

E-COMMERCE AND ONLINE DISPUTE RESOLUTION IN HONG KONG: THE CASE OF eBRAM

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Abstract

This article critically examines the development of online dispute resolution (ODR) in Hong Kong, focusing on the Electronic Business Related Arbitration and Mediation System International Online Dispute Resolution Centre Limited (eBRAM). As an independent, not-for-profit organization, eBRAM offers a platform for resolving disputes among micro, small and medium-sized enterprises (MSMEs). The article explores eBRAM's potential impact on local MSMEs and legal professionals, Hong Kong's position as an international business hub, and its complementarity with existing dispute resolution providers.

Keywords: ODR; eBram; LawTech; Hong Kong.

[A] INTRODUCTION

Hong Kong is a densely populated city, with over 7.5 million people residing in an 1104km-square territory. It is a cultural blend of East and West, with a strong emphasis on the rule of law and traditional Chinese values on law and governance. Despite having a robust commercial sector and stores located in convenient, accessible spots and buildings, the e-commerce industry in Hong Kong is still in its early stages. However, the Covid-19 pandemic has accelerated the development of the e-commerce industry in Hong Kong, with an expected compound annual growth rate of 7.4% between 2019 and 2023, resulting in a USD6.4bn market volume by the year 2023 (Nazim 2019).

In Hong Kong, access to justice is expressly required by the Basic Law (Neuberger 2017). As it is a common law jurisdiction, the Hong Kong authorities aim to provide effective access to justice for citizens. This means not only effective access to court justice and litigation services, but also that the administration seeks to provide effective access to alternative dispute resolution (ADR), such as mediation and arbitration services. ADR services are seen as offering quick and inexpensive ways

for parties to reach an agreement without destroying their relationship (Department of Justice nd).

ODR is also variously known as online ADR, cyber-ADR, virtual ADR and e-ADR. Online platforms that provide mediation and arbitration can handle disputes in which parties do not need to travel to meet each other and can further save the costs of resolving the disputes. However, as a leading centre for dispute resolution in the Asia-Pacific Region, Hong Kong seems hitherto to have had a rather conservative attitude towards ODR mechanisms. This is largely due to the fact that Hong Kong citizens have a strong sense of privacy protection and are very sensitive to personal data collection issues, so they have unease about using online services. A typical example of such concern is the Office of the Privacy Commissioner for Personal Data of Hong Kong, an independent statutory body set up to oversee the enforcement of the Personal Data (Privacy) Ordinance (Cap 486) that came into force on 20 December 1996. It aims to secure the protection of privacy of individuals concerning personal data through promotion, monitoring and supervision of compliance with the ordinance (PCPD nd). As a result, when compared to mainland China, Hong Kong has lagged behind in the development of e-commerce as well as ODR services provided for handling disputes over online purchases.

However, this situation has changed in recent years. The Department of Justice in Hong Kong has been working on providing an online platform to facilitate dispute resolution in legal infrastructure projects (Wong 2019). In addition, the Hong Kong Government officially supports the development of Hong Kong as a leading centre for dispute resolution in the Asia-Pacific region. The advantages of Hong Kong promoting its dispute resolution mechanisms are not difficult to find. An independent and high-quality judiciary, a strong legal profession and a common law legal culture have been brought together to provide a solid legal infrastructure. Hong Kong is an international financial, trade and shipping centre with a range of expertise in different areas including e-commerce and the information technology (IT) industry. It is located at the heart of Asia geographically and in close proximity to the Chinese Mainland. Furthermore, the use of multiple languages and considerable cultural diversity in this international city also benefit the construction of a dispute resolution platform. So, Hong Kong has tremendous potential for development as a major dispute resolution centre for the region and beyond.

Domestically, the opportunities brought about by mainland China's Belt and Road Initiative and the Greater Bay Area (GBA) Development Plan have further pushed Hong Kong to accelerate its ODR service

construction. Various international and regional organizations are taking active steps to promote and use ODR to provide a reliable and efficient platform to facilitate ADR. Several studies have already shown that there is a strong need and interest in providing ODR services. The study shows 83% reporting that effective and consistent dispute resolution was a problem. (APEC 2015). Another study reported that as many as 35% of cross-border disputes involving micro, small and medium-sized enterprises (MSMEs) remain unresolved with the average value of the dispute being some USD50,000 (or HKD390,000) (Ecorys 2012). Over 90% of Hong Kong companies are MSMEs, a similar proportion to many other economies across the region.

In the next section the author will discuss the development of ODR in Hong Kong. Although Hong Kong is famous for its professional financial and legal system, it is hard to deny that the development of the ODR system in Hong Kong is, relatively speaking, lagging behind. Therefore, the further development of ODR in Hong Kong is increasingly important.

The aim of this article is to examine the evolution and potential impact of ODR in Hong Kong, specifically focusing on the Electronic Business Related Arbitration & Mediation System International Online Dispute Resolution Centre (eBRAM), and to evaluate its role in fostering local MSME growth, enhancing Hong Kong's global business prominence and synergizing with established dispute resolution providers.

[B] THE CASE OF eBRAM

As it describes itself, the eBRAM is an independent and not-for-profit organization established under Hong Kong law as a company limited by guarantee.¹ It was established in 2018 with the support of the Asian Academy of International Law,² the Hong Kong Bar Association, the Law Society of Hong Kong and Logistics and Supply Chain MultiTech R&D

¹ See [website](#) for details.

² The Asian Academy of International Law Ltd (AAIL) is an independent and non-profit-making body set up in Hong Kong to further the studies, research and development of international law in Asia. The AAIL provides a platform for discussions on international law issues and to research in developing areas of international law in order to enhance and reinforce Asia's role and participation in the formulation of international law and international relations. See the AAIL [website](#).

Centre.³ As an ODR service provider, the eBRAM is designed for providing a quicker and more convenient platform for resolving disputes between MSMEs, as well as within the fast-growing digital economy. The former eBRAM Centre's chairman Nick Chan has characterized the five main founding objectives of the eBRAM:

- ◇ to facilitate deal-making and cost-effectively prevent disputes involving any countries and parties (including countries and parties that are in any way relevant to mainland China's Belt and Road initiative).
- ◇ to serve as a technology-enabled international platform for deal-making and dispute resolution including through negotiation, arbitration and mediation served by amongst others Dispute Resolver and other persons as the Board may nominate that facilitates deal-making.
- ◇ to prevent disputes and dispute resolution utilizing information technology means for parties with or without a physical presence in Hong Kong or a place where any one of the parties to a deal or dispute is located.
- ◇ to protect personal data, non-personal data and confidentiality; and
- ◇ to provide domain-specific language translation technology (Chan 2018: 2).

Since its establishment in 2018, the eBRAM has actively prepared its own ODR mechanism, from attending ODR workshops and conferences, visiting internet courts, to supporting online arbitration moot competitions and proposing an ODR mechanism to the Hong Kong Legislative Council.

After two years' preparation, the eBRAM platform successfully engaged with the Covid-19 Online Dispute Resolution Scheme which aims to resolve disputes arising from or relating to Covid-19 through speedy and cost-effective ways for MSMEs in April 2020. This government-supported measure is a part of the development of dispute resolution services in Hong Kong. Residents or companies, including MSMEs, in Hong Kong may participate in the scheme if the claim value of their Covid-19-related dispute is not more than HKD500,000 (approximately GBP5000) and

³ The Logistics and Supply Chain MultiTech R&D Centre (LSCM) was founded in 2006 with funding from the Innovation and Technology Fund of the Government of the Hong Kong Special Administrative Region. Since its inception, LSCM's mission has been to foster the development of core competencies in logistics and supply chain-related technologies in Hong Kong and facilitate the adoption of these technologies by industries in Hong Kong and Mainland China. The centre is hosted by three leading universities in Hong Kong, namely the University of Hong Kong, the Chinese University of Hong Kong and the Hong Kong University of Science and Technology. The establishment of the centre marks the realization of the concerted effort and enthusiasm on the part of the government, industry, academia and research institutes. See Logistics and Supply Chain MultiTech R&D Centre, "[Overview](#)".

they have paid a HKD200 registration fee. Appointed as the ODR service provider by the Hong Kong Government, a fully web-based ODR platform with video-conferencing technology support has been provided by the eBRAM to facilitate online negotiation, online mediation and online arbitration for parties.

The draft procedural Rules for the Covid-19 ODR Scheme have been published online. It is worth noting that eBRAM has set up a termination clause in the ODR Agreement through article 4.6, which says,

Notwithstanding the submission of the ODR Agreement, and the commencement of the Proceedings under the eBRAM Platform, eBRAM shall have the absolute discretion on its own motion or a request of a party or Neutral to terminate any Proceedings on the ground that the same is: (a) Not a Covid-19 Related Dispute; (b) an abuse of process; or (c) frivolous, vexatious and scandalous. eBRAM shall not be required to give any reason to the parties in the exercise of such discretion and the decision of eBRAM shall be final and conclusive. The online registration fee shall not be refundable to the parties.

Thus, the eBRAM limits the scope of admissible cases and narrows it to disputes related to Covid-19.

In accordance with the draft eBRAM Rules for the Covid-19 ODR Scheme, the proceedings of the eBRAM ODR service could be summarized as below:

- 1 The commencement of proceedings: the parties who intended to apply for ODR service by the eBRAM under the Scheme need to enter into the ODR Agreement through the eBRAM platform online, submit a claim and response (and counterclaim and response if applicable, with three calendar days for response by the Respondent), pay the online registration fee (at the time of writing the fee is HKD200 per party).
- 2 The negotiation stage: if there is no counterclaim, negotiation via the eBRAM platform will commence upon the claimant's communication of the response and notification. If the parties have not settled the dispute by negotiation within three calendar days (or another no more than three calendar days extension), or the respondent does not communicate a response to the eBRAM, or does not participate in the negotiation, the mediation stage shall immediately commence.
- 3 The mediation stage: upon commencement of the mediation stage, a list of five names is generated by the eBRAM from which the parties select a neutral mediator within three calendar days. If the selection fails, the eBRAM shall appoint the mediator. Following the appointment, the mediator shall communicate with the parties

through the eBRAM platform to attempt to reach a settlement. If this happens, the parties will sign the electronic agreement and execute it on the eBRAM platform. If the parties have failed to reach an agreement by mediation within three calendar days of being notified of the appointment of the mediator, the arbitration stage shall commence immediately, subject to the dispute being arbitrable.

- 4 The arbitration and award stage: upon commencement of the arbitration stage, a list of five names is generated by the eBRAM from which the parties choose a neutral arbitrator within three calendar days. If the parties cannot reach an agreement on such an appointment within three calendar days of the commencement of the arbitration stage, the eBRAM shall appoint the arbitrator. Following the appointment, the arbitrator shall communicate with the parties to set up a submission deadline within one calendar month from the appointment of the arbitrator. The arbitrator shall resolve the dispute based on the information submitted by the parties and render a final and binding award within seven calendar days from the filing of the last submission by the parties.
- 5 Correction of award, settlement and costs: within five calendar days after the uploading of the award, correction of the award could be requested through the eBRAM platform if there had been any calculation, clerical or typographical error, omission, etc. The arbitrator may correct the award within two calendar days of receipt of the request. The arbitrator may also make corrections on his or her own initiative within five calendar days after uploading the award. The terms of settlement shall be uploaded to the eBRAM platform, and the proceedings shall automatically terminate. The costs consist of two parts, one is the HKD200 registration fee and the other depends on the arbitration expenses.

Based on the working design of the eBRAM Platform, the dispute resolution process has been simplified into a flowchart (see Figure 1).

The Scheme is officially supported by the Department of Justice of the Hong Kong Special Administrative Region (HKSAR), which will cover the costs for mediators and arbitrators, in order to provide a “speedy and cost-effective means to resolve disputes among parties, avoiding disputes and differences from being entrenched, thereby helping to build and reinforce a harmonious society”. The Department of Justice also wants to relieve the court’s caseload in civil claims and more generally to create more jobs for the legal and dispute resolution sector in Hong Kong. Moreover, the Scheme will “utilize an ODR platform thereby strengthening Hong Kong’s LawTech capability” (Department of Justice 2020).

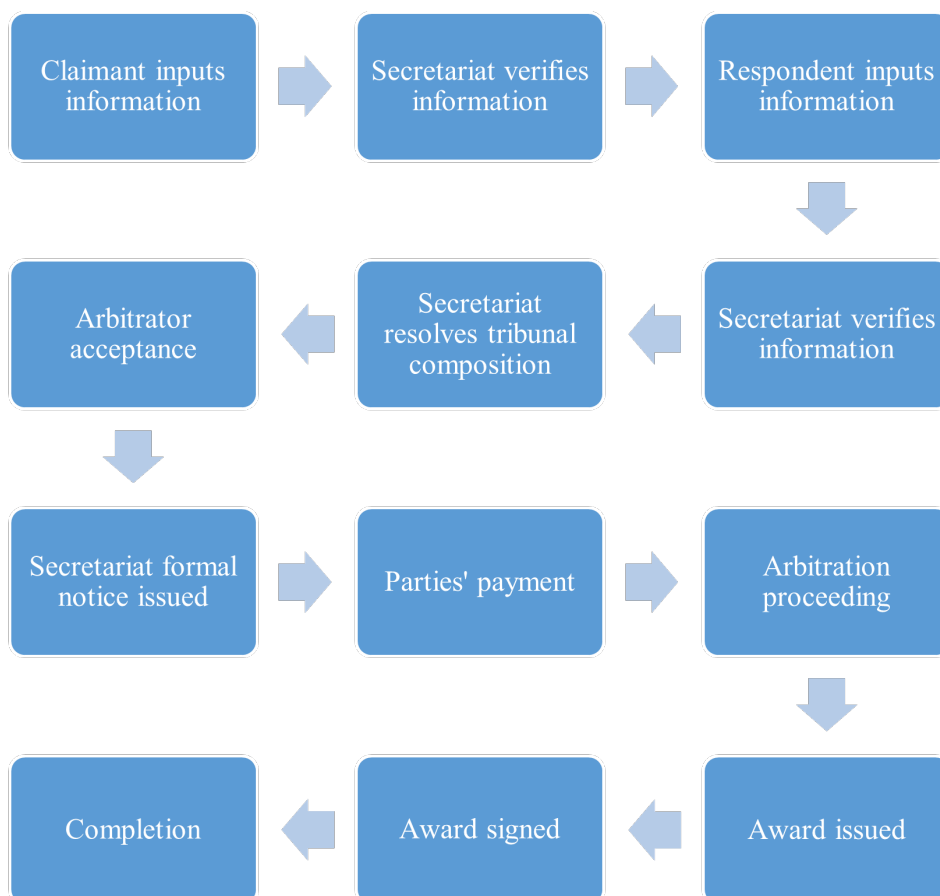


Figure 1: eBRAM's neutral-facilitated binding ODR workflow process

[C] IMPLICATIONS OF THE eBRAM ODR MODEL

Theoretically, the establishment and further operation of the eBRAM Platform would bring Hong Kong many benefits.

Firstly, it may facilitate the development of local MSMEs and legal professionals. From a local perspective, the platform's development as proposed by the eBRAM will bring clear benefits to Hong Kong. These benefits include providing a secure, innovative and comprehensive ODR platform, which is low-cost and affordable for local MSMEs, thereby facilitating their business operation and achieving better access to justice.

Secondly, the provision of business opportunities and enhancement of training opportunities for local professionals would be created by establishing the eBRAM. The introduction of ODR in Hong Kong will promote professional education and training so that local professionals could develop capabilities in ODR and IT skills. Many of the features proposed by the eBRAM—like the application of artificial intelligence

translation in Chinese, English, Russian, Arabic and Spanish, the adoption of blockchain and secure cloud platform for transactions, and the usage of state-of-the-art data centres and robust legal framework for privacy protection—would be desirable and valuable not only to the businesses from Belt and Road jurisdictions as well as the GBA, but also to all their trading partners across the globe.

From a broader perspective, it will help enhance Hong Kong's role as an international city of business in Asia through the operation of the eBRAM as a credible, acceptable and sustainable regional dispute resolution body with its administration based in Hong Kong. In other words, it could showcase Hong Kong's unique status and capability under the "one country, two systems" constitutional arrangement in addressing the service needs of diverse legal and judicial systems in various places, using Hong Kong as the seat of arbitration and, more generally, promoting the use of various forms of ADR in Hong Kong. Hong Kong, being a cosmopolitan city, has a unique advantage in respect of the market for ODR services among Belt and Road jurisdictions and in the GBA, given that our legal and judicial system preserves the common law system, the multilingual abilities of many people in Hong Kong and our reputation as a leading international financial centre, as well as being an international legal and dispute resolution services hub in the Asia-Pacific region. Specifically, this will contribute to a further transformation of ADR to ODR in the GBA. It will enable or affect other relevant dispute resolution providers to facilitate ODR services in the GBA, with international panels of arbitrators and mediators from Hong Kong and other jurisdictions. It will also improve legal education and training so that many of those involved in dispute resolution are capable of IT skills.

Last but not least, in practice, the Hong Kong International Arbitration Centre (HKIAC) has provided a domain name dispute service in the past and continues to do so. Worries about the potential competition between the HKIAC and the eBRAM on ODR services are unnecessary. Instead, compared with the HKIAC cases and fees, the eBRAM would complement and create synergy with existing dispute resolution service providers (like HKIAC) to make the Hong Kong arbitration and mediation industry broader, more diverse, and inclusive of the latest digital technology. The eBRAM Platform can also be utilized by existing arbitration bodies, including the HKIAC and Hong Kong Maritime Arbitration Group. Such an arrangement will further enhance the synergy between the existing dispute resolution bodies and the eBRAM and elevate dispute resolution services in Hong Kong to scale new heights.

To date, data on dispute cases handled by the eBRAM have not yet been formally released by the eBRAM itself. According to the minutes of the meeting of the Legislative Council of HKSAR on 25 April 2022, the eBRAM Centre has handled a total of 23 cases under the Covid-19 ODR Scheme. Of these cases, 11 ended because the respondent did not give consent to undergo the ODR, while two cases were settled during the negotiation stage. The remaining 10 cases were still pending at that time, as obtaining consent from all parties to participate in the dispute resolution process was a significant obstacle and the main reason for the small number of ODR cases completed (Legislative Council 2022). Thus, further observations to examine how this new ODR platform works in practice in Hong Kong still need to be made.

[D] CONCLUSIONS

The emergence and development of ODR in Hong Kong, particularly through the establishment and operation of eBRAM, holds considerable potential benefits for the city. The eBRAM platform offers a secure, innovative and comprehensive ODR platform that is both cost-effective and accessible for local MSMEs, thereby contributing to improved access to justice. Moreover, the eBRAM platform can complement and synergize with existing dispute resolution service providers, such as the HKIAC, thus broadening and diversifying the city's arbitration and mediation industry while incorporating the latest digital technology. Although the number of cases managed by eBRAM to date remains limited, further observations and research are required to evaluate the efficacy of this nascent ODR platform in practice. Ultimately, the development of ODR in Hong Kong presents a valuable opportunity for the city to fortify its position as a leading international legal and dispute resolution services centre in the Asia-Pacific region.

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Dr Yang Lin is an assistant research officer at the Faculty of Law, University of Hong Kong, where he obtained his PhD in law. His research mainly focuses on dispute resolution and internet governance, and e-commerce law. He has experience in resolving various online disputes. His interests also include consumer protection and comparative legal studies. Before gaining his doctorate, he participated in and helped to train students for various international moot court competitions. Recent publications include Shiling Xiao and Yang Lin, "Judicial Review of Administrative Rules in China: Incremental Expansion of Judicial Power," *Journal of Comparative*

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