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## THE CISG AND CROSS-BORDER ACCESS TO COMMERCIAL JUSTICE

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## THE CISG AND CROSS-BORDER ACCESS TO COMMERCIAL JUSTICE

*Mark Walter\**

### ABSTRACT

Global trade has changed rapidly, and in some ways dramatically, since the Great Recession began in 2008. Two sometimes competing factors are at play: the slowdown in globalization due primarily to protectionist measures employed at the national level and the new international opportunities created by technology and regulatory environment reform. Both factors present unique benefits and challenges for micro, small and medium enterprises (MSMEs)<sup>1</sup> engaging in or planning to engage in cross-border trade. Barriers to MSME cross-border trade remain high, with one of the highest being the lack of cross-border access to commercial justice for smaller participants. There is a decreased incentive for small businesses to engage in trade and global value chains, or to use arm's length contracts in such cases, where there is little potential for resolving disputes through litigation, arbitration or mediation. One solution that is gaining significant attention in legal, business and technology circles is Online Dispute Resolution (ODR), which is, in turn, driving legal harmonization that benefits MSMEs. This paper is a discussion

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<sup>1</sup> The term “micro, small and medium enterprise (MSME),” when used to describe the collection of non-large businesses, is interchangeable with the term “small and medium enterprise (SME).” This paper uses MSME, primarily because it often refers specifically to “micro enterprises” as disaggregated from other non-large businesses. Note the distinction made by the World Bank:

[t]he acronym SME—‘small and medium-sized enterprise’—is used in most contexts as the generic term to qualify all enterprises that are not large. In most instances, the term is not defined precisely in the sense that no upper or lower size thresholds are indicated. In addition, the acronym MSME—“micro, small and medium enterprise”—is used to emphasize the inclusion of the smallest firms.

WORLD TRADE ORG., WORLD TRADE REPORT 2016, at 15 (2016), [https://www.wto.org/english/res\\_e/booksp\\_e/world\\_trade\\_report16\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/world_trade_report16_e.pdf).

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of the evolution of a new generation of micro and small cross-border entrepreneurs, the growth of and rationale for improved access to commercial justice, the role the CISG should play in technology-assisted dispute resolution and, more generally, in establishing an environment conducive to MSME growth.

## I. INTRODUCTION

The UN Convention on Contracts for the International Sale of Goods (CISG) has potential to level the legal playing field for small enterprises engaged in international trade, something never contemplated in its early development, understandably, given the complexities of international trade at the time. For the CISG to work effectively for small enterprises, however, it needs to be both a foundation and a capstone to an integrated system of instruments and institutions, some established and some new, that reflect the potential for growth driven by small entrepreneurs trading across borders.

In January of 2019, *The Economist* declared this the era of “Slowbalisation,” citing a significant shift away from the rapid global economic integration of the 1990s and early 2000s.<sup>2</sup> Slowing globalization is likely to have a disproportionate effect on developing countries. Additionally, micro, small and medium enterprises (MSMEs) will be especially hard hit, not only because they are becoming important components in regional and global trade,<sup>3</sup> but also because free trade has led to rapid growth in developing countries and MSMEs operating domestically have benefited from cheaper foreign goods and wealthier domestic markets.

On the other hand, while changing trade policies may add barriers, particularly for MSMEs interested in entering global value chains, new technology continues to open doors. E-commerce and other Information Communications Technology (ICT) allows even micro businesses to go global. The Micromultinational<sup>4</sup> is a real and growing segment of commerce,

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<sup>2</sup> *Slowbalisation*, THE ECONOMIST (Jan. 24, 2019), <https://www.economist.com/leaders/2019/01/24/the-steam-has-gone-out-of-globalisation>.

<sup>3</sup> MSME trade is still small in comparison to large firm trade, but is growing. For a general overview of MSME involvement in international trade, broken down by sector, country GDP, exports and imports, see generally WORLD TRADE ORG., *supra* note 1.

<sup>4</sup> See Hal Varian, *Micromultinationals Will Run the World*, FOREIGN POLICY (Aug. 15, 2011, 4:02 AM), <https://foreignpolicy.com/2011/08/15/micromultinationals-will-run-the-world/>; see also

both in the developing and developed economies.<sup>5</sup> Online trading platforms such as Alibaba, Ebay, Lazada and Amazon have provided new opportunities for small businesses to trade with verified partners and, as loosely governed platforms, afford some certainty of the legitimacy of their trading partners.<sup>6</sup> According to *The Economist*, “over the past decade global e-commerce has been expanding at an average rate of 20% a year as bricks-and-mortar shops have languished.”<sup>7</sup> Many of today’s small startups know they need to be global the day they open their doors because niche products need larger markets in order to be successful, and new technology means small innovators need not necessarily be physically located in the markets for their products. A micro enterprise in Kansas with a novel idea for bringing mosquito nets to market in Indonesia can effectively use internet technology for most or even all non-production aspects of the business.

Likewise, even with slowing globalization, Global Value Chains (GVCs) are not going away, and the opportunities they create for small businesses, though barriers to entry can be very high, are enticing new entrants with good ideas and are pushing governments to create policies that support and facilitate their establishment and growth. Even arguably protectionist trade policies around local content requirements (*e.g.*, “buy local” regulations intended to create local jobs and promote entrepreneurship) are often designed with MSMEs in mind and, though the evidence of effectiveness is mixed and remains scant, if done in the right ways, can and does help small businesses enter GVCs.<sup>8</sup>

Whether because of local content measures or the natural evolution of the global economy, Micromultinationals are no longer being neglected in

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*Testing, testing*, THE ECONOMIST (Jan. 16, 2014), <https://www.economist.com/special-report/2014/01/18/testing-testing>.

<sup>5</sup> Penny Pritzker & Devin Wenig, *The Rise of the Micro-multinational, and Why it Matters to the U.S. Economy*, MERCURY NEWS (May 14, 2015, 4:38 AM), <https://www.mercurynews.com/2015/05/14/penny-pritzker-and-devin-wenig-the-rise-of-the-micro-multinational-and-why-it-matters-to-the-u-s-economy/>.

<sup>6</sup> See, *e.g.*, TJ McCue, *Amazon Report Cites More Than 1 Million Small Business Sellers On Platform*, FORBES (July 24, 2018, 7:28 PM), <https://www.forbes.com/sites/tjmccue/2018/07/24/amazon-report-cites-more-than-1-million-small-business-sellers-on-platform/#6784b35f3e83>.

<sup>7</sup> *E-commerce Takes Off*, THE ECONOMIST (Oct. 26, 2017), <https://www.economist.com/special-report/2017/10/26/e-commerce-takes-off>.

<sup>8</sup> There is, for example, a Buy America provision built into the 2009 American Recovery and Reinvestment Act (ARRA). See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009). For a developing country example, see In-Country Value Development Programme, <http://www.incountryvalueoman.net/>.

trade policy and in international commercial law, and countries and multilateral organizations are making significant efforts to catch law and policy up with small business expansion across borders. Nonetheless, the law remains too far behind. In the words of Mr. David Dodwell, executive director of the Hong Kong-APEC Trade Policy Study Group, speaking at a recent conference in Osaka, “We are urging our small businesses out of the [domestic market] trenches armed only with baguettes.”

Dispute resolution is one area of important growth for MSMEs in trade. Small businesses experience the same risks in trading across borders as their larger contemporaries—currency, distance, language, trade usage, risk of loss in transit, and, of course, legal risks and contract enforcement risks—but, for small businesses, the financial stakes are typically much higher and more personal, and their access to commercial justice for smaller disputes is virtually non-existent.

This paper discusses the growing interest in dispute resolution designed for small value cross-border claims—primarily Online Dispute Resolution (ODR); recent efforts within the Asia Pacific Economic Cooperation (APEC) forum to establish ODR as a viable solution to regional small-value cross-border disputes; and the critical role the CISG and other efforts at legal harmonization and simplification may play in the realization of this objective.

## II. THE RISE OF ONLINE DISPUTE RESOLUTION

The idea that a machine can help resolve disputes goes back at least to the development of Legal Expert Systems—computer software that attempts to recreate the human decision-making process.<sup>9</sup> Its rise is in direct response to the recognition (though not necessarily market demand, as I will discuss later) that there is little recourse for a breach of contract where the contract and resulting dispute is international and small.

### *A. Access to Commercial Justice*

One of the fundamental realities of the human condition is that agreements fail. It is difficult to put a figure on the percentage of contracts

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<sup>9</sup> Richard Susskind, *Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning*, 49 MODERN L. REV. 1, 4 (1986).

that fail, simply because contracts are of so many varieties (from a \$20 transaction at a farm market to a \$2 billion investor-state agreement related to an oil rig). Contracts are also ubiquitous, occurring countless, millions of times every day and in every context imaginable. E-Commerce transactions, with their indelible and measurable electronic footprints, are a little easier to study than a general collection of small business transactions, where a multitude of transaction types are used. It is estimated that 3% to 5% of all electronic commercial transactions result in a dispute.<sup>10</sup> One of the few large scale studies of contract disputes among MSMEs (in Europe) found that some 28% of MSMEs were involved in disputes over a three year period, businesses involved in disputes had on average six disputes with other businesses, the average value of a cross-border dispute was €44,300, and more than 35% of cross border disputes went unresolved.<sup>11</sup>

It is also difficult to determine the demand for access to dispute resolution mechanisms simply by asking businesses. When asked whether they feel the need for better and cheaper access to commercial dispute resolution, most micro and small businesses are likely to report that they do not need it because they tend to build the risk of breach into the costs of their contracts. But this extra cost built into a contract shifting risk to the other party or softening the financial blow of a breach represents a higher transaction cost than would exist if there were adequate resort to dispute resolution. Small businesses are likely to offset risk in one of three ways: shift it to the other party; absorb (or ignore) the risk; or limit themselves to relational contracting with people they know rather than at arm's length further afield. All of these methods for offsetting risk increase transaction costs.

Once we make some simple assumptions, then, we can logically conclude even without adequate empirical research, that the lack of access to commercial justice results in barriers to entry for MSMEs wishing to do business across borders. The logical hypothesis on how lack of access to commercial justice inhibits growth goes something like this:

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<sup>10</sup> See Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. REV. 329, 333 (2016).

<sup>11</sup> Ecorys, *Study on the Use of Alternative Dispute Resolution for Business to Business Disputes*, ADR CTR. FOR DEV. (Oct. 15, 2012), <https://www.adrcenterfordevelopment.com/wp-content/uploads/2018/06/ADR-Final-Report-151012-1.pdf>.

- We start with the demonstrable, but poorly studied, postulation that small and most medium enterprises doing business across borders lack access to justice. Enforcement of judgements is uncertain and costs associated with international dispute resolution are typically higher than the value in dispute;
- If enforcement of the contract is uncertain or unlikely, there is little incentive to enter into sophisticated contracts;
- The alternative to sophisticated contracts is “relational contracting” in which business is conducted exclusively through trust networks of friends, neighbors and relatives;
- Transaction costs are significantly higher for relational contracts across borders, though this is also poorly studied;
- High transaction costs and the market limitations attendant to reliance on trust networks results in barriers to entry.

Better access to cross-border commercial justice will incentivize improved understanding and more frequent use of arm’s length contracts which should, in turn, result in lower transaction costs and lower barriers to entry for micro, small and medium businesses wishing to engage in regional and global value chains. This is not to say that relational aspects have no place in contracting. It is not necessarily an “either, or” calculus.<sup>12</sup> But, as the UK High Court pointed out in *Yam Seng Pte. Ltd. v. International Trade Corp Ltd.*, relational contracts “require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements.”<sup>13</sup> This is desirable but not possible for small businesses attempting to engage in business across borders with limited resources.

With a paucity of adequate research and a poor understanding of the value of arm’s length contracting, support to MSMEs has often focused on *entrenching* the use of relational contracting through developing “trust

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<sup>12</sup> A 2015 *Forbes Magazine* article makes the case that relational contracting reintroduces ethics, loyalty and integrity into contracting. See Kate Vitasek, *Driving Integrity: Relational Contracting on the Rise*, FORBES (May 20, 2015, 7:48 AM), <https://www.forbes.com/sites/katevitasek/2015/05/20/driving-integrity-relational-contracting-on-the-rise/#31beeab55525>.

<sup>13</sup> 146 Con LR 39, [2013] EWHC 111 (QB), [2013] 1 Lloyd’s Rep. 526, [2013] 1 CLC 662, [2013] 1 All ER (Comm.) 1321, [2013] BLR 147.

networks” rather than building incentives to using more sophisticated methods of contractual risk allocation and to providing cost efficient ADR alternatives. This approach follows a path of least resistance, and may help small businesses grow locally, but simultaneously limits their ability to contract over distances and, especially, across borders.

### *B. The ODR Answer to Access to Commercial Justice*

ODR is ascendant, at least in the Asia Pacific region, for three principal reasons:

- (1) It is potentially the cheapest and most efficient method for providing access to commercial justice for the smallest businesses and the smallest disputes. Theoretically, there is no dispute too small for ODR;
- (2) ODR is an attractive option and has drawn the curiosity of both the legal and digital worlds; and
- (3) Thanks to pushes from the United States Department of State, the Hong Kong China Ministry of Justice, the Singapore Ministry of Law and other Asia Pacific economies, the Asia Pacific Economic Cooperation (APEC) forum has taken ODR on as a region-wide objective.

Most ODR systems, the number of which is growing rapidly,<sup>14</sup> rely on a multi-tiered dispute resolution approach, administered online with varying degrees of human intervention. The first stage typically consists of technology-assisted negotiation in which machine learning allows the computer to prompt formulations and reformulations of the problem and of the parties’ interests so that they may achieve a consensual middle ground.

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<sup>14</sup> A number of ODR systems/platforms already exist. British Columbia requires civil claims for amounts up to CAD5,000 to be initiated in its ODR system. *See Online Dispute Resolution*, SMALL CLAIMS BC (Mar. 2019), <http://www.smallclaimsbc.ca/settlement-options/ODR>. Franklin County, Ohio, in the United States, offers online negotiation as an option in small claims cases. *See Online Dispute Resolution*, FRANKLIN COUNTY MUN. CT. (Oct. 1, 2016), <https://sc.courtinnovations.com/OHFCMC/home>. Modria and Matterhorn are examples of proprietary ODR platforms. *See* MODRIA, <https://www.tylertech.com/products/modria> (last visited Aug. 22, 2019); MATTERHORN, <https://getmatterhorn.com/> (last visited Aug. 22, 2019). Online trading platform, Alibaba, offers technology assisted dispute resolution. *See Help Center*, ALIBABA, [https://service.alibaba.com/buyer/faq\\_detail/10609493.htm](https://service.alibaba.com/buyer/faq_detail/10609493.htm) (last visited Aug. 22, 2019). Ebay also offers technology assisted dispute resolution. *See Dispute Resolution Overview*, EBAY, <https://pages.ebay.com/services/buyandsell/disputeres.html> (last visited Aug. 22, 2019).



Assisted negotiation and mediation are less about the law, as they focus on the parties' future interests, rather than their present grievances. Most disputes can end at this stage. Further stages can include AI-driven mediation and, of course, mediation or arbitration that is supported by real people but done remotely using virtual courtrooms and blockchain technology for protecting evidence and other information.

By far, the most daunting non-technological and non-market challenge thus far to the adoption of ODR frameworks has been the troubling debate over how to distinguish between businesses and consumers. It is, largely, why no convention resulted from the UNCITRAL Working Group on ODR and, instead, resulted in a set of technical notes.<sup>15</sup> When micro and small businesses engage in commerce it is often difficult to determine whether the commercial action in question is for business purposes or for personal consumption. It may, in fact, be done with both purposes in mind. For example, writing this paper on my notebook computer is for a business purpose, but I also use the computer for personal purposes.

The business/consumer nature of the parties matters a great deal because states may be very reluctant to recognize and enforce awards and judgements where one of the parties has waived his or her right to bring the dispute to "traditional justice"—*i.e.*, a domestic court. "Unsophisticated actors oftentimes do not have the bargaining power, competence nor advice required to ensure the respect of their rights, if they remain unaided by specific dispute resolution mechanisms that level the playing field."<sup>16</sup>

Overcoming this challenge is critical to providing access to commercial justice for smaller businesses; small enterprises are far more likely to be caught in the divide between commercial and consumer, precisely because they are more likely to be mistaken as consumers and then systemically excluded from participating in innovative dispute resolution mechanisms under the pretense of consumer protection by the state.

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<sup>15</sup> *Technical Notes on Online Dispute Resolution*, UNCITRAL (2017), [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382\\_english\\_technical\\_notes\\_on\\_odr.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf).

<sup>16</sup> GABRIELLE KAUFMANN-KOHLER & THOMAS SCHULTZ, *ONLINE DISPUTE RESOLUTION: CHALLENGES FOR CONTEMPORARY JUSTICE* 69 (Julian Lew ed., 2004) (citing LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 197 (1999)).

### III. ODR IN APEC<sup>17</sup>

Outside of the UNCITRAL's attempts to develop an ODR convention, the Asia Pacific Economic Cooperation (APEC) forum of twenty-one Asia-Pacific Economies<sup>18</sup> is the first multilateral organization to attempt harmonizing aspects of online dispute resolution. APEC's stated mission is to champion free and open trade and investment to accelerate regional economic integration; encourage economic and technical cooperation; and, achieve balanced, inclusive, sustainable, innovative and secure growth.<sup>19</sup> APEC, often better known for its annual "family photo"<sup>20</sup> than for the policies it facilitates, is a large and sometimes cumbersome organization, operating by consensus building and open dialogue and characterized by the fact that there are no binding obligations. APEC's member economies (2016 *CIA World Factbook* figures) account for approximately 39% of the world's population (around 2.8 billion people), 47% of world trade—with a total value of exports and imports of US\$18.5 trillion, and 60% of world GDP, with nominal GDP of US\$44 trillion.

APEC administers three major committees with more than seventy different working groups, covering everything from counterterrorism to electric vehicles. The Economic Committee (APEC-EC) focuses attention

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<sup>17</sup> Asia-Pacific Economic Cooperation, *APEC: Imagine the Possibilities*, YOUTUBE (Sept. 3, 2012), <https://youtube/aOCX8DoyxYo>.

<sup>18</sup> Australia, Brunei Darussalam, Canada, Chile, Chinese Taipei, Hong Kong, China, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, People's Republic of China, Peru, Republic of Korea, The Republic of the Philippines, The Russian Federation, Singapore, Thailand, United States of America, and Vietnam. Note that APEC members are referred to as economies because of the unique political status of Hong Kong, China and Chinese Taipei. This paper will, when referring to APEC members, use accepted nomenclature wherein Hong Kong, China is used rather than Hong Kong, and Chinese Taipei is used rather than Taiwan.

<sup>19</sup> APEC's complete mission statement is:

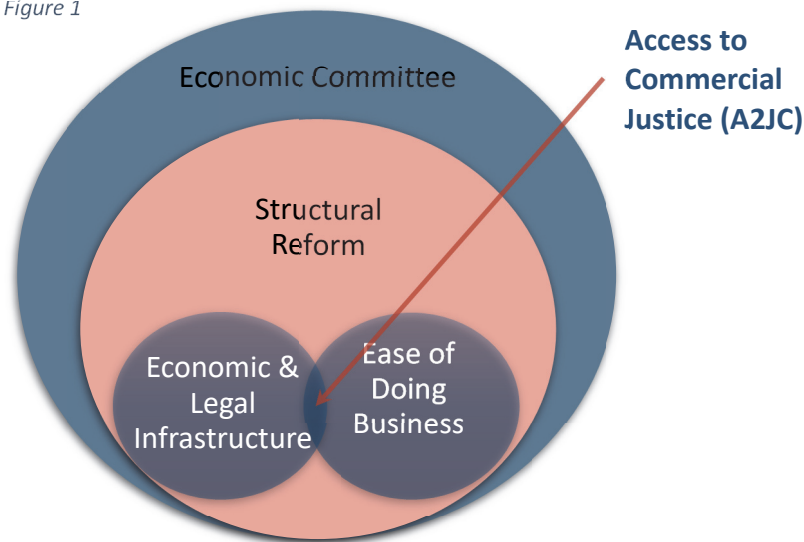
APEC is the premier Asia-Pacific economic forum. Our primary goal is to support sustainable economic growth and prosperity in the Asia-Pacific region. We are united in our drive to build a dynamic and harmonious Asia-Pacific community by championing free and open trade and investment, promoting and accelerating regional economic integration, encouraging economic and technical cooperation, enhancing human security, and facilitating a favorable and sustainable business environment. Our initiatives turn policy goals into concrete results and agreements into tangible benefits.

*Mission Statement*, APEC, <https://www.apec.org/about-us/about-apec/mission-statement> (last visited Aug. 22, 2019).

<sup>20</sup> See *APEC Fashion Hits and Misses*, CNN (Nov. 20, 2016), <https://edition.cnn.com/travel/gallery/apec-fashion/index.html>.

comparatively narrowly across the topic of structural reform,<sup>21</sup> which includes topics such as the World Bank Ease of Doing Business (EoDB) survey,<sup>22</sup> competition law, digital economy regulation, corporate governance, and commercial and trade legal infrastructure. The ODR initiative resides in a formal subgroup to the EC called the Strengthening Economic Legal Infrastructure (SELI) Friends of the Chair (FotC) but is very relevant to the EoDB group. See Figure 1, below.

Figure 1



APEC's interest in Online Dispute Resolution developed at the nexus of a number of other APEC topics: the ADR indicators in the Enforcing

<sup>21</sup> See *The Renewed APEC Agenda for Structural Reform (2016–2020)*, APEC, [https://www.apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Structural-Reform/2015\\_structural/Attachment%20A.aspx](https://www.apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Structural-Reform/2015_structural/Attachment%20A.aspx) (last visited Aug. 22, 2019).

<sup>22</sup> See *APEC Ease of Doing Business (EoDB) Action Plan*, APEC, <https://www.apec.org/Groups/Economic-Committee/Toolkit-for-Structural-Reform/EoDB-Action-Plan> (last visited Aug. 22, 2019).

Contracts section of the EoDB;<sup>23</sup> the cross-APEC work in digital economy,<sup>24</sup> and input provided by UNCITRAL when the organization received Guest Status in the Economic Committee.<sup>25</sup> Over the past three years, significant momentum for the project has been built around a very simple ODR Work Plan generated and endorsed in 2017. The present work plan calls for the following activities without providing detail:

- *Build a pilot in conjunction with platform host/ODR provider via outreach to regional arbitration/mediation centers to determine possible partners for hosting ODR platform*
- *Promote harmonization of the relevant laws for ODR using existing international instruments*
- *Cross-APEC collaboration*
- *Conduct relevant research/information gathering*
- *Design ODR platform*
- *Develop ODR procedural rules*

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<sup>23</sup> Since 2015, the EoDB has included an alternative dispute resolution index. *See generally Enforcing Contracts Methodology*, THE WORLD BANK, <https://www.doingbusiness.org/en/methodology/enforcing-contracts> (last visited Aug. 22, 2019). The alternative dispute resolution index has six components:

- “Whether domestic commercial arbitration is governed by a consolidated law or consolidated chapter or section of the applicable code of civil procedure encompassing substantially all its aspects.” *Id.*
- “Whether commercial disputes of all kinds—aside from those dealing with public order, public policy, bankruptcy, consumer rights, employment issues or intellectual property—can be submitted to arbitration.” *Id.*
- “Whether valid arbitration clauses or agreements are enforced by local courts in more than 50% of cases.” *Id.*
- “Whether voluntary mediation, conciliation or both are a recognized way of resolving commercial disputes.” *Id.*
- “Whether voluntary mediation, conciliation or both are governed by a consolidated law or consolidated chapter or section of the applicable code of civil procedure encompassing substantially all their aspects.” *Id.*
- “Whether there are any financial incentives for parties to attempt mediation or conciliation (for example, if mediation or conciliation is successful, a refund of court filing fees, an income tax credit or the like).” *Id.*

<sup>24</sup> APEC’s interests in digital economy are broad, covering connectivity, digital economy, and technology in the business, enabling an environment and facilitation of ICT support. *See APEC Connectivity Blueprint*, APEC (Jan. 2015), <https://www.apec.org/Publications/2015/01/APEC-Connectivity-Blueprint>; *APEC Internet and Digital Economy Roadmap*, APEC (Oct. 24, 2017), [https://www.apec.org/-/media/Files/Groups/ECSG/17\\_csom\\_006.pdf](https://www.apec.org/-/media/Files/Groups/ECSG/17_csom_006.pdf); *see also APEC App Challenge*, ASIA FOUND., <https://asiafoundation.github.io/apecapp/> (last visited Aug. 22, 2019).

<sup>25</sup> *See APEC SELI*, UNCITRAL, <http://uncitralrcap.org/en/apec-seli/?ckattemp=2> (last visited Aug. 22, 2019).

- *Capacity building*
- *Leverage private sector and academic community support*
- *Explore the use of other modern technology for contract management or enforcement and prevention of disputes.*

At this stage, procedural rules and a collaborative framework have been developed and have been discussed at the first Senior Officials Meeting (SOM) of 2019 in Santiago, Chile. The results of the discussion have been distributed to the twenty-one economies and responses will guide the future direction of the project. Little additional work beyond this has been done on the APEC ODR work plan.

Significant challenges remain to establishing an operational ODR collaborative framework in APEC. Among them:

- While the APEC ODR framework would apply only to Business to Business (B2B) transactions, a reasonable way to distinguish between B2B and Business to Consumer (B2C) transactions must be applied. Application of the CISG as the default underlying law has been suggested as the fittest solution, but discussion has not progressed and consensus remains uncertain.
- The first Work Plan objective is establishment of an APEC ODR pilot in conjunction with a platform host. This is likely not possible for APEC since it would require endorsement of a proprietary platform. One solution may be an open source platform, the minimum standards for which are endorsed by APEC with input from all stakeholders, including UNCITRAL, UNIDROIT and HCCH, the three multilateral legal organizations with APEC Guest Status.
- APEC's consensus-based structure means that any endorsement must be agreed to by all twenty-one member economies. This means that any detailed proposals, such as a complete set of procedural rules, would require significantly more time for deliberation than is available in the APEC context. It also means that one or two economies can often halt an entire process when they are immovable on an issue they consider critical.
- Capacity building and leveraging the private sector and academic communities is challenging, primarily because of a lack of funding dedicated to the effort, but has great potential. A dedicated APEC Specialized Center, a support institution collaborating with APEC, sponsored by one or more APEC member economies and endorsed

by all twenty-one member economies, is one possibility for bringing academic and private sector institutions together toward a common goal.

- *Technology Neutrality*—As noted above, though the technology exists, it is typically proprietary. For technology to be adopted in APEC, some members would need assurance that everyone would have equal access. For this reason an open-source platform would be desirable.
- *Legal Challenges*—Privacy issues; consumer protection issues; due process issues (can you get due process from a machine judge?). These problems can be compounded by the lowered capacity in developing economy legal environments and need to be addressed.
- *Market Challenges*—Not much is known about how to get small businesses, especially those in developing countries, to use ODR. Surveys are not effective, so investigative studies on small business contracting and transaction costs will be needed.

#### IV. THE MULTIFACETED ROLE THE CISG AND OTHER INTERNATIONAL LEGAL INSTRUMENTS CAN PLAY IN APEC ACCESS TO COMMERCIAL JUSTICE

As the default contract law for international sales of goods in thirteen of the twenty-one APEC member economies<sup>26</sup> (see Figure 2) and, along with the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards,<sup>27</sup> one of the few examples of harmonized law in the region, the CISG, is a well-recognized and useful tool for incentivizing further harmonization. With the exception of the Convention on the Use of Electronic Communications in International Contracts, UNCITRAL instruments are in wide use across the APEC region and lead the drive for regional commercial law harmonization.

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<sup>26</sup> Not including Hong Kong, where applicability of the CISG remains uncertain. See Bernardo Cartoni, *Is the CISG Applicable to Hong Kong-related Disputes?*, SSRN ELECTRONIC J. (Aug. 2015), [https://www.researchgate.net/publication/281109885\\_Is\\_the\\_CISG\\_applicable\\_to\\_Hong\\_Kong-related\\_disputes/citation/download](https://www.researchgate.net/publication/281109885_Is_the_CISG_applicable_to_Hong_Kong-related_disputes/citation/download).

<sup>27</sup> The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards could be the basis for enforcement of awards arising out of ODR.

*Figure 2*

	NY Convention	Model Law on Arbitration	Model Law on Electronic Commerce	Convention on Use of Electronic Communications	CISG
Australia	√	√	√	--	√
Brunei	√	√	√	--	--
Canada	√	√	√	--	√
Chile	√	√	--	--	√
China	√	√	√	√	√
Hong Kong	√	√	√	--	--
Indonesia	√	--	--	--	--
Japan	√	√	--	--	√
Malaysia	√	√	√	--	--
Mexico	√	√	√	--	√
New	√	√	√	--	√
New	--	--	--	--	--
Peru	√	√	--	--	√
Philippines	√	√	√	--	--
Rep. Korea	√	√	√	--	√
Russia	√	√	--	√	√
Singapore	√	√	√	√	√
Chinese	√	√	--	--	--
Thailand	√	√	√	--	--
USA	√	√	√	--	√
Vietnam	√	--	√	--	√

*A. CISG as Default Definition for Merchant/B2B*

As noted above, an ODR collaborative framework will apply only to B2B crossborder transactions; but, as a tool specifically designed for micro, small and medium enterprises engaged in small transactions (ideally, the smaller the better), finding an appropriate distinction between consumers and businesses will be difficult.

Ultimately, there is very little fundamental difference between consumers and small businesses. Given the lack of redress available to parties for small transactions, whether they are consumers or businesses,<sup>28</sup> particularly in cross-border settings,<sup>29</sup> it is far better to take a liberal view of business transactions than to cautiously avoid including consumers and foreclosing access to commercial justice for a wide swath of small businesses that blend business and consumer types of purchases.

Article 2(a) of the CISG excludes application to sales “of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.” The UNCITRAL Committee of the Whole, reporting on the draft Convention on the International Sale of Goods in 1977, discussed the exclusion of consumer contracts, agreeing:

that consumer sales should be excluded from the scope of the Convention on the ground that such transactions were, in a number of countries, subject to special laws and regulations designed to protect consumers. Such an exclusion would not significantly limit the scope of application since consumer sales would only in relatively few cases qualify as an international sale within the meaning of the Convention.<sup>30</sup>

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<sup>28</sup>

[T]raditional dispute settlement mechanisms may not provide effective redress in e-commerce transactions, there is a need to consider alternative dispute resolution (ADR) mechanisms that can provide speedy, low-cost redress for claims arising from online interactions. When ADR takes place using computer-mediated communication in an online environment, it is referred to as online dispute resolution [ODR].

*E-Commerce and Development Report*, UNCTAD xxiv (2003), [https://unctad.org/en/Docs/ecdr2003\\_en.pdf](https://unctad.org/en/Docs/ecdr2003_en.pdf).

<sup>29</sup> “The lack of effective consumer redress when the parties are in different countries is a major barrier to consumer confidence . . . .” Consumer International, (2000) *Disputes in Cyberspace: Online Dispute Resolution for Consumers in Cross-Border Disputes—An International Survey*, at 6.

<sup>30</sup> *Report of Committee of the Whole I relating to the draft Convention on the International Sale of Goods*, CISG, <http://www.cisg.law.pace.edu/cisg/legislative/doc-B01.html> (last updated July 13, 2007).



The first of the two conditions for this argument provides the misleading core of today's favoured argument for excluding consumers, and the second does not apply today in the same way it did in 1977.

The efforts at UNCITRAL to develop an online dispute resolution convention also hinged on an exclusion of consumers from its scope. Unlike with the CISG, however, the exclusion of consumers was a fundamental issue. With the CISG, the exclusion of consumers was a convenience that allowed the conference to avoid the prickly subject of devising methods to distinguish between consumers and businesses, and the stakes were not as high since few small businesses that could be confused with consumers were doing cross-border business. The convenient solution was to add a blanket exclusion and let courts, tribunals and academics decide later how to draw the line. The line between consumers and businesses was not a critical component of the CISG and disregarding it did not result in a deal-breaking intractable issue for member states.

With ODR, however, the exclusion of consumers could result in an overreach, disproportionately affecting small businesses that could be mistaken for consumers, partly because ODR has proven to be such an effective mechanism for resolving consumer e-commerce disputes; nearly every consumer e-commerce platform has one. The dilemma is not over whether to distinguish between B2C and B2B transactions, but *how* to distinguish, and whether treating a transaction, even if it had elements of B2C, as B2B, could run counter to the way a national court and domestic policy would treat it.

The line drawn between consumers and business goes back at least as far as the 1964 Hague Convention on Uniform Law on International Sales (ULIS). The ULIS in Article 5(2) states that “[t]he present Law shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments.” The language reflects the early recognition that states treat consumers and businesses very differently. Roughly twenty years later, the CISG introduced in Article 2(a) a similar distinction, declaring that the Convention does not apply to sales “of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use.”

Fortuitously for ODR and MSMEs, courts and tribunals have generally imposed an exclusivity requirement, declaring that goods must be intended

for exclusive personal use in order to exclude a contract from the CISG. This established interpretation, applied in the context of ODR, will allow the benefit of online dispute resolution to extend to anyone using goods purchased even *primarily* for personal use. In other words, even if I purchased my computer for personal use but with the anticipation of using it for business, there is no reason why the CISG should not apply.

But that interpretation will not necessarily bear out at the domestic level. Consumer protection laws may and often do take a more protective approach to consumer transactions, casting the consumer protection net so that it catches a sizable percentage of transactions that are intended to be B2B, and thus limiting these parties' use of ODR. In other words, the "unless" limitation to the exception narrows the reach of Article 2(a), and can lead to a conflict between domestic consumer protection law and the Convention in those cases where applicability of the domestic law does not require that the seller either knew or ought to have known of the buyer's intended use.

In order for ODR to be an effective tool for small businesses, the CISG should be adopted as the default underlying substantive law, or at the very least as the default rule on consumer transactions, and its personal use exception should be construed narrowly. This will need to be agreed to by all twenty-one APEC member economies. No small task. In the long run, however, this will avoid endless debate over where the line between consumer and business exists. The reality is that there is no bright line, but the closer APEC can come to one, the more likely the effort will be successful.

### *B. CISG as a Contracting Capacity Building Tool*

Even the most perfect dispute resolution system will not be used if its market does not understand it and does not prepare for the possibility of needing to use it. While the CISG offers an excellent set of rules to underlay the procedure of an ODR system, it also provides a simple, neutral and effective tool for helping people understand and use contracts. The Catch twenty-two that is often discussed in the developing country context is that people do not use contracts without adequate access to justice, and without adequate access to justice, there is no incentive to use contracts.

But, even without robust enforcement mechanisms, contracts that spell out how risk is to be allocated and the parties' responsibilities are less likely to be breached, and even if they are, negotiated settlements are easier.

Further, courts and other dispute resolution mechanisms often do not work precisely *because* there is no demand. If the community is not using contracts, and is relying on trust and self-help in cases of breach, there is no customer base for litigation, mediation and arbitration. Developing countries are littered with empty commercial benches and derelict mediation and arbitration centers because donors figured that if the institutions were established, angry disputants would flock to them. The secret ingredient to ensuring the success of renovated dispute resolution systems is the establishment of a culture of contract, and there is little better method for helping communities understand contracting than with the help of the CISG.

### *1. Recommendations*

A number of recommendations have arisen out the efforts in APEC to develop an ODR Collaborative Framework. After three years of efforts, the foremost need is to revise the Work Plan so that it frames the issues more robustly, identifies specific tools for capacity building and harmonization, expands its scope to Cross-Border Access to Commercial Justice rather than ODR alone, and removes activities that are impractical in the APEC context. A sample work plan is offered in Annex 1.

Continued efforts at harmonization are critical. Universal adoption and ratification of international commercial law instruments does not equal harmonization. Harmonized implementation, particularly of the CISG and New York Convention is much more difficult and not yet meaningfully achieved in the APEC region.

Even in the absence of an ODR Collaborative Framework and Procedural Rules, the establishment of a set of Minimum Standards for Online Dispute Resolution in APEC would advance the goals significantly. How such minimum standards are to be ensured and monitored is a difficult question, though, but the most efficient way would likely be an APEC Specialized Center that is endorsed by APEC but separately funded and administered.

Minimum standards should include:

- **Legal and Procedural Neutrality**—Default legal and procedural rules will be based on established multilaterally developed legal instruments, including but not limited to the UN Convention on Contracts for the International Sale of Goods (CISG) and the UNCITRAL Technical Notes on ODR.

- **Technology Neutrality**—Wherever possible and practical, ODR technology platforms shall be built on open source software.
- **Accessibility**—Reasonable accessibility for parties across the APEC region must be a key feature of the platform.
- **Due Process**—Platform operators must provide evidence that the platform provides parties with a minimum level of due process acceptable to all APEC members.
- **Transparency**—Platform operators must agree to report certain statistics and case information without identification of parties.
- **Party Autonomy**—The technology neutral standard notwithstanding, parties must be able to agree in advance to derogations of law, rules and forum.

## ANNEX 1

### **Proposed SELI MSME Cross-Border Access to Commercial Justice Work Plan 2019-2022**

Noting the rapid proliferation of MSME involvement in APEC regional and global value chains (GVCs) and a lack of parallel mechanisms for facilitating efficient contract formation and access to commercial dispute resolution for smaller GVC participants, the Strengthening Economic Legal Infrastructure (SELI) Friends of the APEC Economic Committee Chair group has adopted this work plan, introduced with a set of guiding principles. The work plan sets out the APEC membership's common objectives for facilitating improvement, region-wide, in access to and effectiveness of cross-border commercial contracting and dispute resolution.

Continued expansion involvement of MSMEs in regional and global value chains depends in part on their ability to understand, execute, and adhere to arm's length contracts and on their ability to access dispute resolution and dispute prevention mechanisms in a meaningful and cost-efficient way.

This work plan builds on the progress made under the SELI Online Dispute Resolution Work Plan and retains online dispute resolution as the flagship activity. Recognizing that small businesses engaged in cross-border trade are disadvantaged in their capacity to contract and, in cases of contract failure, to cheaply and fairly resolve disputes, the work plan incorporates the need to broaden the scope to good contracting practices and all forms of international commercial dispute resolution, including commercial courts, mediation, arbitration, ODR, and multi-tiered dispute resolution mechanisms. The work plan also endeavors to prioritize private sector understanding of new tools available in the fields of contracting and access to commercial justice, including new conventions and innovative technology. The UN Convention on Enforcement of International Settlement Agreements Arising from Mediation (Singapore Convention—soon to be open for signature) may be foremost among these new tools and could have a powerful impact on MSME growth.

#### **Purpose**

The purpose of the work plan is to ensure that APEC's efforts, in the Economic Committee and across all fora, are fully engaged with and facilitative of efficient contracting and access to commercial justice for micro, small and medium enterprises conducting business across the region's borders.

### Guiding Principles

*Culture of Contract.* Efficient dispute resolution that recognizes parties' rights and comports with widely accepted notions of due process is both necessary for and an outgrowth of the advancement of a commercial culture in the MSME community that values the benefits of entering into agreements that carefully allocate risk, specify the terms of performance, and prepare for the potential of dispute, however small the risk may be. Well-drafted contracts and agreements entered into with an understanding of risk, responsibilities and rights, result in fewer breaches, and, for those that do result in a breach, resolution is typically less expensive and more efficient.

*Transparency.* Leveling the playing field for the entrance of MSMEs to regional and global value chains requires the establishment of rules, procedures and systems that provide equal access to all commercial participants, including those in the informal economy and disadvantaged communities.

*Due Process.* Commercial rule of law demands that member economies must respect the legal rights owed to a person. SELI is committed to helping ensure that activities related to access to commercial justice are consistent with APEC member economies' principles of due process.

### Work Plan Objectives

- **Promote and coordinate relevant research and information gathering.**  
APEC's Policy Support Unit (PSU), APEC's member economies and other interested parties and institutions conduct research relevant to contracting and dispute resolution in the cross-border MSME community, yet the body of such research and resulting data on MSME cross-border contracting and dispute resolution remains small. SELI, through discussions with constituent member economies, endeavors to contribute recommendations for studies and other research to both APEC (including EC and Policy Support Unit) and to the research community at large.
- **Explore ways to leverage the private sector, civil society and academic community.**  
Private sector organizations (including private dispute resolution providers, law firms, and contracting support firms), civil society organizations and universities all have interests in MSME cross-border contracting and dispute resolution. SELI will explore and

promote collaboration with these organizations and facilitate their participation in and contribution to APEC's efforts.

- **Promote harmonization of relevant laws, regulatory frameworks and guides through the adoption and implementation of international instruments.**

The United Nations Commission on International Trade Law (UNCITRAL), the Hague Conference on Private International Law (HCCH), the International Institute for the Unification of Private law (UNIDROIT) and other international bodies, have developed important international instruments designed to be ratified (in the case of conventions) or adopted (model laws and guides) by economies to harmonize the trade enabling environment. Many of these instruments (such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards—New York Convention) have been widely adopted but not always properly implemented, while others, such as the UN Convention on Enforcement of International Settlement Agreements Arising from Mediation (Singapore Convention) are new and either not yet open for signature or are not fully adopted among APEC member economies. SELI will endeavor to support the adoption and implementation of these instruments across the APEC region.

- **Promote and coordinate relevant cross-APEC collaboration.**

A number of APEC fora engage on topics that are highly relevant to MSME contracting and dispute resolution. These topics include MSME trade (SMEWG, ABAC and GOS) and the use of modern technology (ECSG and TELWG) but do not exclude other relevant APEC topics. SELI endeavors to maintain up-to-date information on relevant APEC activities and keep other fora informed on their relevance to MSME Access to Commercial Justice.
- **Promote, coordinate and support capacity building efforts.**

A culture of contract and concomitant reliance on commercial dispute resolution requires an understanding of contracting, risk allocation, the benefits of adherence, and the available mechanisms for dispute resolution. SELI will, to the extent possible, promote and guide capacity building efforts done by APEC economies, donors, civil society and the private sector.

- **Explore the use of technology solutions for contract management, enforcement, and prevention of disputes.**

Technology is rapidly transforming business relationships and transactions and dispute resolution. Smart contracting, mobile lending, mobile payments and technology assisted dispute resolution are significant drivers behind MSME entry into regional and global value chains. SELI will continue to explore opportunities for the introduction of technology that facilitates contracting, lending agreements and the resolution of disputes.

- **Adopt an APEC Collaborative Framework for the establishment of a legal and procedural environment conducive to the use of online dispute resolution.**

Online Dispute Resolution was the founding inspiration behind this work plan and has met with significant progress through a number of APEC workshops and a set of draft procedural rules. SELI will continue to pursue ODR as a flagship activity, and will seek to finalize the model procedural rules and help facilitate an environment that encourages market entry of ODR platforms and providers.



