet, however, there are only limited practice directions, regulations, or guidelines exist relating to ODR. Nonetheless, the same ethical principles which underscore the provision of ADR services underscore the provision of ODR services. In some cases, additional ethical or practical considerations should be applied as well.

In 2017, the [Singapore Academy of Law](#) published its landmark ‘Legal Technology Vision,’ which is described as a ‘call to action for lawyers – whether practicing in law firms or serving as in-house counsel to corporations – to become part of the disruption that faces the legal industry today.’¹¹ The platform calls for a four-pronged approach¹² to the continued development of legal technology in Singapore, and urges lawyers and law practices to involve themselves directly in not only the adoption of new legal technology, but in improving and inventing new technologies as well.

The platform also calls for updates to practice directions and outdated rules and regulations that may hinder the adoption or effective use of such technologies, or which at the very least fail to address fundamental changes in the nature of legal practice when it is conducted online.¹³ While the Legal Profession Act¹⁴, the Professional Conduct Rules¹⁵, the Arbitration Act¹⁶ and the Mediation Act¹⁷ in Singapore presumably apply to the practice of ODR as well, none of these texts have been updated to specifically regulate ODR. The most recent Rules of Court and State Court Practice Directions provide updates to assist lawyers using the eLitigation and ICMS filing systems, but do not contain guidance for lawyers practicing ODR outside the courts. SAL has pledged to work with the Ministry of Law and the Singapore Professional Conduct Council towards resolving these apparent gaps in the legal framework.

While as yet laws and regulations have not been specifically updated to address ODR practice, the [Law Society of Singapore](#) does provide detailed ethical guidance for lawyers in Singapore on the use of information technology, including the practice of law on the Internet.¹⁸ The guidance clarifies that practicing law purely online is not possible under Singapore law, as

¹¹ Legal Technology Vision (2017), 3.

¹² This is referred to as the (AI)² Model: Adoption, Improvements, Adaptation, and Invention. For further details, see the Legal Technology Vision (2017), 7-9.

¹³ Legal Technology Vision (2017), 19.

¹⁴ Legal Profession Act, Chapter 161 (2009)

¹⁵ Legal Profession (Professional Conduct) Rules (2015).

¹⁶ Arbitration Act, Chapter 10 (2002).

¹⁷ Mediation Act (2017).

¹⁸ Law Society of Singapore Guidance Note 6.1.1 (2018).

every registered law office must have a physical address.¹⁹ The Law Society also provides ethical guidance on the use of technology such as cloud computing²⁰ and electronic and storage of documents.²¹ Among ADR providers, SMC has updated its Procedures and Code of Conduct to address conduct during online mediations.²²

In addition to the guidance provided to lawyers practicing in ODR by the Law Society, ODR ethical principles have been formulated by a number of legal scholars and thought leaders in the field.²³ Such principles include: accessibility, accountability, competence, confidentiality, empowerment, equality, fairness, honesty, impartiality/neutrality, informed participation, innovation, integration, protection from harm, security, transparency, limited discovery, and trust.²⁴ Lawyers practicing in ODR should be especially aware of security, data privacy, and identity verification concerns, and must at all times remain compliant with the Personal Data Protection Act.²⁵

Consumer Protection and ODR

Finally, one of the key issues in the development of ODR technologies, platforms, and usage around the world is how to manage consumer-to-business disputes in the ODR context. Consumers can face outsized challenges in enforcing their legal claims compared to the size or the amount of their claim, and these challenges increase when it comes to transactions that were completed online or through a cross-border transaction.²⁶ On the one hand, ODR presents policymakers with an opportunity to ensure access to justice for consumers who might otherwise be forced to walk away from their legal claims under a system of dispute resolution where the associated fees for pursuing the claim are too high to justify the expense. On the other hand, ODR presents a challenge for policymakers concerned that it may displace access to traditional legal processes for consumers altogether. In Singapore, policymakers have tread a fine line between embracing ODR for consumer protection, and ensuring that traditional modes of access to justice are not replaced. More could

Consumer protection in Singapore is regulated through the Consumer Protection (Fair Trading) Act.²⁷ Until recently, consumers in Singapore were required to physically go to court to settle small claims (claims which amount to less than SGD 10,000, including consumer disputes). But as of 2017, the CJTS has established an online filing system for claims arising under the Small Claim Tribunals Act and users may also utilize the e-negotiation feature on the CJTS portal if they wish to do so. Thus, consumers seeking access to court may do so in a more affordable fashion through the CJTS.

In addition to this option, consumers in Singapore have had the option of seeking dispute resolution through the [Consumer Association of Singapore](#) ('CASE') for over thirty years. A

¹⁹ Legal Profession Act, S 25(1)(a)(iv) (2009).

²⁰ Law Society of Singapore Guidance Note 3.4.1 (2017).

²¹ Law Society of Singapore Guidance Note 3.12.1 (2006).

²² Singapore Mediation Centre Small Case Commercial Mediation Scheme, Mediation Procedure (2018).

²³ See for example Rainey (2014); Rainey (2016); Ebner and Zeleznikow (2015); Ebner and Zeleznikow (2016); and Zeleznikow and Bellucci (2012).

²⁴ Quek (2018), 5.

²⁵ Personal Data Protection Act (2012).

²⁶ World Economic Forum (2019), 4-5.

²⁷ Consumer Protection (Fair Trading) Act (2009).

not-for-profit consumer advocacy group, CASE provides mediation and arbitration services for consumer-to-business disputes, and consumers may file complaints online through the CASE complaint portal.

Despite these access points, some observers in Singapore feel that consumer protections could be stronger.²⁸ Whether ODR will figure prominently into future revisions of the consumer protection framework remains to be seen. However, such a development has been marked out as a clear possibility by the [Future Law Innovation Programme](#) ('FLIP'), an initiative launched by SAL in 2017.²⁹ The Legal Technology Vision also includes in its recommendations for areas of improvements ODR processes related to consumer protection and access to justice.³⁰ Therefore, it is likely that ODR will see increased usage and implementation for consumer protection in Singapore as technology and legal frameworks continue to develop.

APEC, MSMEs and the Case for a Regional ODR Framework

Going beyond the Singapore borders, within APEC an initiative is underway to utilise ODR as a means of increasing access to justice for micro, small, and medium enterprises in business-to-business disputes. MSMEs account for ninety-seven per cent of businesses and employ over half of the workforce in the APEC region; yet, they account for only thirty-five per cent of direct exports. The Economic Committee at APEC has recognized that increasing export growth among MSMEs is critical to economic development across APEC, but first, barriers to entry must be addressed.

One such barrier is the lack of access to commercial justice in cross-border transactions for MSMEs.³¹ Domestic courts are not well suited for resolving small claims cross-border disputes (the average value of which is USD \$52,000³²) as they are still deeply tied to jurisdiction, geography, and in-person enforcement. Arbitration is also not a viable option for most MSMEs, as it is increasingly expensive and may be too time consuming for small business owners. And, creating special courts like small claims tribunals may result in similar drawbacks to domestic courts, such as high costs for legal representation, travel to and from the special court, and potential language or translation issues.

The result of these barriers is, in the words of David Dodwell, Executive Director of the Hong Kong-APEC Trade Policy Group, 'eye-watering.' Over one third of MSMEs will suffer a dispute

²⁸ Loo and Ong (2017), 16-17.

²⁹ Flip 101 Problem Statements (2017), 10.

³⁰ Legal Technology Vision, 39.

³¹ ABAC, USC Marshall, Driving Economic Growth Through Cross-Border E-Commerce in APEC: Empowering MSMEs and Eliminating Barriers at 35, 69, 81 (APEC interviews with 506 business executives plus 244 survey responses): <https://www2.abaonline.org/assets/2015/4%20Manila/MSMEEWG%2035-053%20USC%20Marshall%20SMMes%20in%20e-Commerce%20Research%20Project%20Full%20Report.pdf>

³² Ecorys, Study on the use of Alternative Dispute Resolution for Business to Business disputes in the European Union, at 6, 123, 125 (commissioned by the European Commission) <http://www.adrcenterinternational.com/wp-content/uploads/2015/01/ADR-Final-Report-151012.pdf> (based in part interviews with 10,840 businesses including MSMEs); European Commission, DG Enterprise and Industry, Business Disputes Keep Businesses from Doing Business, at 4

within three years of doing business.³³ On average, each dispute will involve six different companies, spread across many countries. The average time it takes to resolve a dispute will be 446 days. And, the average cost of a US lawyer is USD \$1,200 per hour. Almost any dispute can therefore threaten the very existence of an MSME, but almost no education or counseling is provided to MSMEs entering the market about the risks posed by cross-border disputes. Most often, rather than seek settlement, MSMEs simply walk away from their investment.

To address these regional barriers to entry and increase MSME export growth, the APEC Economic Committee approved a Workplan in 2016 titled “Developing a Cooperative ODR Framework for MSMEs in B2B Transactions and Use of Modern Technology for Dispute Resolution and Electronic Agreement Management.” The Workplan calls for building a pilot ODR platform with regional providers, promoting harmonization of the relevant laws for ODR, and developing ODR procedural rules, among other priorities. It takes guidance from the UNCITRAL Technical Notes on Online Dispute Resolution, which recognizes ODR as best suited to ‘assist the parties in resolving a dispute in a fast, flexible, and secure manner, without the need for physical presence at a hearing.’ The goal is to build a comprehensive ODR framework, complete with a platform to test new technologies and the user experience, and a set of procedural rules for adoption by parties around the APEC region.

Problem Solved?

Several unresolved issues may yet stall progress on a functional APEC-wide ODR framework. These can be considered in two categories: those that might doom the framework itself, and those that might doom its implementation. In the first category belong issues on which APEC member economies cannot reach consensus on a definition, plan of action, or particular wording within an APEC document. For example, the approved Workplan limits ODR scope to B2B disputes, but definitions of ‘business transactions’ or ‘business’ differ among jurisdictions in APEC. Failure to come to an agreement about how to manage the differences over the definition of B2B dispute within the framework could result in a ‘no’ vote or an abstention during official proceedings when the time comes for adoption of the framework, which would kill the entire effort.³⁴

In the second category belong broader international framework issues, which may prove even more difficult to address. For example, there is a lack of harmonization among APEC members regarding the international instruments relevant to ODR and e-commerce: only two APEC member economies have adopted the UN Convention on the Use of Electronic Communication in International Contracts. Only two-thirds of the APEC member economies currently have laws based on the UN Model Law on Electronic Commerce. Legal systems where courts enforce traditional ‘in-writing’ requirements related to contract formation may find themselves at odds with requests for recognition of electronically formulated and signed agreements. And, even the B2B issue highlighted in the first category could present enforcement headaches for parties enforcing an award resulting from the APEC ODR platform

³³ Dodwell, ‘How SMEs can enter international markets without being eaten alive: the role of ODR.’ Presentation at *APEC Workshop for Developing a Collaborative Framework for Online Dispute Resolution*, Osaka, Japan, 8 November 2018.

³⁴ APEC is a consensus-based body, and therefore all APEC instruments, motions, documents, and activities must meet uniform approval during the voting process or they will not progress.

in a jurisdiction that would not otherwise recognize their status as a business. So, the APEC ODR framework faces a difficult journey ahead before MSMEs in APEC can log onto a central platform and seek cross-border dispute resolution services.

But, an additional recent development in the existing international ecosystem may assist the framework's implementation, should it proceed through the APEC adoption process: the arrival of the UN Convention on the Enforcement of International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention on Mediation. This will be explained in further detail below.

The Singapore Convention on Mediation and ODR

At the General Assembly meeting in December 2018, the UN formally adopted the Convention on the Enforcement of International Settlement Agreements Resulting from Mediation, and in the same session, determined to call the new convention after Singapore.³⁵ The Convention will be opened for signing on 7 August 2019, in Singapore. Heralded as an exciting and important advancement in the field of international dispute resolution, the Singapore Convention's advocates and supporters hope that, if successful, it will help to achieve for cross-border mediation what the New York Convention³⁶ achieved for international arbitration.³⁷

The Singapore Convention holds particular promise for the development of online mediation processes. Article 2(2) of the Singapore Convention establishes that the formal writing requirements for enforcement proceedings may be met by the production of electronic documents and signatures. This smooths the road for enforcement of settlement agreements resulting from online mediation proceedings. Thus, two APEC businesses utilizing an APEC-wide ODR platform to mediate their dispute would likely be able to seek expedited enforcement of any resulting agreement in a signatory country to the Convention. Widespread adoption of the Convention in the APEC region, therefore, could bolster APEC's efforts to introduce and implement the APEC ODR platform, and potentially increase the platform's viability.

Conclusion

In conclusion, the fifth phase of ODR in Singapore and APEC is ushering in widespread developments and advancements in the practice and implementation of online and technology-assisted platforms and processes. The addition of the Singapore Convention on Mediation to the international dispute resolution landscape promises to add another layer to the emerging regulatory framework.

³⁵ Schnabel (2018), 8.

³⁶ UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

³⁷ Chua (2018), 1.

