

# ONLINE DISPUTE RESOLUTION, SUITABILITY IN THE CONSTRUCTION INDUSTRY <sup>1</sup>

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## CONSTRUCTION PROJECTS AND DISPUTES

1. International trade has in recent decades generated a large number of disputes. It is common in the construction industry for differences between parties and disagreements to occur throughout the life cycle of a construction project, from procurement through development to completion.
2. Construction projects tend to be complex with difficult conditions attached. Each construction project involves the relationship of the contracting parties from the time of negotiating of the contract and all through the construction phase up to completion. Many factors such as issues with interpretation of the contract provisions; the scope of work; understanding of the obligations, design, quality, time and payment issues, uncertainties at any stage/phase of the project; and dealing with technical issues such as defects, delays, acceleration, liquidated damages affect the relationship of contracting parties. Parties can, if all of these are managed well and/or properly, avoid the breakdown of relationship while getting the job done at reasonable costs.

## Construction Disputes & Resolution Mechanism

3. When such issues transform into disputes, resolving these can prove to be time consuming, costly and at times may even become a pointless exercise.
4. In adopting the right dispute resolution mechanism (eg. Arbitration, Adjudication, Mediation, or Expert Determination), parties also need to consider the adverse performance of the project; distraction and over-burdening of staff on the project; erosion of confidence and trust in working relationships; adverse impact on the reputation of the parties; lost opportunities for future work; and destruction of business relationships.

## Documents only and/or expedited/fast track ADR mechanisms

5. There are currently dispute resolution mechanisms in the construction industry that allow for disputes to be resolved by fast track via documents.

*Building and Construction Industry Security of Payment Act* <sup>2</sup> ("SOP Act")

6. Adjudication under *section 16(4)(1)* of the *SOP Act* allows an adjudicator to determine the matter purely based on the adjudication application and response submitted, if the documents contain sufficient information such that no further submissions, inspection or conference is needed.

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<sup>2</sup> <http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=5b80ccf2-9d5d-47cd-b464-03041118348b;page=0;query=Id%3A%22c4d83967-3241-4336-9b6d-7c36a2bd088e%22%20Status%3Ainforce;rec=0#legis>



7. The adjudication application and response submitted by the Claimant and Respondent respectively must contain sufficient information accompanied by such documents as may be prescribed and necessary to the respective claims/positions, as well as, other relevant information or documents (including photographs, correspondences and submissions).

*Singapore International Arbitration Centre Rules*<sup>3</sup> ("SIAC Rules")

8. Similarly, documents-only arbitration is common with arbitral institutions such as the SIAC, which have adopted a fast-track procedure. Although the default position regarding expedited procedure requires the Tribunal to hold a hearing for the examination of all witnesses and for any argument, according to *Rule 5.2(c)* such hearing does not need to be held if parties agree to have the dispute decided on the basis of documentary evidence only.<sup>4</sup>
9. In order for arbitral proceedings to be conducted in accordance with the Expedited Procedure, the criteria to be satisfied includes setting out the amount in dispute (representing the aggregate of the claim, counterclaim and any set-off defence) must not exceed 5,000,000.00 Singapore dollars unless the parties agree, or when it is a matter of exceptional urgency.
10. In coming to a decision, the Tribunal would take into account parties' submissions pursuant to *Rule 17* of the *SIAC Rules* viz. the Statement of Claim setting out in full detail a statement of facts supporting the claim, the legal grounds or arguments supporting the claim and the relief claimed together with the amount of all quantifiable claim; the Statement of Defence setting out the full defence to the Statement of Claim including the facts and contentions of the law on which it is relied and any counterclaim; and all supporting documents.
11. Other institutions, which have adopted an option for documents only arbitration, include the *World Intellectual Property Organisation* ("WIPO")<sup>5</sup> and the *Stockholm Chamber of Commerce*<sup>6</sup>.

#### **ONLINE DISPUTE RESOLUTION ("ODR") IN GENERAL**

12. ODR is essentially a branch of Alternative Dispute Resolution ("ADR") using technology to facilitate dispute resolution through negotiation, mediation and arbitration and/or a combination of these approaches.
13. Often referred to as Internet electronic dispute resolution, the online portion essentially involves conducting the process (including the filing and the managing of the claim) online. ODR is frequently seen as the solution to resolving electronic commerce ("e-commerce") or Internet-related disputes which are cross-border in nature and can be too costly to be dealt with through traditional forms of dispute resolution system.
14. It is no surprise therefore that most existing ODR systems, as well as discussions on ODR have been singularly focused on electronic commerce and/or Internet-related disputes.

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<sup>3</sup> <http://statutes.agc.gov.sg/aol/search/display/view.w3p?idnt=5b80ccf2-9d5d-47cd-b464-03041118348b;page=0;query=Id%3A%22c4d83967-3241-4336-9b6d-7c36a2bd088e%22%20Status%3Ainforce;rec=0#legis>

<sup>4</sup> [http://www.siac.org.sg/our-rules/rules/siac-rules-2013#siac\\_rule5](http://www.siac.org.sg/our-rules/rules/siac-rules-2013#siac_rule5)

<sup>5</sup> [www.wipo.int/](http://www.wipo.int/)

<sup>6</sup> <http://www.sccinstitute.com/>



## Examples of ODR systems

15. Some of the ODR services currently available under international organisations and/or institutions are set out below.

### *China International Economics & Trade Arbitration Commission ("CIETAC")'s Online Arbitration Rules*<sup>7</sup>

16. The CITEAC *Online Arbitration Rules* adopted by the China Council for the promotion of International Trade/China Chamber of International Commerce<sup>8</sup> essentially intended to independently and efficiently resolve larger volume Business-to-Business ("B2B") disputes, electronic commerce or other economic and trade disputes.
17. The Rules that provide for three different procedures – (a) the "main" online procedure, (b) a "summary" procedure (mainly for disputes with a value of between Renminbi(RMB) 100,000 and less than RMB 1,000,000) and (c) an "expedited" procedure (mainly for disputes with a value of RMB 100,000 or less) also contain elaborate provisions regarding electronic submissions, electronic data interchange and documents.

### *International Centre for Dispute Resolution ("ICDR") Manufacturers/Suppliers ODR Protocol ("MSODR")*<sup>9</sup>

18. E-commerce and trade disputes between manufacturers and suppliers involving smaller sums are often referred to *MSODR* for quick, fair and inexpensive resolution.
19. Consisting of a two phases of negotiation/arbitration process completed within sixty six days, the process is conducted through online submissions of documents by manufacturers and suppliers in the supply chain. Starting with online negotiation which occurs through an automated online negotiation method, in the event of impasse, such disputes will automatically be transferred to online arbitration. A trained expert arbitrator, based on documents submitted by the parties, will then make a decision within 30 days.

### *General Electric's (GE) International Centre for Dispute Resolution Procedures*<sup>10</sup>

20. In 2011, GE launched a pilot programme testing the feasibility of ODR for its Oil-and-Gas manufacturers and supplies for claims smaller than 50,0000 Euros, using the *International Dispute Resolution Procedures*.<sup>11</sup>
21. GE's ODR process utilizes an automated online application system with parties paying filing fees and uploading relevant documents before providing blind bidding online in an attempt by parties to agree a settlement amount.

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<sup>7</sup> <http://www.cietac.org/index.cms>

<sup>8</sup> <http://www.ccpit.org.cn/>

<sup>9</sup> [https://www.icdr.org/icdr/faces/icdrservices/msodr?\\_afLoop=850267628847220&\\_afWindowMode=0&\\_afWindowId=null#%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D850267628847220%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D31vvg61do4](https://www.icdr.org/icdr/faces/icdrservices/msodr?_afLoop=850267628847220&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D850267628847220%26_afWindowMode%3D0%26_adf.ctrl-state%3D31vvg61do4)

<sup>10</sup> [https://www.icdr.org/icdr/faces/home?\\_afLoop=811040020410201&\\_afWindowMode=0&\\_afWindowId=null#%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D811040020410201%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3Drhnw9r4vu\\_133](https://www.icdr.org/icdr/faces/home?_afLoop=811040020410201&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D811040020410201%26_afWindowMode%3D0%26_adf.ctrl-state%3Drhnw9r4vu_133)

<sup>11</sup> <https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased>



22. If no settlement is reached, the dispute will proceed onto online arbitration for an additional charge. The dispute will then be decided by engineers selected from the *International Centre for Dispute Resolution* who would make their determinations based on documents uploaded.

**European Union's<sup>12</sup> Regulations on consumer ODR<sup>13</sup> (operational in January 2016)**

23. This mechanism under the auspices of the European Union offers a simple, efficient, and fast out-of-court solution for disputes arising from online transactions seeking easy and low-cost dispute resolution to boost both consumer and trader confidence.
24. The *Regulations* create an ODR platform in the form of an interactive website offering a simple point of entry to consumers and traders. The interactive website provides general information, allows for submission of electronic complaint form and a case management tool to enable ADR entities to conduct dispute resolution proceedings.

**Advantage of ODR over Traditional Legal Mechanisms**

25. The issue with relying on traditional legal mechanisms is that the application of traditional rules of conflict of laws may result in a less than ideal situation whereby a consumer may be forced to litigate his claim in the merchant's domicile or be forced to cede his claim due to costs arising from the procedure. Similarly the traditional forms of alternative dispute resolution are rarely compatible with such low value claims when the costs of resorting to such forms of ADR are taken into account.
26. In comparison, ODR is viewed as more compatible with the straightforward nature of most e-commerce transactions. For example, the Internet Corporation for Assigned Names and Numbers ("*ICANN*")<sup>14</sup>'s online domain dispute resolution system, the Uniform Domain-Name Dispute Resolution Policy ("*UDRP*")<sup>15</sup> has proven to be a viable alternative to litigation in national courts for the resolution of domain names disputes. Under *Rule 13* of the *Rules for Uniform Domain Name Dispute Resolution Policy*<sup>16</sup>, disputes are often resolved through the parties' submission of documents and statements by the panel assembled, with in-person hearings being carried out only in exceptional circumstances.

**ODR AS A VIABLE OPTION IN RESOLVING CONSTRUCTION DISPUTES**

27. With the existing dispute resolution mechanisms such as Arbitration and Adjudication already having 'documents only' review of claims in arriving at Awards and Determinations and commonly adopted approach of requesting parties to transmit their respective cases, submissions and communication electronically via email, resolving construction claims via an online platform is in this writer's view, a potential future step in the evolution of what could be referred to as Appropriate Dispute Resolution mechanism.

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<sup>12</sup> [http://europa.eu/index\\_en.htm](http://europa.eu/index_en.htm)

<sup>13</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>

<sup>14</sup> <https://www.icann.org/>

<sup>15</sup> <https://www.icann.org/udrp/udrp.htm>

<sup>16</sup> <https://www.icann.org/resources/pages/rules-be-2012-02-25-en>



### **Anil Changaroth**

Anil, the immediate past Chair of SCL(S) has been in practice since 1995. A fellow of the CI Arb & SI Arb and a Solicitor of England and Wales, his work primarily involves commercial, civil, corporate & criminal dispute resolution with a focus on construction related mediation, adjudication, arbitration and litigation and represents parties in in the region. Also an Arbitrator and Mediator, he established **CHANGAROTH CHAMBERS LLC** on 1st July 2014, a law firm focusing on *Counselling the Business and the Business of Counselling*.



The Honourable Mr. D. Sadananda Gowda, Union Minister of Law & Justice, India at the opening of the 2015 UNCITRAL India Workshop on Dispute Resolution in the Construction Industry organised by the Construction Industry Arbitration Council of India, 16<sup>th</sup> February 2015, New Delhi, India

