

**DRAFT FOR DISCUSSION
NETWORK GOVERNANCE
WORKING PARTY**

ALTERNATIVE DISPUTE RESOLUTION

1. Definition of ADR

Alternative Dispute Resolution (ADR) is a term covering a number of mechanisms that provide an alternative to the traditional route of going to court. There are a number of ADR mechanisms. The most widely used are:

Arbitration - The parties choose one or more neutral third parties, arbitrators, to whom they present their dispute for a final and legally binding decision. In some instances, there may be a panel. The arbitrator may be a lawyer, or may be an expert in the field of the dispute. He/she will make a legally based decision, according to the law.

Mediation - The parties attempt to reach a negotiated settlement with each other being helped by a neutral third party. The neutral third party, subject to the parties can either facilitate or evaluate an agreement. Unless or until outlined in a formal agreement, a mediated settlement is non-binding. If any party to the dispute is not satisfied with the outcome, that party may opt not to sign a settlement agreement.

Conciliation - This is similar to mediation, but the neutral third party is appointed only to try and facilitate a settlement. It does not involve the third party giving an evaluation.

Complaint Boards/Ombudsmen - Neutral third parties/organisations offer procedures through which out-of-court dispute settlement of, generally, consumer complaints can be dealt with. They tend to be regulated by national law if at all.

Mini Trial/Executive Tribunal - Again similar to mediation but is more formalised and usually involves legal presentations to a panel of senior directors of each party with a neutral chairman. Following the presentations, the panel tries to reach a settlement.

Expert determination/adjudication - The parties agree to refer the dispute to a neutral third party to make a quick binding decision until the end of a contract or until appeals to court or to an arbitrator are completed

2. Benefits of ADRs

ADR may be simpler, closer to normal business activity, cheaper and less stressful than going to court. The work done in preparing disputes for resolution may be less, or simpler. Parties may choose an arbitrator or mediator for special knowledge or expertise. It may be possible to find earlier or more convenient dates for an ADR than allowed by courts. These factors should make ADRs less expensive than courts. ADRs are also a less stressful experience than courts. Parties involved in open court find the formal court hearing intimidating, and many who fund their own case suffer anxiety about their mounting legal bills and the possibility of having to pay the costs of the other party.

3. Requirements of ADR

The European Commission adopted a Communication on "The Out-Of-Court Settlement Of Consumer Disputes" to encourage and facilitate settlement of consumer disputes at an early stage. This refers to a number of minimum requirements that bodies responsible for out-of-court settlements should comply with. These are formulated under the following seven headings:

- Independence – the decision-making body should have its impartiality assured.
- Transparency – the remit, procedural rules and requirements and how it goes about reaching a decision should be clear to all.
- Adversarial Principle – each party should be allowed to put its case and to hear the case being put against it.
- Principle of Effectiveness – the consumer should not be obliged to be legally represented, the procedure is cheap or free to the consumer and quick.
- Principle of Legality – consumers should not be deprived of the protection afforded to them by mandatory provisions (Rome Convention).
- Principle of Liberty – parties will only be bound by decisions if they were informed of the binding nature and specifically accepted this in advance.
- Principle of Representation – parties have a right to be represented or assisted by a third party.

Other core requirements should be:

- Ease of use/access: it should be easy to access i.e. online access must be available and be easily understood. The steps involved should be clearly spelt out.
- Speed: a dispute should be resolved in a very short time frame, sometimes in a few weeks.
- Cost: the cost of resolving a dispute must be well below the cost of not resolving it.
- Privacy: Parties should be able to keep the fact that they are in dispute and the details of that dispute, private and confidential, especially if it concerns trade secrets or price-sensitive information. Encryption should be available when transmitting information online.

4. Funding/Operation of ADRs

ADRs may be run in a number of different ways, for example by trade or consumer bodies, individual company schemes, private independent bodies or under statutory regimes. ADRs can be funded by a general levy on the corporate bodies who make use of the scheme; fees payable on a per use basis by one or other parties; and schemes funded out of the public purse.

5. Examples of ADRs

United Kingdom

Online ADRs are relatively new in the UK although London is seen as the mediation capital of the world. A number of organisations offer a variety of civil/commercial ADRs. These are:

- Centre for Dispute Resolution www.cedr.co.uk
- Academy of Experts www.academy-experts.org
- ADR Group www.adrgroup.co.uk
- City Disputes Panel
- The Chartered Institute of Arbitrators www.arbitrators.org
- Mediation UK www.mediationuk.org.uk

Some of the above schemes are partially on-line i.e. allow parties to refer a case online with information being encrypted for security. Under the Centre for Dispute Resolution (CEDR) scheme parties are asked to fill out an online questionnaire and any future contact can be conducted on-line. However, the actual resolving of the dispute is done usually face to face. CEDR also provide international mediation. The CEDR fees are charged at a predetermined daily rate according to the anticipated value of the claim.

United States

ADRs are more developed for the on-line environment in the US than in any other country. This reflects the rapid expansion of e-commerce, which in turn has led to an increase in the number of online disputes. In addition, because of the geographical size of the US face to face resolution can be difficult, costly and timely.

Examples of the more developed on-line ADRs are:

- The Mediation Information & Resource Centre www.mediate.com
- Online Mediators www.onlinemediators.com
- National Arbitration Forum www.arb-forum.org

6. Governmental Initiatives

The US Federal Trade Commission and the Department of Commerce will be hosting a workshop in Spring 2000 to explore the use of ADRs for online consumer transactions.

The OECD adopted "Guidelines for Consumer Protection in the Context of Electronic Commerce" on 9 December 2000. The Guidelines are non-binding but are designed to encourage private sector initiatives such as ADRs and cooperation among governments, businesses and consumers at both the national and international level.

The EU is developing a recommendation on guiding principles for on-line alternative dispute resolution mechanisms (ADRs) at a national level. At the same time the European Commission is working on an ambitious project which aims to set up an EU on-line ADR - involving independent arbitration - through which companies that adhere to the criteria set out in the scheme can display an EU trademark.

The UK's Lord Chancellor's Department issued a Discussion Paper on ADRs in November 1999. In line with the Government's commitment to modernisation, the Department aims to develop a strategy for the use of ADRs.

Governments have an important role in promoting the use of ADRs. They can do this by identifying barriers to using ADRs and seeking to remove them. In addition, they can encourage the provision of information about ADRs to the public, business community and legal system.

7. Online Issues

There are a number of online issues that should be considered.

- Jurisdiction/applicable law - with the growth of cross border transactions resulting from e-commerce a key issue is how, in the business to consumer context, the consumer can be protected from fraudulent, negligent, or careless electronic businesses. The European Commission are therefore looking to extend the Brussels Convention (which allows a consumer to sue at home) and Rome Convention (application of domestic law) to cross border online transactions and convert the Conventions to Regulations which are directly applicable. How any ADR scheme operates against this backdrop needs careful consideration.
- Confidentiality - in some sectors, notably banking, special care may be required when transmitting online customer confidential information.
- Use of the telephone may be more effective in attempting to resolve disputes it is often easier to achieve this by talking rather than merely exchanging e-mails. This is may be more relevant where parties to the dispute are local to each other.
- Language - in cross border transactions it cannot be assumed that English will be the chosen language.

Annex

The Online Mediator scheme works as follows:

1. A party is requested to register their dispute by completing an online confidential information form, which outlines the nature of the dispute.
2. Online Mediators will contact the other party or parties and seek to obtain their agreement to online mediation. If the responding party indicate that they do not want to mediate, or if there is no response within 7 days, Online Mediators will notify the registering party that the online mediation will not take place. If the responding party indicates that they are prepared to mediate, they will also complete a confidential disagreement information form.
3. If all parties agree to Online Mediation, an Online Mediator is assigned and will contact each participant. From the point of initial contact with all parties, the online mediator will assist parties to reach agreement. Compensation for the mediator is based on the amount in dispute. Online Mediators agree to engage in a reasonable effort to facilitate agreement.
4. When all parties reach agreement, an agreement form will be completed. As part of completing this form, participants will determine whether they intend for their agreement to be legally enforceable or not.

Costs are determined by the value of the dispute. Charges are \$50 for one hour per party for disputes under \$10,000; \$70 for one hour per party for disputes between \$10,000 to \$50,000 and \$100 for one hour per party for disputes over \$50,000.

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