

NOTE OF CONFERENCE
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THE HIDDEN WORLD OF CONSUMER ADR: REDRESS and BEHAVIOUR

I. Models of ADR: The Research Findings - Revealing the Hidden World of Consumer ADR in Slovenia, Poland, Sweden, France, Germany, the UK, and the Netherlands

1. Introduction: Professor Chris Hodges

Consumer ADR systems have arisen in many EU Member States relatively recently, but remain unknown to many people. Many governments are interested in encouraging ADR as an alternative to courts for reasons of improving access to justice, overcoming the problems of costs and funding for court mechanisms, and because ADR systems can assist in maintaining competitive markets. The European Commission intends to issue two legislative proposals in November, one on consumer ADR and the other on ODR (online dispute resolution). Useful studies have been carried out on mapping consumer ADR in the EU previously by Professor Jules Stuyck's team at Leuven and by Civic Consulting. However, there remains widespread ignorance about exactly how consumer ADR systems work 'on the ground' and on the national architectures within which they operate, as well as how long they take, how much they cost, and so on.

The CMS Research Programme on Civil Justice Systems at the Centre for Socio-Legal Studies has set out to illuminate the answers to these crucial questions during 2011. We have undertaken over 100 interviews with ombudsmen and mediators in seven countries, have fed draft findings to the Commission and various interested parties, and Hart Publishing will publish the first round of findings in a book by Easter 2012. We are continuing research more Member States, and hope to do a second edition a year later. This conference gives an overview of our findings, and brings together 70 leading stakeholders, including the Commission, four governments, many ombudsmen, and representatives of consumer and business, as well as scholars, including leading scholars from Japan, California, the Netherlands, Spain and UK.

This is a note that summarises all the presentations. The following three presentations set out an overview of our research findings. Videos of the second and third of those three presentations are available, but the detailed presentations (and much more) will be in the book: only a few points are noted here. Parts II and III of the conference comprise discussion by all participants on a series of major issues that arise. These issues were introduced by individual speakers, whose presentations are shown in boxes below, and whose powerpoints are available separately where they were produced: not all speakers wished to provide separate notes or powerpoint.

2. ADR in EU policy: Dr Iris Benöhr
3. The Models: Professor Chris Hodges
4. Numbers of claims, Costs and Duration of ADR Systems: Dr. Naomi Creutzfeldt-Banda

Some Key Points from the presentations of the research:

1. There are many consumer ADR bodies across European States, most operating nationally and recently with some operating on a pan-EU basis (such as schemes by Eurolease, the Direct Selling Association) or globally (domain names).¹ They are often called ‘ombudsmen’ (copying the origin of that term from public sector ombudsmen) or in France *médiateurs*.
2. The ADR models operate within different national *architectures*, that present some challenges for harmonization. However, the *techniques* that they adopt are very similar. The main techniques are
 - a. requiring direct contact between consumer and trader as a mandatory first step;
 - b. mediation/conciliation by the neutral party;
 - c. statement by the neutral party of a recommendation for a solution (non-binding) or a (binding) determination.
3. Many variations are found in the extent to which ADR systems are *independent* and *transparent*. Some countries have ADR bodies that are clearly independent (such as the Nordic Complaint Boards, that operate rather like courts, or the Netherlands’ geschillencommissie board). Many large companies with major consumer brands have effective in-house customer care departments, but do not usually call these ombudsmen (some French companies call them *médiateurs*). Some regulators have in-house ADR facilities, and some trade associations have semi-independent ADR facilities, often associated with deciding disputes under codes of business practice.
4. Important measures exist at EU level. The European Commission has produced two Recommendations relating to requirements for ADR bodies: 98/25/EC on ADR associated with court proceedings and 2011/310/EC on separate ADR bodies. There is also a 2004 Voluntary European Code of Conduct for Mediators.² Several sectoral regulatory measures encourage ADR systems or require them. An important recent measure is the The Mediation Directive,³ which applies from May 2011. In the court sphere, a parallel instrument is the

¹ The Uniform Domain Name Dispute Resolution Policy (‘UDRP’) of the Internet Corporation for Assigned Names and Numbers (‘ICANN’) on the recommendation of the World Intellectual Property Organization (‘WIPO’).

² http://europa.eu.int/comm/justice_home/ejn/adr_ec_code_conduct_en.pdf

³ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>

Small Claims procedure.⁴ Of great importance is the European Consumer Centres Network (ECC-Net)⁵ and its financial services equivalent FIN-Net.⁶

5. There is a considerable variation amongst ADR systems in the number of claims attracted. Many systems process claims relatively quickly (a few months) compared with courts.
6. Many ADR systems do not charge consumers to use them: 'loser pays' does not arise in these systems. Some do charge, and some apply a loser pays rule, but the sums involved are always less than litigation/court fees and modest in amounts.
7. Many ADR providers report that a significant number of contracts that they receive are requests for information and advice, rather than complaints; and that many complaints essentially involve simple issues and are not difficult to solve.

II. Redress through ADR: In what circumstances does ADR work – and work best?

1. **What criteria should ADR satisfy: independence, expertise, fundamental rights, due process, fairness, justice, legitimacy, governance, effectiveness, efficiency, speed, cost, flexibility – and access to justice? Are these the 'minimum standards' needed for ADR? Why? Are there others?**

Dr Georg Starke, Federal Ministry for Agriculture, Consumer Protection and Food, Berlin

For the German government and especially for the ministry of consumer protection, ADR systems appear to be an attractive alternative to solve a civil dispute between trader and consumer.

ADR should not replace court procedures. But ADR can be a welcome complement to court proceedings.

Example of the *Insurance Ombudsman* in Germany, one of the most successful schemes. He deals with disputes between consumers and insurance companies.

Costs – in Germany the 'loser pays' rule ensures that the successful plaintiff does not have to pay anything (except for attorney fees above the legal standard). For a Euro 1000 value of the claim with an attorney on both sides, the total risk is about Euro 717 for the first instance in Germany. Bringing a dispute before the Ombudsman is for free.

Speed – Ombudsman took an average of 4,4 months to resolve complaint and in Berlin an average civil law case took 11,3 months to be resolved.

Flexibility – ADR mechanisms are often more successful than courts in creating legal peace between parties. The Insurance Ombudsman will tell the consumer if their application is incomplete, the court will not help to make a claim conclusive.

⁴Regulation (EC) No 861/2007 establishing a European small claims procedure, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0001:0022:EN:PDF>.

⁵http://ec.europa.eu/consumers/redress_cons/index_en.htm

⁶http://ec.europa.eu/internal_market/fin-net/docs/mou_en.pdf

All relevant ADR bodies in Germany act in accordance with the Recommendations 98/25/EC and 2011/310/EC.

- Independence, impartiality and competence
- Transparency
- Effectiveness
- Legality
- Fair proceedings

Most important for German ministry of consumer protection are: legality / effectiveness / independence, impartiality and competence. For Germany also other points are important: awareness / voluntariness / defeasibility

Governments can only create pre-conditions for ADR systems. As many of the positive aspects derive from the voluntariness of the instruments, the states should as much as possible refrain from influencing the setup and the work of ADR bodies.

Businesses need to be convinced of the advantages of ADR bodies.

There was general agreement that the existing principles are correct. The Oxford team suggest that the principles should be updated, since they were drafted 10 years ago and ADR systems have moved on significantly, and that they should be split into two aspects: binding 'essential requirements' and performance indicators. There should be a requirement that all ADR providers should comply with the essential requirements, and should produce transparent performance data so that comparisons can be made in time, cost, outcomes as well as ensuring democratic accountability. A first draft of a rewritten list of essential requirements is attached.

2. Where do contrasting ADR models *not* satisfy the criteria? How should systems be improved?

Perhaps unsurprisingly, no-one volunteered to introduce this topic! The CSLS team therefore suggested that one of the key issues is the independence/impartiality of ADR providers, and that although a case can be made that some arrangements satisfy such requirements, the proof lies in the statistics that consumers or business do not *perceive* the arrangements to be independent/impartial, as shown in the comparatively lower usage figures. This would apply to some ombudsmen located in regulators and in companies (examples in France and Germany). These models can be explained in terms of historical development but might be due for reconsideration. At the other extreme, the UK Financial Ombudsman Service (FOS) attracts a high volume but is not perceived as independent by the business sector, and as too being too close to its regulator parent. However, issues arise of what the function is of the ADR body (e.g. the extent to which it is designed to have a regulatory function) and of the transparency of the data and operation of an ADR body. All aspects are inter-related.

Another issue might be whether it is still necessary for ADR decisions to be made by a panel of *three* people: some ombudsmen involve a single case manager, although decisions may be passed up to the/a more senior ombudsman. The Dutch and Nordic models of three 'arbitrators' have symbolic value in including representatives of consumer and business 'sides'. They may also be able to include sectoral expertise on the panel, thereby saving costs, and attract judges as

third members, since they seek the strong practical experience that the ADR panels provide. There are different models.

ADR bodies differ in whether decisions are based on law or codes; and also in whether decisions are based on (legal) rules or on what is 'fair and reasonable'. There may be a difference here between civil law jurisdictions (which can include concepts of fairness in contract law) and common law jurisdictions (which traditionally do not), although EU consumer law has increasingly included fairness. The UK FOS assumed an insurance ombudsman that had for 100 years made commercial shipping decisions on the basis of what is 'fair'. It may be that ADR systems reflect the expectations of consumers in a way that is in advance of the development of legal rules. But some businesses object that they are subject to double standards in having to observe legal rules and *ex post* considerations of fairness, and this creates considerable uncertainty and risk.

The first discussion triggered by this topic started by one question asking what we mean by these criteria. Perhaps criteria should be defined differently under different circumstances. What it means to talk about efficiency, fairness, transparency, etc? It was mentioned that defining and delineating these variables is the challenge.

A second discussion revolved around the role of trust and subsidiarity. One comment emphasized the role of trust in institutional arrangements: that sometimes ADR mechanisms based outside a given organization are more trustful than in-house ones. This triggered the comment of other participant who stressed the importance of subsidiarity. Defending the in-house solutions for dispute resolutions, the participant said that closeness to the point of contact between consumers and businesses is crucial. The farther one goes the more complicated it gets. It was stated that most systems insist in subsidiarity, and trying to get both consumers and businesses to come to an agreement. But if this is impossible, what else should one do?

Another discussion focused on the difference between fairness and legality, particularly in those cases in which one excludes the other. Would not be the case that more fairness brings about less legitimacy? One participant mentioned that, in her opinion, fairness means that both parties see the complete evidence, and legality depends on the applicable law of the jurisdiction. The example of the Netherlands (with 'De Geschillencommissie') was brought forward to highlight how decisions are taken by a panel of 3 people including a judge (to bring the legality issues) and a representative from the industry (to deal with issues related with expertise). But, would not a panel of 3 people make things more complicated. Would not be easier to have only one person instead? In reply, it was stated that, as the judge can ask all the technical issues to the expert right next to him, those consultations are very quick and easy. Another comment dwelled in the importance of public discussion, particularly in the case of the financial industry. It would seem that sometimes ADR mechanisms are captured by the industry. The fact that they can remain "close-doors" has been criticized by Prof. Hazel Genn in 2008.

3. Should decisions be fully transparent?

Professor Willem H. van Boom, Erasmus School of Law, Rotterdam, the Netherlands

Transparency in ADR means different things to different people involved. Moreover, ADR as such is a very large container concept in which just about any mechanism to settle, adjudicate or sweep under the carpet civil claims without the help of ordinary courts will fit. One would not expect full online publication with names of the parties involved in an amicable settlement reached by a conciliator as a proper level of transparency. So, to be realistic, one needs to have a closer look at the particular ADR scheme, its aims as well as its factual socio-economic and political stature in a given jurisdiction.

If the output of an institutional ADR scheme is a *decision*, whether binding or not, it should be a reasoned decision stating the relevant facts, norms and argumentation. I would call this *ex post* transparency for the persons and businesses involved. If consumers are involved, it should ideally be legible for lay people to the extent possible. And if these decisions are intended as precedents for future cases, then some form of publication is appropriate.

From the traders' point of view, every decision leads to a question: should we adapt our business to avoid similar cases going to ADR in future or is this a one-off which we can discard completely? At an aggregate level, the same issues arise for both traders' associations and consumers' associations. If company A is more frequently involved in particular conflicts which come before an ADR board or Ombudsman than one might expect from its market share, then possibly there is a structural flaw in its business model involved. Transparency could help to find the patterns of such structural flaws and provide a feedback loop to both business and consumer constituencies.

Such transparency demands do not apply for all ADR schemes. One could see ADR as a continuum with on the one end completely voluntary and non-binding arrangements and at the far opposite a compulsory scheme which emulates state court practice.

However, at both ends of the spectrum, transparency is relevant. A completely voluntary scheme needs to compete with courts and therefore needs to advertise and substantiate its competitive advantages it has over court adjudication. In a full-fledged compulsory system, the justification for transparency is the need for accountability towards stakeholders and society as a whole.

Hence, especially when ADR operators become influential and establish a certain level of power in the market for dispute resolution – either because of some statutory monopoly or because of the fact that ordinary courts have slowly and deliberately been made inaccessible for ordinary consumer claims precisely because of the existing alternative – there is every reason to raise transparency demands to a much higher level. I mention a few of the demands that would then seem reasonable from a societal point of view:

- Full transparency of and accountability for costs for all stakeholders concerned (government, individual consumers and traders' associations)
- Full transparency of levels of satisfaction of all stakeholders concerned (which might serve as a measurement of whether society thinks the scheme renders fair and just results)
- *Ex ante* transparency for the benefit of consumers and their legal services providers: if the ADR is an alternative route for adjudication, the consequence of choosing ADR might be

that access to court is then forfeited (save nullification procedures of some sort); choosing between options is only efficient if there is perfect information on the expected outcomes of the alternatives.

- The use of fixed and predictable formats, and preferably and indexed database for consultation.

Independent evaluation of all this is warranted. In particular, operators of ADR schemes should not be entrusted with the exclusive power of disseminating their products.

I submit that by guaranteeing a high level of transparency, all else follows. It may trigger higher expectations concerning throughput, costs, legibility, impartiality, the feedback loop, et cetera. Surely, checks and balances that exist in ordinary civil procedure would need to be considered as potentially valuable for ADR as well. Transparency enables scholars to criticize, practitioners to lay bare conflicting outcomes and ill-founded past decisions. An ADR scheme that actually has ‘market power’ should be robust and open to constant public scrutiny.

Obviously, all these requirements come at a price. In a society, however, where ADR is the only viable route to adjudication of certain claims, government is not to be allowed to shirk state responsibility for a fair, balanced and transparent adjudication scheme by cynically pointing to the ADR ‘alternative’. If practically speaking the ADR scheme is the only alternative, then certain fundamental principles come into play for which the state continues to bear responsibility.

To end my introduction and to stimulate debate, I would like to submit the following propositions:

- What transparency means, depends much on legal culture. Rendering a reasoned decision might mean something different in France than in Germany. Respecting privacy when publishing decisions may mean something different as well.
- Transparency rationales are different for voluntary schemes than for mandatory schemes. In the latter case, constitutional warranties may come into play.
- Transparency is key: it triggers quality assurance, lays bare any inconsistencies or biases in the decisions produced, as well as puts pressure on stakeholders to find patterns and act upon these.

Points made in discussion:

- The concept of a ‘reasoned decision’ differs between, for example, Germany and France.
- Court decisions are not all published everywhere, and not all court judgements are published in any event.
- WIPO publishes all decisions online: they can be mined.
- It would be helpful to know how many ADR decisions are later nullified in court proceedings – or not.
- The availability of a corpus of decisions (whether based on law or ‘fair and reasonable’ standards) enables

- businesses to know if they need to change practice;
- consumers to know if they have a valid claim before bringing it;
- practitioners to consider an indexed archive;
- trade associations and regulators to identify patterns, such as trends that need to be addressed or that some of their companies are worse than others.
- The Danish Parliament decided that the Consumer Ombudsman (an enforcer rather than ADR body as the term is used in many other countries) should ‘name and shame’ companies, but he sends draft announcements to companies in advance.
- Freedom of Information laws can elicit names of companies.
- Mediators do not necessarily produce just outcomes: their function is not to reach a decision on law but to assist parties to agree to acceptable compromises.
- A lot depends on whether your ADR model involves competitive or monopolistic ADR/court services.
- Systems and requirements should not be made too complex. The most important priority at present is to persuade companies to sign up to consumer ADR systems: they will just not do this if they are subject to too many requirements and risks at too early a stage.
- The voices from the public expressed clear support for the idea of transparency, but also concerns as to its implications. For instance:
 - The issue of privilege: what to publish and what to keep confidential. It depends on the type of ADR (mediation should probably be much more confidential than arbitration). There was a suggestion that the process should be confidential, yet the outcome must be transparent; Mr Oe described how in the Danish Ombudsman system the issue of what exactly is disclosed is very carefully considered in each case;
 - There is a real need for the use of technology (IT) in organizing data where large numbers of cases are processed;
 - UK: FOS started publishing data on complaints (including naming the businesses involved). This had a discernible effect on their conduct re: complaint handling (they are attempting to avoid being named). Thus – the following conclusion was made: what one does with information about ADR depends on what one wants to achieve by the ADR: dispute resolution or also behavior modification. It was also pointed out (consumer side) that what should be avoided is the opposite effect of the described behavior change: companies brushing complaints under the carpet or in any other way making it difficult for complainants to reach ADR.

4. What is the best architecture for ADR – nationally and internationally?

ADR for Consumer Protection in Japan *Professor Ikuo Sugawara, Nagoya University*

1. Current situation of ADR for consumer protection

(1) An overview of ADR for consumer protection

In Japan, until recent year, ADR for consumers has been typically assured by PL centers. The "PL center" is the general term for industry-sponsored ADR organizations established in response to the official notice of the Ministry of International Trade and Industry since 1994. However, the existence of these ADR alone has been found to be insufficient. Because PL centers can handle disputes involving product liability, but not contractual disputes. Therefore we need more well-established ADR organization for consumer problems.

In Japan, it was sometimes said that Attorney Act (Article 72) was one of the reason why private-sector ADR in Japan was so inactive. As judicial acts undertaken by those other than attorneys, is prohibited under the act and subject to punishment. Therefore it was impossible for private organizations to operate ADR without attorneys' help. So, to change this situation, in April 2007, the ADR Act was enacted. The act enables certified organizations to conduct ADR under specific conditions without an attorney's qualification. However, unfortunately, it should be noted that the ADR Act has not dramatically increased the number of ADR cases involving consumers. So, the emergence of ADR organizations adequately suited for consumer disputes is still awaited.

(2) Characteristics of ADR for consumer-related disputes

How would it be possible to promote ADR for consumer-related disputes? First of all, it would be necessary to design a form of ADR that corresponds to the characteristics of consumer-related disputes. So far, following characteristics become apparent in the process of dispute resolution.

Firstly, many consumer disputes cause prejudice in a small monetary amount. Therefore, victims tend to hesitate to resort to ADR if the procedure is costly.

Secondly, disputes often concern a diverse range of matters depending on the nature of the product or service in question, and require specialized knowledge for resolution.

Thirdly, opposing requirements must be adequately satisfied: careful and thorough treatment of disputes that can cause extensive damage, and swift and simple treatment of individual disputes.

Fourthly, it is not easy to adequately handle the difficulty of proof.

In addition to those characteristics of the ADR process, the problems of administrative cost and manpower shortage, experienced on the part of ADR operators, must be adequately handled. From the user's standpoint, the neutrality and fairness of ADR operators, as well as transparency of the process, are constant requirements.

In other words, challenges exist in various aspects and must be addressed and overcome to promote ADR for consumers. This is no easy task, but the Japanese legal system has started dealing with it, as witnessed by recent reforms in ADR by the National Consumer Information Center and by the financial service sector.

2. Recent challenges

(1) ADR by the National Consumer Information Center

1) Practice

The National Consumer Information Center (hereafter NCIC) is an independent administrative agency whose objective is to provide information of daily consumer interest and conduct surveys and investigations from a comprehensive standpoint in order to contribute to the stabilization and improvement of people's livelihoods. Recently, the Japanese government partially amended the Act on NCIC, and created a new ADR system in which the NCIC undertakes dispute resolution from the consumer's standpoint.

ADR at the NCIC proceeds roughly in the following manner:

The Dispute Resolution Committee, established within NCIC, handles the procedure of dispute resolution from a neutral and fair standpoint while playing the role of a consumer guardian. The Committee comprises expert members who have specialized knowledge and experience in law and business transactions. The members exercise their authority independently.

The Committee conducts two types of ADR: intermediation for a settlement and arbitration. Both types are initiated by one or both of the opposing parties applying for the procedure. Judicial effects such as interruption of prescription and suspension of litigation are granted to the Committee's ADR.

The procedure is carried out behind closed doors, presided over by one, two or more mediator(s) or arbitrator(s) appointed from the Committee members by the Chairperson of the Committee. They work with the goal of completing the procedure within four months from the day of application. The mediators and arbitrators may require the parties to attend the procedure or submit related documents. They also can urge the concerned parties to execute an agreement reached as a result of the procedure when it is not forthcoming.

As ADR for consumers, the National Consumer Information Center's ADR has several unique characteristics.

Firstly, NCIC does not handle all cases for which applications have been received; rather, it conducts ADR solely "important consumer disputes" in view of the large numbers of similar cases, the seriousness of damage, the complex nature of cases and so on.

Secondly, NCIC has a unique concept of neutrality and fairness among its mediators and

arbitrators. The Center Act states that they must engage in the procedure in a neutral and fair manner (Article 20, Paragraph 4; Article 30, Paragraph 5). However, in the process of the amendment of the Center Act, it was confirmed that the neutrality and fairness required of mediators and arbitrators cannot be simply formal but must be substantial. So, the supplementary resolution proposed by the Committee on the Cabinet of both Houses of the Diet (April 11-24, 2008) requires mediators and arbitrators to actively serve as consumers' guardians as deemed necessary, in consideration of the differences between the two parties.

Thirdly, NCIC maintains a relaxed rule of confidentiality. Summaries of results of terminated cases of intermediation for settlement or arbitration may be published if the Committee recognizes the need to do so for the stabilization and improvement of consumers' livelihoods.

Fourthly, the law introduces a moderate sanction device. The Committee may publish information that enables the identification of concerned business operators, when it is deemed particularly necessary to do, for example in case of the refusal of a business operator, without legitimate reason, to cooperate in the procedure.

2) Problems

So far, it can be said that NCIC has produced positive results in its ADR as expected. At the same time, some problems have been identified with the system, as summarized below³.

Firstly, as stated above, under the Center Act, the publication of summarized results of ADR procedures is permitted, or required in some cases. However, publication of the names of the business operators sometimes eliminates the incentive for business operators to participate in ADR. Maintaining a good balance between the functions of dispute resolution and information dissemination is a major challenge currently confronting the Committee.

Secondly, NCIC must find a way to reconcile its role of bringing relief to individual victims with its role of governmental ADR sponsor that proposes global guidelines for dispute resolution. In reality, some cases are often terminated with a settlement detached from what seems a legally reasonable solution, sometimes because the concerned consumers prefer not to proceed to litigation due to anticipated financial and psychological burdens or the business operators being insolvent. The Center must resolve this significant problem of reconciling individual consumers' interests with the public interest.

Other than above basic problem, it is also needed to establish a system to facilitate transition from the Committee's ADR to litigation, to find ways to overcome the problem of factual verification, to consider the need for collective relief for consumer victims, and to establish a partnership and cooperation with other ADR organizations to share information.

(2) ADR in the financial sector

1) Practice

In recent years, as financial products and services become increasingly diverse and sophisticated,

related complaints and disputes have been on the rise. Litigation has always been available as the means of resolving such disputes. However, its disadvantages for consumers, such as the time-consuming process, high cost including attorney's fees, lack of proof supporting consumers' claims, and the risk of privacy being compromised by a publicly-held court trial, tend to force victims to abandon hope of recovery, especially when only a small amount of money has been lost.

Under such circumstances, expectations were growing for the establishment of ADR for financial services as a simple and quick means of settling disputes outside the formal judicial system, thereby providing greater protection and convenience to users of financial services. In 2009, the Japanese government revised 16 laws, thereby initiating ADR specifically for disputes resulting from financial services.

ADR in the financial sector roughly proceeds as follows:

In the first place, a financial ADR organization receives inquiries and complaints about financial products and services from its customers on the telephone or in person. When a dispute is not resolved in discussions between the parties and the consumer wishes to resort to ADR, the consumer can apply to the financial ADR organization. The organization is then required to assist the claimant in preparing the necessary documents.

Following the above, the ADR organization appoints members of its dispute resolution committee which must include an attorney, a person engaged in the financial operation concerned, a consumer counselor, and a designated judicial scrivener, all of whom fulfill specified roles. None of the committee members can have an interest in the claimant. Once the procedure is initiated following the consumer's application, the other party, i.e. a financial service provider, is not allowed to refuse to respond without legitimate reasons.

The dispute resolution committee interviews the parties and witnesses; requests submission of written reports, account books, documents and other materials; prepares a draft settlement and advises its acceptance.

Financial institutions are required to sign a basic agreement concerning the execution of ADR procedures with the designated dispute resolution organization that covers the domain of their commercial services. The basic agreement stipulates financial institutions' duties: for example, duty to cooperate in the investigation, duty to respect the result of the procedure. Designated organizations are legally authorized to publish cases of non-compliance with these obligations by financial organizations. Furthermore, the organizations may charge a monetary penalty to, or cancel the agreement with delinquent financial institutions if the basic agreement contains corresponding clauses.

These ADR procedures are characterized by neutrality, fairness, rapidity and low cost. Specifically, the average time required for dispute settlement is two to six months, much shorter than a lawsuit, thanks to the efforts by neutral and impartial experts and attorneys well versed in financial affairs. Financial ADR organizations fix their own fees for procedures, which are mostly free for customers.

The institutional characteristics of ADR in the financial service sector include the following:

Firstly, different organizations provide specific frameworks of ADR for different financial products and services.

The second characteristic is that the establishment of a designated dispute resolution organization is voluntary and not obligatory.

Thirdly, ADR for financial services is placed under closer administrative supervision and more detailed regulation than ADR in other sectors.

Fourthly, financial institutions' duties are considered contractual, and not regulatory. Even financial institutions violate their duty to respond to ADR procedures, such as to cooperate in the investigation and to respect ADR results, they cannot be viewed as legal violations, to which the Prime Minister may issue orders for suspension of business activities. However, these violations provide grounds for the designated dispute resolution organizations to cancel the basic agreement, thereby putting financial institutions into a state of not observing the contractual regulation, and therefore subject to administrative inspection. This structural control ensures the effective observance of regulations.

2) Problems

Problems that have been identified on this ADR thus far from institution's side include the need for structural adjustment to accommodate the increasing number of applications and collaboration between diversified dispute resolution support groups. System users have pointed out the need to accelerate proceedings, improve accessibility, and introduce a system of forfeiting profits for effective security.

3. Future challenges and prospects for ADR for consumer protection in Japan

Since the establishment of the Consumer Basic Act, Japan's consumer policy has largely shifted its orientation, from government-centered prior control to judiciary-led retroactive control. The two ADR organizations for consumer disputes presented in the preceding section respectively represent on the one hand an example of a governmental ADR as a pillar supporting a retroactive control-oriented society and on the other hand, an example of a private-sector ADR introduced in such a way as not to compromise the industry's independence in the financial field which essentially requires strict regulations. These examples suggest two interesting directions that provide clues as to how the government and private sectors should interact in the future. One commonality of the two systems is the fundamental concept of mitigation of the disparities between consumers and business operators in information and negotiation power, as stated in the Consumer Basic Act. It can be said that this concept has enabled a clear expression of the notion of neutrality in the two systems, leading to policy development squaring with consumer protection. This is an achievement that should be highly evaluated.

At the same time, the two examples cover areas in which governmental intervention is relatively

strongly needed: important consumer disputes and financial services disputes. However, different consumer disputes require different levels of government intervention, and some disputes impose limitations on government intervention. Deeper examination is necessary for future development of ADR for consumer protection, with lessons drawn from the two examples.

In addition to those discussed in this paper, ADR is desired in many domains such as online shopping and advertising. For ADR in these domains, challenges are expected to emerge in various forms, concerning stronger incentives for users, the maintenance of neutrality of ADR organizations, cost reduction, improvement of accessibility and so on, and these must be dealt with in accordance with the characteristics of these domains. Moreover, a mechanism for integrating diversified ADR information will be necessary from both sides of the system, i.e., users and administrators.

5. How do developments in consumer ADR relate to systems and developments in public sector oversight and dispute resolution?

Many states have public sector ombudsmen. It is important to consider developments in private and public ADR and ombudsmen systems together, in order to capture appropriate learning but also to avoid fragmentation. For example, a possible response to the problem of how to raise consumer awareness of ADR might be a wide understanding that ombudsmen could deal with complaints against government as well as traders, and all ombudsmen operated to the same standards and effectiveness. Citizens would think ‘ombudsmen’ where they now think only ‘courts’.

Dr Angus Nurse, Birmingham City University

Major reviews of public sector ombudsmen have been occurring in UK, and government policy is to reform the arrangements, with various similarities to ideas that are being talked about in the consumer ADR world.

Important documents are:

- *Common Sense, Common Safety* (The Young Review) October 2010
- *Complaints & Litigation*: Health Select Committee proposals for Health Service Ombudsman reform, June 2011
- *Open Public Services*, Cabinet Office White Paper, July 2011
- *Public Services Ombudsmen Project*, Law Commission, July 2011

The White Paper noted that there needs to be a means for individuals to enforce rights, and that ombudsmen are the appropriate means for locating a power of redress, investigating complaints, promoting local resolution, and speedy remedial action. All services should be covered by ombudsmen. It seems that there is to be an increased link between ombudsmen and the courts. Values at the heart of this service are modernization, accountability and transparency. All public

sector ombudsmen should publish their reports, and should be able to consider generic issues.

For further details see the attached powerpoint.

6. How do we measure the function and success of ADR schemes?

Professor Deborah Hensler, Stanford Law School

See separate note

III. Where Next?

7. Improvements in ADR techniques

ADR systems are not standing still, but innovating and developing, where they are free to do this, at considerable speed. There can be a constraint on development where too many operational details are included in legislation, as has been experienced by the French Energy Ombudsman.

Peter Moerkens, De GeschillencommissieStichting, The Hague

[See attached powerpoint]

We have developed an integral comprehensive digital system of complaint and dispute solving at three levels. Those three levels enforce each other, as so we call our system cubed, to the third power.

I am very pleased to explain you our fully integrated cubed system.

In the first picture/slide, you see our - as we call it - umbrella organization. Under the umbrella at this moment 50 consumer complaints boards solve disputes between consumers and entrepreneurs/suppliers. All those 50 boards are fully independent and impartial. Unique is that the logistic and judicial support of those boards is centrally organised at De Geschillencommissie. Also unique is that De Geschillencommissie has commitment from government, consumer's associations en trade associations.

Consumer's associations participate because our system offers the consumer a simple, fast, cheap and easy accessible solution for his problem.

Trade organizations see as important advantage participation improves the service quality in the

sector. A consumer complaint board is an important link in the quality circle.

Important element in the system is that consumer and trade organizations agree bilateral terms of delivery with a dispute article as part of it. From that article the consumer has the right to make an appeal on a consumer complaints board when he has a conflict with a supplier. The supplier is obliged to cooperate, as a member of the trade organization. The board deals with the conflict and gives a binding decision. Both parties, consumer and supplier, are bound to follow the decision. In the system is a compliance guarantee, to both parties. The consumer has to put the part of the bill that is not paid in depot. If the consumer following the binding decision has to pay, we transfer the money to the supplier. If the supplier does not follow the decision, the trade organization will take over and pays the consumer. The trade organization then starts a collecting procedure to the supplier.

The government sees from the viewing point of both consumer protection and accessibility to law, the complaint boards as a good alternative for the judge.

It's a form of self-regulation by the private sector supported by government.

This was the integration to the first level/power.

To the second power, square, the integration is part of our digital process: on line dispute resolution.

It starts of course with the consumer who submits his complaint. He gets all the information needed to submit the complaint on our website, he receives an email with a login code and a password and he fills in the digital questionnaire. He can also electronically pay the registry money and he can upload supporting documents.

Thereafter the entrepreneur receives an email form us, also with a login code and password and he can electronically submit his defence.

Both parties can electronically follow their file.

It is a workflow system. The system, at the hand of the tasks and deadlines, manages all the files.

There is an index with all the participating entrepreneurs. The consumer can verify whether an entrepreneur is adjoined. And the system can notify with this index the supplier by email to hand in / to lodge his defence.

The index with decisions makes it possible for consumers, suppliers, and also for the general public to see previous decisions of the boards.

Finally, the system provides the trade organizations management information about the performance of the complaints boards.

Now I will present you our comprehensive cubed model of complaint and dispute solving. We

make a difference in this model between complaint and dispute. We define a complaint as a problem between a consumer and business at the stage that both parties are dealing with it, possibly supported by a trade organization. The complaint becomes a dispute when it is submitted to a board of De Geschillencommissie.

Two developments triggered us to generate this model. Firstly, there is the evolving transparency of the quality of service by internet. Quality management and complaint solving is, with the rise of comparison and complaint sites, getting more and more important for business. Trade organizations can have a major task in it. Secondly, the electronic system we developed is expandable so we can support with this electronic system trade organizations in complaint solving.

Now I will explain to you our model, which is in fact a funnel and a chain. It consists of three Phases. Phase three is the digital process of De Geschillencommissie. Phase one and two are newly developed. All three phases are based on one electronic database.

It starts with a consumer and an entrepreneur who have a problem, a question, an uncertainty or a complaint. If they can't solve it, the entrepreneur can refer the consumer to the website of the trade organization.

In phase one, the consumer gets an answer to his question and the problem is solved. The instruments used are a frequently asked list of questions and a smart questionnaire. There is no involvement of staff.

If the problem is not solved in phase one, the consumer goes to phase two. In this phase consumer and supplier can communicate electronically about their problem. The trade organization can monitor the communication. By itself or on demand of either the consumer or entrepreneur the trade organization can actively support both parties to reach a settlement. It can be done by email, by telephone or for example in a personal meeting. In our estimation about 80 percent of the complaints can be solved because it is all about communication and relation. 20 percent of the complaints can not be settled in this phase because they are too complex or because out of principle both parties want a decision. Those cases can electronically be transferred to the process of De Geschillencommissie, in which both parties can decide which documents will be part of the dispute file.

The use of this service provided by the trade organization is optional for the consumer.

It is evident that in this service from De Geschillencommissie to the trade organizations, in this chain approach, there is a Chinese wall between phase one and phase two executed by the trade organization and phase three that is executed by De Geschillencommissie. Because of the independence and impartiality of De Geschillencommissie, the role and responsibilities of the trade organizations and De Geschillencommissie must be clear and evident.

I hope I have given you a clear insight in our comprehensive cubed model of complaint and dispute solving and I thank you for your attention.

Belmed: The New Belgian Digital Portal for Consumer ADR
Stefaan Voet, University of Ghent

In April 2011, the Belgian Economy Minister (Mr. Vincent Van Quickenborne) launched Belmed: *Belgian Mediation* (<http://economie.fgov.be/belmed.jsp>) (available in Dutch, French, German, and English). Belmed is a digital portal (platform) for consumer ADR, which it wants to promote and make more accessible. It offers information *and* solutions for consumers and enterprises. Belmed only applies to consumer disputes (noncommercial disputes are excluded) and disputes between a consumer and an enterprise (disputes between consumers and between enterprises are excluded).

Belmed consists of two parts: an informative part, and an online mediation part. On the one hand, Belmed offers a useful summary of all existing ADR tools in Belgium. It gives an overview of all mediation, arbitration and conciliation agencies, authorities and ombudsmen, and their contact information.

This informative part also contains a consumer guide on how to settle a dispute in an amicable way (e.g. examples of letters to send to an enterprise to report a problem).

On the other hand, and this is the novelty, Belmed offers the possibility of making an online application for mediation. The idea is to create one uniform digital office for the consumer, so he or she doesn't have to bother, or find out, which agency, ombudsman, commission, etc. he or she has to go to.

The consumer (or company) goes to the website of Belmed, and clicks on the 'online mediation' application.

Two preliminary questions are asked:

- *Did you contact the company or consumer to report the problem?* If not, you are told to do so, and how to do so. If so, you are sent to the next screen.

- *Did you start a court proceeding?* If so, you cannot make an online application. If not, you will be able to make an application. The consumer has to register by using his electronic passport (eID).

The Belmed system, which functions as a "serving-hatch", sends the application to the competent mediation authority and they will deal with the case (they will contact the applicant, the opponent, explain the mediation procedure, etc.). The Ministry only serves as the administrator of Belmed. Neither the identity of the applicant nor the contents of the application, are read by the Ministry. This makes sense, because the Ministry is the control agency of some of the mediation authorities. The applicant and the mediation authority only have to provide some (objective) statistical information, so the Ministry has an idea by who, and how Belmed is used. In the long term, this will allow measuring the functioning and success of consumer ADR.

If a mediation process starts, it goes completely online. The applicant, who receives an account, can follow up on the application, and can communicate with the mediator by email.

The use and consultation of Belmed are free of charge. The costs of the mediation procedure depend on the mediation authority/procedure.

For the moment (November 2011), seven mediation authorities have signed a protocol to work with the Belmed system: the Ombudsman Service for Energy, the Mediation Service Banks – Credits – Investments, the Secondhand Vehicle Reconciliation Commission, the Travel Disputes Commission, the European Consumer Centre, the Furniture Disputes Commission, and the Real Estate Conciliation, Arbitration and Mediation Board. The long term idea is to have agreements with all mediation authorities.

The Ministry is fully aware of the fact that not everybody has computer access, or can work with computers. To deal with this, an ‘expert in poverty and social exclusion’ is hired, who is responsible for the proper use of language, and the user-friendliness of the system. On the other hand Public Computer Spaces (e.g. libraries, schools, etc.) are contacted to collaborate, so consumers can make applications in those spaces.

Though statistical data is not yet available, it seems that most complaints are formulated with respect to energy.

8. What opportunities exist to extend ADR?

- ADR in competition damages claims:

Duncan Campbell, CBI

ADR MODEL FOR SETTLING FOLLOW-ON CLAIMS IN COMPETITION CASES CBI discussion paper – 9 April 2010

Reasons for an ADR model

The CBI supports the objective of providing effective redress to the victims of cartels and believes every effort should be made to facilitate this through ADR. The objective is to ensure fair and early disposal of legitimate claims with minimal costs and without recourse to the courts. This model of providing direct redress is designed to offer advantages to all the principal participants in a cartel case.

Advantages for the competition authority

The authority would enhance its role in advancing consumer welfare.

There would be no cost to the authority or direct involvement in delivering the redress.

The authority would still make the required decision on the existence of the cartel, its duration and the market affected.

Advantages for claimants

Compensation would be obtained sooner without the risks and costs of litigation.

Compensation can be provided to consumers, who individually have low value claims, at lower cost than through a court based system.

The compensation can be in a form having more appeal to the claimants, such as new products or trade credits or vouchers.

Advantages for companies

The exposure to follow-on claims can be quantified at an earlier stage and with more certainty than through protracted litigation. This would enable companies to draw a line under their involvement in a cartel at an earlier point

There would be substantial savings in litigation costs and in internal resources. Companies would be free to focus on future opportunities rather than past problems.

Companies can repair their damaged image more rapidly and effectively through the earlier resolution of claims. This could help in rebuilding customer relationships.

A flexible ADR model

The ADR model would provide flexibility and could be adapted to each individual case. It would provide an optional model for settlement that companies could offer for discussion with the authority.

Flexibility is needed, as redress following a cartel affecting thousands of consumers would require a different approach than one involving a small number of industrial purchasers.

How would the model work?

Defending companies would agree to fund the process leading to awards of compensation.

Awards would be made by a panel to specified claimants, or classes of claimants.

The panel would be made up of a legally qualified chair, together with assessors having industry and financial/accounting expertise.

The panel would determine the procedure to be followed in a specific case.

The panel would hear limited evidence on the amount of overcharge and the level of pass-through at each level of the supply chain. The panel would make an assessment of the overcharge and relevant pass-through percentages, which would then form the basis of compensation.

The award would be binding on the defending companies who agreed to participate but only binding on the claimants when accepted.

The processing of individual claims with the companies concerned and the payment of the compensation would be carried out through a third-party administrator.

The process would be under the supervision of a recognised ADR provider, such as CEDR, IDRS or ADR Group.

Is there a role for the consumer and other representative groups?

Under the process set up for the panel, it could invite submissions from representative groups able to provide views on the level of overcharge and pass-through issues.

What happens if the claimant does not accept an award?

The claimant will be free to pursue its own claim through the courts.

But when making an award of litigation costs the court may consider the amount of compensation that was available through the ADR panel. The claimant may well therefore be subject to a potential costs penalty by pursuing litigation. This could include paying the defending companies' costs as well as its own.

What happens if all the defending companies do not sign up to the process?

The process would still operate for the remaining companies and provide them with the advantages described above.

The panel could make awards based on the overcharge paid by the customers of the individual companies.

A company that did not participate would be at the risk of further litigation from its own customers and others under joint and several liability. There would be additional pressure through publicity of the ADR scheme.

Can the authority justify a reduction in the fine?

A reduction in the fine would be an important incentive for the defendants to agree to provide direct redress.

If one element of the fine constitutes the confiscation of illegal profits, then this could justifiably be returned to the victims rather than the state.

The reduction in the fine could be made conditional on the panel's report of the defendants' payment of compensation to the claimants.

Dr Pablo Cortés, Leicester University and Dr Julia Hörnle, Queen Mary London

WHAT IS ONLINE DISPUTE RESOLUTION?

In the Internet context parties located in different parts of the world make contracts with each other at the click of a mouse. However litigation for these disputes is often inconvenient, impractical, time-consuming and expensive due to the low value of the transactions and the physical distance between the parties.

Online Dispute Resolution (ODR) is often referred as a form of ADR which takes advantage of the speed and convenience of the Internet and ICT. ODR is the best (and often the only) option for enhancing the redress of consumer grievances, strengthening their trust in the market, and promoting the sustainable growth of e-commerce. Hence, e-commerce is the most natural field for the application of ODR, in particular for settling complaints that are characterised for being:

- cross-border
- low value
- high volume
- occurred between Internet users

For that reason there is ongoing work to enhance the use of ODR for resolving these types of disputes. Presently the most significant initiatives are:

1. The European Commission is due to publish a Directive on Consumer ADR and a Regulation on Consumer ODR establishing an ODR Platform by the end of November. For background information see Digital Agenda for Europe COM (2010)245 p. 13, and Green Paper on ADR (2001) and Responses at http://ec.europa.eu/consumers/redress_cons/adr_en.htm#consultation.
2. UN Commission for International Trade Law (UNCITRAL) Working Group III (Online Dispute Resolution) is drafting procedural rules for ODR to settle disputes arising from e-commerce. See A/CN.9/WG.III/WP.109 - Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules. Available at http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html

A few success stories of ODR providers:

- ✓ **eBay/PayPal** employ a tiered ODR process where parties first try to voluntarily settle their disputes by using assisted negotiation software; when they cannot reach a settlement the claim escalates to adjudication. PayPal freezes the money involved in the transaction of the dispute, thus ensuring the enforcement of the final decision. It resolves over 60 million disputes a year.
- ✓ **CyberSettle** uses blind-bidding negotiation to settle insurance and commercial disputes. Parties make confidential offers that will only be disclosed when both offers match certain standards (usually ranging from 30 to 5 percent) or a given amount of money. The settlement is the mid-point

of the two offers. CyberSettle has been working online since 1998 settling over 200,000 disputes with an accumulated value of more than USD 1.6 billion.

- ✓ **Domain Names:** The UDRP, developed by ICANN, is an adjudicative ODR process that allows trade mark owners to fight cybersquatting (domain name holders, who had registered a domain name in bad faith for the purpose of reselling it for a profit, or taking advantage of the reputation of a trademark). The UDRP is similar to non-legally binding (but enforceable) arbitration. The most important ODR service provider is WIPO Mediation and Arbitration Centre. Thus far, more than 20,000 disputes have been resolved.

CHALLENGES IN THE GROWTH OF B2C ODR

Despite the need for ODR, its growth has been slow when compared with traditional ADR, accounting for a very limited number of successful ODR providers. Presently, ODR is used for specific subject matters (e.g. the UDRP for domain names) and it operates in specific market places (e.g. PayPal for eBay). Some of their defining features are that they incorporate incentives for parties to participate and rely on non-legalistic self-enforcement mechanisms.

What are the hurdles for the growth of ODR in the consumer context?

- Lack of awareness: Most consumers and traders have not heard of ODR.
- Traders do not have incentives for using external ODR. When consumers propose traders to use ODR (e.g. ECODIR) they often refuse as they perceive it as biased entity (i.e. a consumer tool).
- Private and for profit ODR providers are mistrusted. The funding of ODR providers by traders may raise issues related to the independence and impartiality of ODR services.
- It is difficult to designing ODR processes that consider asymmetric relationships taking into account the needs of repeat-players versus one-time-users.
- Applying consumer law and procedural standards to low value disputes
- Costs and red-tape: Investment in ODR may not justify economies of scale.
- Added cross-border challenges:
 - Language barriers
 - Complexity of conflict of laws
 - Costs
 - Enforcement

THERE IS STILL NEED FOR ODR: KEYS FOR ITS GROWTH

The law should seek for ways to overcome the hurdles in the growth of ODR. An effective ODR will install greater confidence in consumers while increasing their access to justice and recognising consumers' legitimate rights. There are a number of strategies that can be put forward to enhance the use of ODR:

- ✓ Business and consumer education and awareness campaigns
- ✓ Investment in dispute avoidance
- ✓ Tiered processes: resolving disputes at the earliest possible stage

- ✓ Financing: Public/ industry/ trader/ case fees/etc.
- ✓ Free ODR Platform coordinating ODR services
- ✓ Minimum standards to guarantee fair outcomes
- ✓ Accreditation of ODR providers
- ✓ Making it mandatory in certain sectors or generally in all cross-border disputes?
 - Duty by the trader to link on its website and in other communications to the ODR platform and stating a commitment to participate/comply
- ✓ Incentives for traders
 - Trustmark: public or private?
 - Black lists: Name and shame on the ODR platform?
 - Condemn of legal costs
 - Pressure by payment providers

Allowing pre-dispute binding ODR?

Prof Fernando Esteban de la Rosa, University of Grenada

B2C ODR IN THE EU

- **Consumer concept in the EU:**

Imperious need to define what is to be understood as consumer: It is possible to apply the already existing definitions provided for by the European Directives recognizing consumer rights according to which a consumer is basically a natural person acting for a purpose outside his trade or profession.

Two clarifications are in order:

- 1) If the buyer acts partly within and partly outside his trade or profession, it may not be deemed as a consumer “unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply” (*Johan Gruber v. Bay Wa AG C-464/01*).
- 2) In the light of the principle of appearance, a "consumer" is any natural person who can be regarded as acting for a purpose outside their trade, business, craft or profession, meaning that if a trader acts for a purpose outside their trade, but he does not reveal such a circumstance to the seller, appearing to him like a trader, he will not be deemed as a consumer.

- **What happens with the broader concept of consumer existing in a Member State?**

Problems may appear if there is a wider consumer concept in a MS. (*e.g.* Spanish law includes both natural and legal persons in defining a consumer)

Solutions? Preferably not exclude legal persons from submitting their claims in a consumer ADR scheme in a country where they are considered as such.

EU PLATFORM OPERATIONAL ONLY WITHIN EUROPEAN BORDERS AND IN CROSS BORDER SITUATIONS

- ✓ European legislation is not exported beyond EU borders → nor should the principles and rules applicable to the functioning of the European ADR schemes.
- ✓ Only consumers having their habitual residence in the EU should benefit from using the EU ODR Platform and the exclusion of non residents can be fully justified.
- ✓ Habitual residence in a EU/EEA MS is essential to tag a situation as cross border, provided the trader's established in another MS.

✓ **Where is a trader established?**

Three criteria:

- the statutory seat
- the central administration
- the principal place of business.

NB! Problems appear if a trader has its statutory seat in one MS and its central administration or even the principal place of business in another MS. EU legislation must shed light into this matter....

✓ **What happens with the transactions between consumers and foreign traders from outside the EU?**

Access to the European ODR Platform should be permitted if the foreign traders have a clear connection with the EU Market, even if the trader does not have its statutory seat, central administration or principal place of business in a MS, but the dispute arises out of operations of any branch, agency, or other establishment situated in a MS. In such a case, the trader should be deemed to be established in that MS.

STANDARDS FOR ODR/ADR

The Commission Recommendations 2001/310/EC and 98/257/EC play an important role in setting the standards for ODR/ADR.

ODR Processes

Binding: processes that terminate with legally binding decisions (arbitration)

Non-binding: non-adjudicative processes where parties are free to reach an agreement (e.g. mediation and conciliation)

The principles provided for by the Recommendations must find a suitable reflection in the configuration of the ODR schemes in order to ensure an adequate consumer protection.

- ✓ The principles of independence and impartiality as well as the adversarial principle should be equally applied to binding and non binding processes.
- ✓ The principle of transparency, a distinction must be made between binding and non-binding processes. While in binding processes the decision should be published, in non-binding processes the settlement and the negotiations should remain confidential.
- ✓ The principle of legality is essential when the process has a binding outcome, as it should

ensure that the consumer rights are fully respected.

- ✓ Principle of liberty: consumers should not be contractually required to participate in a binding dispute resolution process (such as arbitration) before the dispute arises, unless they are covered by legal provisions.

- **Who does the control operate?**

The European initiative should set up a mechanism to guarantee that the ODR Providers comply with the rules establishing minimum standards.

Options to conduct the control:

- 1) New approach: award an European Trustmark to those ODR Providers fulfilling the criteria
- 2) Traditional approach: leave the control in the hands of the MS.

- ODR platforms

Zbynel Loebel, external counsel of ADR.EU and coordinator of an international pilot on cross-border ODR

[See attached powerpoint]

Information about a pilot project related to the cross-border ODR infrastructure using UNCITRAL ODR Rules

The Czech Republic would like to inform the UNCITRAL Secretariat about the preparation of an international pilot project (Pilot) related to the provision of the cross-border ODR infrastructure based on the UNCITRAL ODR Rules. We propose that this Pilot should be presented in Vienna during the meeting of the UNCITRAL WG III on 14-18 November 2011. All participating countries will be invited to participate in the Pilot.

The basic concept of the proposed Pilot is the following:

1. Participation in the Pilot will be open to any regulator and consumer organization and/or ADR/ODR provider(s) following input and/or endorsement by respective national regulator(s). In the future system, ADR/ODR providers will administer cases and consumer organizations will provide guidance to consumers and liaise with involved domestic online sellers to ensure their wide participation in the cross-border ODR.
2. The cross-border ODR infrastructure platform will be piloted as a set of services to participating ADR/ODR providers and possibly consumer centers; the platform itself will not be an ODR provider but will provide its services to the participating ODR providers and possibly consumer centers. The service will be developed by an international team of technical experts (service team) with input from national regulators, consumer centers and

ODR providers;

3. Consistent with the above, at the conclusion of the pilot, the technical experts will finalize and publish an open communication standard and minimum technical requirements so that future ODR providers are able to implement their own unique ODR solutions in compliance (or consistent) with the published specifications. There should also be a duty of every user to communicate all additions or modifications of the communication standard to the service team and the right of the service team to publish selected additions and/or modifications as updates of the published communication standard.
4. To the extent necessary and practical, relevant components of the cross-border ODR infrastructure will incorporate documents being prepared by UNCITRAL: (i) disputes will be processed and resolved consistent with UNCITRAL ODR Rules; (ii) participating ODR providers will agree to fulfill minimum criteria developed by UNCITRAL; (iii) participating ODR providers will ensure that they and their respective neutrals adhere to minimum prescribed criteria prepared by UNCITRAL;
5. As a direct consequence of the above (paragraphs 1 – 4), ODR programs participating in the cross-border ODR infrastructure will: (i) meet consistent criteria and operate under similar rules; (ii) either be accredited or reviewed by respective national regulator(s) prior to their participation; (iii) be assisted by interlinked consumer centers providing guidelines to consumers and outreach to domestic online sellers; (iv) incorporate common ODR procedural language/communication standard understandable to all ODR providers and consumer centers, in order to enable self-resolution as well as third-party mediation/arbitration; and (iv) operate as an online platform, implementing the common ODR language.
6. Participating ODR providers will be able to issue supplemental rules. Such supplemental rules cannot be in conflict with the ODR Rules but can complement them.
7. The Pilot will track and confirm the costs of maintaining the cross-border ODR infrastructure platform and specifications as well as best ways how to prevent forum shopping and cherry picking among participating ODR providers. Participants in the platform will agree to localize the communication standard(s) into their language(s) and to encourage the use of the UNCITRAL ODR Rules in their respective countries.
8. One role of the participating ODR providers (including public and/or private consumer centers and trustmark programs) will be to encourage appropriate online sellers to develop and participate in cross-border ODR as a standard business practice and a valuable service to customers. Businesses may opt into cross-border ODR either on a case-by-case basis or through formal, public participation in various ODR and/or trust mark programs.

After the announcement of the Pilot in November, the Pilot will begin with an initial stage which might take from January 2012 to end of June 2012. During the initial stage, the following principle tasks are to be provided:

- Verification and testing of the proposed functions of the cross-border ODR infrastructure platform and the services to be provided by the service team;
- Clarification of costs involved for ODR providers with administering cross-border ODR disputes;
- Necessity/desireability of some type of coordination structure of the participating ODR stakeholders;
- Contacts and discussions with payment channels;
- Contacts and discussions with associations of online sellers and large online sellers;

It may be possible to report the results of the initial stage during a subsequent UNCITRAL WG meeting and – at the very least – issue a progress report at the ODR Forum (held on 27-29 June 2012 in Prague), together with proposed next steps.

We anticipate that the development of the infrastructure platform will be financed by the service team. Any costs associated with actual case handling will be covered by individual participating programs.

Czech Republic is prepared to endorse Czech Arbitration Court (ADR.EU) as the Czech ODR provider for the purposes of the Pilot. The confirmed participants in the pilot will likely include the Better Business Bureau (BBB) in the U.S. and Canada. In addition, other countries have been contacted to participate, including EU (ECC-NET), Korea, Japan, Singapore and Argentine.

Any interested participants are kindly requested to inform about their interest the Pilot coordinator at zbynek.loebel@adr.eu.

9. Should ADR deliver behaviour control (improvements in performance through scrutiny and regulation) as well as dispute resolution? How can regulators, business and consumers deliver redress, dispute resolution and improved standards?

Adrian Dally, Financial Ombudsman Service, London

[See attached powerpoint]

There is a spectrum of options available to those designing the functions of an ADR scheme:

1. Dispute resolution: function is to resolve disputes between the parties, and the decisions of the ADR scheme have little significance beyond the individual circumstances of the dispute. “*What price justice?*” Dispute resolution

2. Dispute resolution + ‘nudged’ behaviour control: function is to resolve disputes between the parties
and

- report the behaviour it sees

- publish comparative performance data
- publish individual decisions

...so that the transparency of the scheme's decisions create a 'civil incentive' for businesses to behave in ways considered fair by the scheme. "*Making decisions work harder*"

3. Dispute resolution + link to regulation: functions to

- resolve disputes between the parties
- 'nudge' better behaviour by transparency

and

- link to complaint-handling regime set by regulator
- report business performance to regulator
- feed into regulator's collective redress functions (and be bound by its collective redress decisions)

...so that the ADR scheme sits within a regulatory system that enables the regulator to act in a risk-based way. "*Deliver the wider public interest*"

HenrikØe, Danish Consumer Ombudsman

ADRs must be fair and respect procedural safeguards

Advantages:

- Informal, quick - and inexpensive for consumers (but maybe not for companies)
- Most decisions are followed

Disadvantages:

- Decisions are normally not enforceable
- Often not possible to produce evidence (e.g. witness statements) – subsequent court procedure can be necessary

– Possible solutions:

- 1) The decision is enforceable **by default** if the trader does not inform the ADR board that he does not intend to follow its decision
- 2) Free legal aid to consumers/ small claims procedure
- 3) 'Name and shame'
- 4) Decision is binding according to prior agreement between the parties

- One-case solutions only

Advantages:

A more general approach

- Intervention (e.g. by negotiation with trade and industry or court proceedings) can:
 - rectify the market
 - give trade and industry ‘ownership’ to the interpretation of the law (guidelines and guidance papers)

Enforcement in cases that are of more general interest:

- Administrative orders
- Injunction/order and/or penalty imposed by the court
- Civil lawsuit (e.g. for compensation) on behalf on one or more consumers
- Collective redress

Disadvantages:

- The cases or investigations can be very costly for the businesses concerned
- The question of prioritisation
- A penalty is often disproportional to the profit made by the business and does not deliver redress to the consumers

Combination of ADRs and public enforcement?

How to make ADRs effective:

- Not too comprehensive a system
- Not all types of goods and services should be included – sometimes the claim is too small and costs therefore disproportionate
- Mediation and settlements within the ADRs should be possible
- Make sure that decisions are followed in the majority of cases

Essential to have effective tools

- Collective redress is one such tool (can also facilitate settlements)
- A white paper from the EU Commission Com(2008)165 final suggests a new model for achieving compensation for consumer and businesses who are victims of antitrust violations
 - Collective redress
 - In case of breach of the competition rules the infringer is liable for damages unless he demonstrates excusable error

Don't forget to improve the court procedures

Points made:

- The Danish Consumer Ombudsman receives 5,000 complaints a year, and can only investigate 1,000; where he cannot act he tells consumers to go to the ADR system.
- If the ombudsman does not agree with an ADR decision he can take the matter up.
- Ombudsman can seek negotiated outcome, but

- can consider reference to the court. The power to refer a case to court fulfills the need for the system to have effective instruments of enforcement. The most important ‘teeth’ in that regard is the power of the Ombudsman to initiate collective redress.
- However, collective redress can be costly
- Question of priorities:
 - Penalties?
 - Compensation?
 - Combination of penalties and compensation?
- There is a fear in Denmark as to what we will see in terms of a European ADR structure
- Emphasized that there should be a possibility of settling (as in the Dutch model)
- Questions of process and authority also arise:
 - The Danish system has at its pinnacle the Supreme Court
 - Authority must be built into the system
 - Collective redress is the ‘nuclear bomb’ in terms of background coercive threat available in the Danish system. Not necessary to use in majority of circumstances but the existence of the power constitutes important authority and power in the process.

10. Why do we need courts? What for? What role should ADR, regulators and courts have, and how should they work together?

Malcolm Carlisle OBE, European Justice Forum

As far as our organization is concerned, all that we want to do is to create an environment where business wishes to set up alternative mechanisms of settling disputes avoiding litigation, and above all, collective litigation. You start I hope by recognizing that the vast majority of complaints gets sorted out within companies. Secondly, there are a multitude of systems outside companies that facilitate conciliation where outside conciliation is required. Everyone recognizes that they are a patchwork in so far as they do not cover everything. Everyone realizes that they are quite different in structure and architecture and that does not matter, providing they achieve the objective, which is to get people to recognize merits or demerits of their case and come to a resolution. If we are going to accomplish that objective of creating new mechanisms for bringing common sense into these arguments we are going to fail utterly if we start out by over-complex schemes.

Let us recognize the merit of creating alternatives to courts, let us recognize that if we seek perfection we will never get there, and let us not denigrate informal low cost systems that probably do not need even a fraction of all the things that we would love them to meet. The courts are there, they can do with a huge amount of competition, and if they improve everyone benefits. You have always got that alternative to go to the courts.

The title that I was supposed to address is what is the connection between courts and ADR. I hope I have suggested that the answer to that is “as little as possible”. In other words if you have an ADR system that needs constant intervention of courts you have probably failed.

Points made:

- The German Insurance Ombudsman adopts a policy that any case involving a significant issue of (undecided) law should not be dealt with by him but should be taken to the court, as the proper forum for deciding law.
- That observation raises the issue of whether the courts are the proper forum for deciding issues of law, but ADR systems are the better forum for applying decided law to (essential straightforward) facts. Should the relationship between courts and ombudsmen be reviewed, on that basis, and the two bodies refer matters between them accordingly?
- Should ADR decisions be able to be enforced in court in the event of non-compliance by traders within a given time through a fast track procedure, thereby avoiding unnecessary re-hearings about evidence that has already been considered? Should the trader's article 6 ECHR rights require total re-hearing, or could he be permitted to produce only new evidence or arguments?

11. How should ADR be developed nationally, across the EU and beyond? What are the implications for access to justice?

Sebastian Bohr, European Commission DG SANCO, Brussels

(Disclaimer: The views expressed are personal and do not reflect the position of the Institution to which he belongs.)

An easier way of resolving disputes will increase consumer confidence in the Single Market and the Single Market Act, therefore, identified legislation on ADR and ODR as a key action to empower consumers.

Where consumers contact traders over a dispute and are unsuccessful, 46% of them then give up. ECC-Net data show that over 50% of their cross-border cases relate to e-commerce.

The main current problems are:

- coverage;
- information to consumers about where to go;
- uneven quality of ADR schemes;
- online ADR procedures are hardly developed.

The European Commission intends to make two legislative proposals before the end of this year: an ADR Framework Directive and an ODR Regulation, together with a Communication. These measures will build on what exists now.

ADR implies there being an independent person and this aspect distinguishes ADR from complaint-handling systems. ODR is an ADR building on technological developments and handling the procedure entirely online.

Envisaged features of the ADR Directive:

1. Member States should have ADR schemes for all consumer disputes
2. ADR schemes should respect quality principles, such as impartiality, effectiveness and transparency
3. Information to consumers about the competent ADR scheme
4. Facilitate networking amongst ADR schemes, such as FIN-NET
5. Co-operation between ADR schemes and enforcement authorities
6. Monitoring of ADR schemes' performance.

Envisaged features of the ODR Regulation:

1. Establish an EU-wide referral system providing the structure to encompass all existing and future ADRs.
2. It will cover cross-border disputes related to e-commerce transactions.
2. This should create a single entry point. This point together with the structure of the ECC-network will help consumers practically to submit their complaints.
3. The system would refer submitted complaints online automatically to the competent national ADR scheme.

The aim of the proposals is to achieve that ADR schemes exist for all consumer disputes throughout the EU. This will create for businesses a level playing field.

Peter Avery, OECD, Paris

It will be important to focus on essential requirements and evaluation criteria. . On-line dispute resolution and the role of the intermediary are important in the evolution of ADR systems. Opening up cross-border ADR is challenging and UNCITRAL may be helpful here.

Keith Richards, Raleo Ltd, London

One should celebrate differences between ADR systems, rather than seek uniformity; note the differences between countries in their *regulatory* architectures. ADR is outdated in that it should

be called *Appropriate* Dispute Resolution. Justice is not simply achieved in court: these are different systems with different expectations. Disputants often have very high expectations.

How does the criterion of accountability apply? Who is to carry the can?

Keep it simple. A one-stop shop would be best.

Do not forget the drivers for business; enhance reputation, keep regulation at bay, capture the learnings.

ADR need not necessarily be free: consumers expect to pay for services. But it must be low cost.

There is a need for a filtering process, to force the consumer to think seriously about their complaint, and adopt a reasonable approach to its merits. This needs assistance in evaluating the issue at an early stage and its viability. Complainants have high expectations and what may help is consumer counselling before undertaking the ADR process so that there is a measure of understanding and managing expectations

Draft tabled by CSLS Oxford team for discussion

ESSENTIAL REQUIREMENTS AND KEY PERFORMANCE INDICATORS

We propose that the following essential requirements should apply to *all* dispute resolution (DR) systems, including ADR and courts:

1. Accessibility.

- a. The DR system should be visible to potential users.
- b. Its procedures, costs and duration should be clear in advance of use.
- c. The service should be free to consumers.
- d. It should provide a service in all appropriate languages to the nature of disputes that it purports to handle.

2. Requirements of justice.

- a. Confidence and Trust. Every DR system should maintain the confidence of the public and not attract disrepute.
- b. Impartiality. Those involved in making decisions should be independent of all who might have an interest in the outcome, and should have no conflict of interest.
- c. Consistency. Decisions involving similar subject matter should be consistent and sufficiently predictable. Consistency should apply both to decisions of the particular DR system and to decisions made by similar DR systems.
- d. Fairness. Decisions should conform to principles of justice and fairness. Systems should not attract unmeritorious claims, and should identify them and stop them at an early stage.
- e. Competence. The DR system should not make decisions on issues or cases for which another DR system would be more appropriate.
- f. Confidentiality. Confidential information of the parties should be maintained during the DR process. Once a decision is reached, it should be published online. At that stage, parties should be able to assert the continuing confidentiality of facts that are subject to legal obligations of confidentiality.

3. Effectiveness.

- a. The DR system should deliver a sufficient proportion of desired outcomes.
- b. The duration of its procedures should be proportionate and acceptable, given the nature of the subject matter.
- c. The cost of the system as a whole, and the fees payable in individual cases should be proportionate to the service provided and the disputes for which it is intended.
- d. Decisions should be binding on traders.
- e. The system should provide for an adequate level of compliance with its decisions.

4. Accountability and verification.

- a. There should be appropriate and transparent oversight mechanisms, to provide democratic and social confidence in the process and in its outcomes.

- b. The ADR provider should publish at least annually data on:
 - i. its KPIs (the number of claims received, how they were processed, what resolutions were achieved, how long they took, and what the costs were)
 - ii. claims handled, in agreed formats, identifying types of claims, urgent issues, whether the traders complied with any agreements or determinations.

We propose that the following **KPIs** should be applied, so that the performance of ADR providers may have democratic accountability. [Matter for discussion on how they should be applied....] These are matters of operational data, such as on:

1. Claims data:
 - a. The number of claims received,
 - b. how they were processed,
 - c. what resolutions were achieved,
 - d. how long they took,
 - e. whether the traders complied with any agreements or determinations,
 - f. what type of issues were raised
 - g. which companies were involved??
2. The costs of the system.