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COMMITTEE ON CONSUMER POLICY**

**Working Party on Information Security and Privacy**

**LEGAL PROVISIONS RELATED TO BUSINESS-TO-CONSUMER ALTERNATIVE DISPUTE  
RESOLUTION IN RELATION TO PRIVACY AND CONSUMER PROTECTION**

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## **FOREWORD**

This document addresses the extent to which existing national legal provisions may impact recourse to alternative dispute resolution (ADR) in relation to electronic commerce. It presents a synthesis of Member country responses to the Questionnaire on Legal Provisions related to Business-to-Consumer Alternative Dispute Resolution (ADR) in relation to Privacy and Consumer Protection (attached as an annex).

This document provides a summary of the main points, an introduction to the project, a synthesis of the responses received, and a few concluding remarks. It was prepared by the Secretariat with contributions from the Committee on Consumer Policy (CCP) and the Working Party on Information Security and Privacy (WPISP), as part of their joint work programme on business-to-consumer (B2C) ADR in the online environment.

The Committee for Information, Computer and Communications Policy and the Committee on Consumer Policy agreed to declassify this document under written procedure, completed on 26 June 2002.

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## MAIN POINTS

Although the numerous national instruments related to alternative dispute resolution (ADR) reported by Member countries are not specific to the online environment<sup>1</sup>, their collation helps provide a general picture of the nature and scope of application of existing provisions related to ADR in most OECD Member countries, and may serve as the basis for further work to facilitate online ADR at the cross-border level.

- **Member countries recognise the potential benefits of, and encourage informal ADR.**

A common theme echoed throughout the responses is the importance Member countries attach to informal ADR. In the majority of countries, policy initiatives recognising the potential benefits of ADR have been developed. These initiatives aim at increasing the availability of effective, timely and cheap mechanisms as an alternative to formal court-based dispute resolution.<sup>2</sup>

- **Offline ADR schemes that are established, funded or run by governments are common in Member countries.**

Legal provisions that establish particular types of offline ADR schemes, such as court-annexed ADR or ADR for landlord-tenant disputes, are common in Member countries. They vary from consumer ombudsmen to arbitration boards to conciliation courts. The scope of their competence is usually limited to either a particular type of dispute or a specific sector. Recourse to these schemes may be mandatory or encouraged.

- **There is little broad-based regulation addressing ADR in Member countries: the general picture is a patchwork.**

Member countries have no overarching framework regulating formal and informal ADR. Although many countries regulate arbitration, informal types of ADR remain largely unregulated. However, many countries described provisions that apply to business-to-consumer (B2C) disputes in specific contexts. Rules have been developed for different types of ADR depending on the subject matter of the dispute (*e.g.* privacy); the underlying transaction (*e.g.* insurance, telecommunications); the size, value and complexity of the dispute; whether arbitration or mediation is involved, etc.

- **In most Member countries, parties generally are free to agree to non-binding ADR on a contractual basis.**

Recourse to informal B2C ADR is not subject to specific legal limitations. In most countries, parties are free to agree to ADR on a contractual basis, subject to the restrictions that apply generally to contracts such as fraud, duress or public policy concerns (*e.g.* unconscionability, non-waivable rights, clauses unfair to an individual, and concerns of equity and fairness). These considerations appear to be a general limit to recourse to, and implementation of mandatory or binding ADR.

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1. The main legal instrument targeting online ADR is the EU Directive (2000/31/EC) on electronic commerce. This instrument encourages online ADR but does not impose any legal requirements on it.

2. In addition, OECD Member countries have adopted guidelines related to the protection of consumers online that call for meaningful access to fair and timely ADR without undue cost or burden.

## INTRODUCTION

In order to gain a better understanding of the role ADR can play in enhancing user and consumer confidence in e-commerce, the OECD, the International Chamber of Commerce and The Hague Conference on Private International Law organised a joint conference on online ADR in relation to privacy and consumer protection, that was held in The Hague in December 2000. The conference explored the use of online ADR systems for disputes involving small values and/or low levels of harm that arise between businesses and consumers online. The primary focus was on informal, flexible systems that allow for the necessary balancing between the type of dispute and the formality of the process for resolution.

At their February 2001 and March 2001 meetings, the Working Party on Information Security and Privacy (WPISP) and the Committee on Consumer Policy (CCP) decided to follow up on The Hague Conference with the aim of raising user and consumer awareness about online ADR and encouraging recourse to fair and effective B2C online ADR. This follow-up work included three elements: an updated inventory of online ADR mechanisms, an educational instrument for potential parties to online ADR, and a questionnaire on legal issues.

The questionnaire on legal issues (see Annex) was developed by the Secretariat with input from WPISP and CCP delegates participating via an electronic discussion group. In June 2001, the questionnaire was finalised and sent to Member countries and stakeholders for response.

The Secretariat received responses to the questionnaire from 24 Member countries, including Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Japan, Korea, Mexico, Netherlands, New Zealand, Poland, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States. Responses were also received from The Research Centre for Computer and Law, University of Namur, Belgium (CRID), *Confcommercio* (The Italian Retail Association)<sup>1</sup>, and two online ADR providers, TRUSTe and SquareTrade.

The objective of the questionnaire was to generate an overview of the national legal regimes applicable to B2C ADR in Member countries, with a view to understanding if and how existing legal provisions impact recourse to ADR, particularly in relation the online environment. The questions aimed to elicit factual information on the content of legal provisions (both general and specific) applicable to ADR, both in national and cross-border situations.

There are limitations in the conclusions that can be drawn from the answers to the questionnaire. First, it was difficult to respond to the broad range of questions in a completely definitive way. In particular, for countries with legal systems in which competence over ADR is shared by national and regional or local authorities, it was not always possible to describe all relevant regulatory measures. Similarly, the fact that legal provisions related to ADR are not usually grouped together in a unique set of rules made it difficult to provide comprehensive responses. Finally, comparisons between countries were complicated by variations among national definitions of ADR processes (*e.g.* mediation or arbitration).

Despite these limitations, a number of commonalities emerged from the answers given by Member countries.

## I. GENERAL PROVISIONS ON ADR

Some Member countries have specific provisions that require or encourage parties to have recourse to informal ADR for certain types of disputes. Aside from legal provisions, a majority of countries referred in responses to general policies of encouraging consumers to have recourse to informal ADR, particularly where government schemes have been made available. Other countries have specific provisions prohibiting or limiting recourse to ADR in certain circumstances.

### A. Provisions encouraging or requiring ADR

Australia, Canada, Italy, Japan, New Zealand, the United Kingdom and the United States have provisions that encourage recourse to ADR for certain disputes. In the United Kingdom, pre-trial protocols for defamation, personal injury, clinical disputes, professional negligence and construction and engineering matters encourage recourse to ADR. In Australia, the Fair Trading Tribunal Act 1998 expressly encourages the use of ADR in resolving disputes brought before the tribunal.

Austria, Canada, France, Germany, Italy, Japan, New Zealand, United Kingdom and the United States have provisions that, in certain circumstances, explicitly require parties to exhaust ADR prior to seeking judicial remedies.

#### *Provisions requiring ADR before a complaint is filed*

Some countries require parties to exhaust ADR in certain circumstances prior to filing a complaint in court. For instance, Germany has regional legislation requiring parties to attempt conciliation for disputes relating to property law, involving small claims for compensation, neighbourhood law and claims over damage to personal reputation. In Austria and Switzerland tenancy disputes should be taken to a specific ADR administrative body. In France if agreement cannot be reached on rent when a lease is being renewed, the parties must refer the matter to the *Commission Départementale de Conciliation* before applying to the courts.<sup>3</sup>

#### *Provisions requiring ADR after a complaint is filed (court-annexed programmes)*

Some countries have legislation that allows courts or tribunals to require parties that have filed complaints before them to go to ADR in appropriate circumstances for matters within their jurisdiction. Countries that referred to such provisions include Australia, Canada, Italy, Japan, New Zealand and the United States. For example, in Australia, the 1994 Tenancy Tribunal Act requires mediation as a first method for dispute resolution between parties seeking the intervention of the tribunal. As a further example, in Canada, state-based legislation requires all parties to civil disputes to attend a mediation session at the close of pleadings before any further step can be taken in the case. In British Columbia, Canada, a mandatory settlement conference conducted informally by a judge is part of a small claims court initiative.

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3. Article 17, Act of 6 July 1989 concerning leases of dwelling houses.

In a similar development, the Netherlands noted that it has recently initiated court-annexed mediation projects on an experimental basis in five different courts throughout the country. As part of the programme, judges can request that parties try to reach a solution with the help of a mediator in specific administrative and civil (including family mediation) cases. Further, in the United States, pursuant to a range of legislation, some state and federal courts require litigants to exhaust ADR first as a matter of course, after a complaint is filed, before the trial can continue. For example, in Maine, in most civil cases, after filing a complaint in court, parties must schedule an ADR conference to try to resolve the dispute.<sup>4</sup>

## **B. Provisions prohibiting or limiting recourse to ADR**

Some countries have provisions prohibiting or limiting recourse to ADR. France, Germany and Italy noted that parties could not generally seek to resolve disputes involving inalienable or non-disposable rights through ADR (*e.g.* divorce, familial disputes, etc.). Similarly, Mexico referred to legal provisions that prohibit certain matters such as familial conflicts and divorce to be resolved by arbitration.<sup>5</sup> In the United States, while the parties cannot be required to go through court-annexed ADR for certain disputes notably involving constitutional rights<sup>6</sup>, they can voluntarily agree to try to resolve them through private ADR.

Denmark, Finland, Germany, Korea, Netherlands, Poland, Spain, Sweden and Switzerland have set up national ADR schemes to which recourse is not permitted for certain types of cases (*e.g.* below a specified monetary value) and/or to certain parties [*e.g.* exclusion of business-to-government (B2G) disputes]. In the Netherlands certified complaints boards are not able to deal with a range of disputes including those relating to death, physical injury or illness. Further in Switzerland, under the *Concordat* (agreement on arbitration), the parties are not free to use arbitration if the case comes under the exclusive jurisdiction of a state authority.

## **C. Exhaustion of ADR**

Few Member countries report having specific provisions that would affect the validity of a contractual agreement to exhaust recourse through ADR prior to seeking redress through the courts.

Korea, New Zealand, the United States and Spain indicated that contracts to exhaust ADR would, in practice, likely be enforceable. For example, in the United States, such a contract would generally be upheld unless the parties seeking to invalidate it can show that it was procured by fraud, duress, mistake, unconscionability or illegality. Australia, Canada and Japan reported that parties could enter contracts to exhaust ADR. However, they stressed that such contracts may be set aside or declared invalid by the court as an “unfair contract term” or because of some other irregularity such as procurement by undue influence, violation of public policy or restriction on consumer access to ordinary legal remedies.

The majority of European Union countries referenced the EU Directive on Unfair Contract Terms that, *per se*, does not allow consumers to give up their right to go to court. They also mentioned national implementing legislation as further bases on which a contract could be invalidated if its effect were to restrict access to ordinary legal remedies. For instance, Austria noted provisions in its Consumer Protection Act which declare invalid a contract that deprives a consumer of his/her right to bring a matter before

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4. Maine Rules of Civil Procedure, Rule 16B.

5. Article 615 of the Federal Civil Procedures Code.

6. The Alternative Dispute Resolution Act states that courts cannot refer parties to ADR after litigation has been filed if the dispute is based on constitutional rights, concerns equal rights protection and voting or the relief sought consists of money damages of an amount greater than USD 150 000.

court. Similarly, Italy referred to its Civil Code which states that any clauses in B2C contracts that concern or entail exceptions to the competence of judicial authorities are presumed to be abusive. Other countries to reference national legislation on unfair contract terms or the EU Directive in this context included Denmark, Finland, France, Italy, Netherlands, Sweden and the United Kingdom. In a similar but broader approach, Mexico noted that its Federal Consumer Protection Law also invalidates clauses that are generally “against consumers’ rights”.

#### **D. Binding ADR**

In general there are no specific provisions that prohibit contractual agreements between parties to be bound by ADR after a dispute has arisen, and, *a fortiori*, at the end of the ADR process. For example, Austria, France and Italy noted that in the case of agreements signed at the conclusion of an ADR process, contractual autonomy is recognised and agreements signed by the parties will be binding according to contract law.

However, the general practice appears to be that contractual provisions binding parties to ADR prior to a dispute having arisen may be regarded as an “unfair” contract term or contrary to public policy, notably if it deprives the consumer to the right to go to court. Countries which adopted this approach included Australia, Austria, Canada, Denmark, Finland, Italy, Japan, Netherlands, Spain and Sweden. Legislation in Sweden and France for example mandates that consumer contracts entered prior to a dispute containing an arbitration clause are automatically invalid as unfair. Similarly, in the United Kingdom, an arbitration agreement is automatically void as unfair for consumers specifically if it relates to a claim for a small amount.

New Zealand and the United States noted that, in practice, a consumer is free to consent to be bound by ADR but that contract law will apply to ultimately determine the validity of a contract to engage in and be bound by ADR. For example, in the United States, a contract is not invalid simply because it deprives the consumer of the right to go to court – the validity of a contract in this situation is decided on a case-by-case basis. The general rule is that such contracts are valid, irrevocable, and enforceable, except where they violate general principles of contract law, such as fraud, duress or unconscionability. Legislation in Japan also indicates that an agreement to refer future disputes to arbitration is valid as long as it relates to determined relations of right and disputes arising therefrom.

#### **E. Implementation and judicial enforcement of ADR outcomes**

Many ADR outcomes are implemented by the consent of the parties and thus do not require further third-party intervention. However, when one party refuses to abide by an ADR agreement, many countries indicated that they have mechanisms for enforcement of ADR agreements. It remains unclear, in the B2C cross-border context, how an ADR outcome involving nationals from different countries can be enforced.

Japan, New Zealand, the United Kingdom and the United States indicated that ADR outcomes such as mediation or conciliation can be judicially enforced under basic contract principles. Other countries have specific legislative provisions that provide mechanisms for the enforcement of domestic ADR outcomes. For instance, in the Netherlands, agreements reached after a mediation procedure can generally be brought to court to be confirmed by a judge. Further in France, in cases of non-judicial conciliation, if the parties agree, the court may be asked to give binding force to their agreement.<sup>7</sup>

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7. Article 9 of the Decree of 20 March 1978.

Some countries also indicated that ADR agreements made during the course of proceedings (for example in the context of court-annexed ADR) can be given the status of judgements on application to the court if both parties consent. Australia, France, Japan, the United States, and the United Kingdom referred to this approach. For instance, in France, the courts have a general conciliatory role such that if the parties reach settlement during a procedure, they may at any time ask the court to record their agreement or the court can itself prepare a conciliation agreement to be signed by the parties. Canada also indicated similarly that an ADR outcome can be enforced with the consent of the parties in which case an ADR agreement forms the basis of a consent order issued with the same status as any other court order.

Austria, Germany, Hungary, Italy, Korea, Mexico, Poland, Spain, Switzerland and Turkey indicated that ADR decisions rendered by bodies operating under national schemes can be enforced in some circumstances. For example in Mexico, under the Federal Consumer Protection Law, outcomes issued or agreements approved by PROFECO (the Consumer Protection Attorney's Office) under its conciliation and arbitration procedures have the nature of final judgements and must be fulfilled by the parties or enforced by the courts. Also in Austria, an outcome delivered by the relevant ADR body concerning Landlord and Tenant Law constitutes an "executory title" and as such is therefore enforceable provided the dispute isn't pursued in court within four weeks of service of the ADR outcome. Conversely, Denmark and Finland indicated that the decisions or recommendations of Consumer Complaints Boards are not enforceable or binding.

Finally, a few countries mentioned specific legislative limits on implementation of ADR outcomes awarded by particular statutory ADR bodies or in the context of arbitration. For example, in Japan, under the Law of Public Summons Procedure and Arbitration Procedure, either disputant can apply for the annulment of an award if one of a number of circumstances exist, including for instance, if the award requires a party to undertake an act prohibited by law. Under UK arbitration legislation, an arbitration agreement can be "set aside" if the court is satisfied that the agreement is "null and void", inoperable or incapable of being performed. Further, in the Netherlands, when the outcome of an arbitration or binding advice procedure is manifestly in conflict with public morals or public policy, its implementation will be affected.<sup>8</sup> Other specific legislative provisions exist in Czech Republic, France, Mexico, Poland, Switzerland, Turkey and the United States.

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8. See for arbitration procedures, Code of Civil Procedure art. 1065.1.e and for binding advice procedures, Civil Codebook 7 art. 902.

## II. PROCEDURAL SAFEGUARDS FOR ADR

In some Member countries there are legal provisions imposing certain procedural safeguards for a broad range of ADR programmes. Other countries have procedural safeguards only for a particular type of ADR or ADR for a particular type of dispute.

### A. Confidentiality

The United States cited specific legislation providing for confidentiality of ADR proceedings or outcomes. The United States noted that there are some state-based regulations which ensure confidentiality. For example, Ohio's mediation confidentiality statute requires mediation communications to be confidential, subject to a number of exceptions.<sup>9</sup>

Confidentiality rules for government-run ADR schemes appear to vary. In Sweden the existing ADR body is a public authority such that all processes are usually public but a decision can be made confidential if it contains delicate personal or business information. A similar approach is taken in Poland where Court of Conciliation cases are public unless disclosure would be against public policy or would reveal state/business secrets. Similarly, in Denmark, Finland, and Korea, legislation aimed at ensuring public access to public processes applies to government run ADR bodies to override any agreement as to confidentiality. For example, in Denmark, the Open Administration Act would apply such that information regarding the proceeding of an ADR or an ADR outcome can be given to a third party on demand.

Conversely, in Switzerland, arbitration procedures in state-run bodies are usually confidential but if a party appeals against a decision, the appellate authority is entitled to all relevant information on the ADR process.

Australia, France and Japan referred to safeguards applicable to ADR in the judicial context (or court-annexed ADR). For example, in France there are safeguards imported in the procedures of conciliation undertaken by judicial conciliators and mediation proceedings conducted by court appointed mediators. These safeguards notably guarantee the confidentiality of the proceedings. Further, in Japan, conciliation cases, under the Law of Conciliation of Civil Affairs, are confidential but the parties and the persons interested in the case can request perusal or copying of the record of the case unless it would obstruct the keeping of the record or the functions of the court. Legislation in some countries actually deems information arising from an ADR process as inadmissible as evidence. For example, in Australia the Federal Court Act provides that evidence of anything said, or of any admission made at a court-annexed mediation session, is inadmissible in any court or proceedings.

However, several Member countries indicated that, in practice, parties may be compelled under some circumstances to disclose information in relation to an ADR proceeding, regardless of whether the parties

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9. In addition, ADR experts in the United States are working on a Draft Uniform Mediation Act, which sets forth a general requirement for confidentiality of mediations and enumerates several specific exceptions. These exceptions include: waiver; communications relating to the ongoing or future commission of a crime; record of a signed agreement; meeting and records open by law and public policy mediations; evidence of child abuse and neglect; evidence of professional misconduct or malpractice by the mediator; evidence of professional misconduct; or malpractice by a party or representative of a party.

have agreed to keep the proceedings confidential. Australia, Canada, France, Italy, Mexico, Netherlands, New Zealand,<sup>10</sup> Switzerland and the United Kingdom outlined this approach. For example, Mexico noted that, under the Federal Consumer Protection Law, authorities, ADR providers and consumers must provide PROFECO, the Consumer Protection Attorney, with any information needed for legal procedures. Also, Australia and Canada noted that ADR practitioners (mediators, etc.) are ethically obliged to disclose certain information if that were necessary to prevent serious harm. Australia and Canada noted further that courts appear to have a general discretion in this context: they may respect confidentiality on the grounds of public interest but, equally, may decide that public interest considerations override the confidentiality agreement.

## **B. Qualifications/neutrality of ADR provider**

Most Member countries indicated that there are legal provisions that specifically regulate the qualifications and neutrality of ADR practitioners in court-annexed/court-referred ADR. Countries referring to such regulation include Australia, Canada, France, Japan, the Netherlands and the United States. For example, in France, the Code of Civil Procedure lays down requirements for judicial conciliators and mediators, including for example that conciliators must have at least three years' experience in law, but there are no mandatory general conditions for non-judicial services. Further, in the United States, some state courts or legislatures impose training or experience standards on mediators who practice in state or court-funded mediation programmes.

Austria, Denmark, Finland, Germany, Hungary, Italy, Japan, Korea, Mexico, Poland, Slovak Republic, Spain, Sweden, Switzerland and the United Kingdom cited provisions regulating the qualifications and neutrality of ADR practitioners in statutory ADR bodies. For instance, in Denmark, the legislation establishing the Consumer Complaints Board has provisions that detail how the board is to be composed (and therefore who can act as an intermediary).

There also appear to be some rules on qualifications and neutrality of general ADR services in some Member countries. Australia referred to state/territory legislation that deals with accreditation of mediators. Japan reported that competent ministers must certify organisations that intend to settle privacy/personal information disputes. Japan also reported that people who engage in ADR "for profit" must be qualified as lawyers in principle. In the United States, ADR providers are largely unregulated. In most states, a person can offer private mediation services without taking a class, passing a test or having a special license or certification. In practice, however, most independent mediation programmes and mediation membership organisations impose their own training or experience standards on mediators.<sup>11</sup> Finally, New Zealand noted that practising lawyers usually provide ADR and are subject to ethical requirements and disciplinary procedures. Czech Republic and Mexico also cited provisions applying in the context of arbitration. For example, in Mexico, the Federal Consumer Protection Law contains regulations for registration of independent arbitrators in consumer disputes.

## **C. Other procedural safeguards**

Canada, Czech Republic [only business-to-business (B2B)], Japan, Mexico (only B2B), Netherlands, New Zealand, the United Kingdom and the United States stated that certain procedural safeguards applied to arbitration. For example, in New Zealand, the *Arbitration Act 1996* contains a number of procedural

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10. In New Zealand, the Arbitration Act 1996 prohibits the disclosure of information revealed during an arbitration unless the parties agree.

11. *cf.* Draft Uniform Mediation Act mentioned above.

requirements and provides that agreements may be set aside if the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case.

Australia, Austria, Denmark, Finland, Italy, Korea, Mexico, Netherlands, Poland, Spain, Sweden and Switzerland indicated that public authorities and bodies conducting national or state ADR schemes must observe certain safeguards. For instance, in Korea, legal provisions outline some procedural safeguards that apply to the ADR processes conducted by the Consumer Dispute Settlement Committee, such as composition of the Committee, term of its members, quorum for decisions, and deadlines for reaching a decision.

In terms of general regulation of ADR processes, the United States cited some specific provisions governing procedures for B2C disputes over warranties. The Magnuson Moss Warranty Act requires the US Federal Trade Commission to establish minimum requirements for disputes resolution procedures. As such, any consumer dispute resolution mechanism under the Act must, *inter alia*, be able to settle disputes independently, without influence from the parties involved; follow written procedures; and provide each party an opportunity to present its side, to submit supporting materials and to rebut points made by the other party. There are also some state-based regulations which uphold the right to representation in mediation negotiations. For example, Alaska and North Dakota statutes prohibit mediators from excluding an attorney from the mediation table.

Aside from legal provisions, some other regulatory initiatives that seek to import safeguards into ADR were noted. Both the EU Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes and Benchmarks for Industry-Based Dispute Resolution (a co-regulatory initiative) in Australia were cited in this context.

New Zealand and the United Kingdom also noted that some procedural safeguards may be introduced into ADR processes in a "*de facto*" sense, given that mediators, conciliators and other third party neutrals are often required to adhere to professional codes of conduct. For instance, in New Zealand most ADR is undertaken by lawyers who are subject to ethical requirements and disciplinary procedures which may serve to introduce some procedural safeguards, particularly around independence, impartiality and transparency.

Finally, the United States mentioned the existence of voluntary guidelines for ADR providers conducting B2C disputes.<sup>12</sup>

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12. See for the United States: [www.adr.org](http://www.adr.org); [www.arb-forum.com](http://www.arb-forum.com); [www.jamsadr.com/arbitration\\_guide.asp](http://www.jamsadr.com/arbitration_guide.asp).

### III. THE PATCHWORK OF EXISTING ADR MECHANISMS

No Member country reported the existence of an overarching regulatory framework for B2C ADR. However, many countries described provisions that apply to B2C disputes in specific contexts. Rules have been developed for different types of ADR depending on the subject matter of the dispute (*e.g.* privacy) or the underlying transaction (*e.g.* insurance, telecommunications); the size, value and complexity of the dispute; whether arbitration or mediation is involved, etc.

Most countries offer some sort of government-established, funded or run programme to resolve certain B2C disputes. These programmes can be split into two categories: mixed public-private ADR and government-established, funded or run ADR.

#### A. Mixed public-private ADR

Some countries have developed ADR schemes that result from a mix of public sector-private sector initiatives. For example, Australia has legislation through which industry-developed codes of conduct (which often incorporate ADR provisions) can be made mandatory. For example, an Australian franchising code of conduct provides for the referral of franchising disputes to the Office of the Mediation Adviser. Australia also has a mix of public-private sector initiatives in the privacy area, which provide that if the consumer and business are unable to resolve privacy disputes between themselves, the consumer can request that an independent person investigate the complaint. Where the business concerned is subject to an approved privacy code that includes a mechanism for handling complaints, the independent investigator will be an adjudicator nominated under the code. Where the business is not subject to an approved privacy code, the Federal Privacy Commissioner will handle the complaint. In Austria, in the area of telecommunications, an independent industry body serves, *inter alia*, as a conciliation office, and telecommunication providers are obliged to participate in the procedure.

The Slovak Republic reported legislation that entitles non-governmental consumer associations to mediate disputes arising between consumers and business. There are two umbrella consumer associations operating in the whole of the country as well as several regional organisations. Slovak distance and doorstep selling legislation also entitles consumer associations to mediate disputes in that sector.

#### B. Government-established, funded or run ADR

##### *General consumer complaint bodies*

Member countries have established a variety of consumer complaint bodies to deal generally with B2C ADR. Denmark and Finland have established consumer complaints boards, and Australia, Germany, Hungary, Japan, Korea, Mexico, New Zealand, Spain, Sweden, Switzerland and Turkey have established a variety of other related mechanisms. In addition, Poland described an ADR scheme which is a more formal or “court-like” ADR body, the Court of Conciliation. This ADR body was established by the Act on Trade Inspection and involves a formal process commenced by filing a motion before the court. The parties submit to the court’s processes voluntarily, but once the authority and procedures of the court are accepted, its decisions are binding equally to the verdicts of common courts and there is no right of appeal. In contrast to this formal procedure, the United States reported that many state attorney general’s offices or

consumer protection agencies offer voluntary informal dispute resolution programmes to resolve B2C disputes.

### ***Complaint mechanisms for specific industry sectors or specific types of disputes***

A number of Member countries also have established government-run B2C ADR schemes or bodies that deal only with consumer complaints from a particular industry or sector or particular kinds of disputes.

Australia, Austria, Canada, Finland, Germany, Italy, Korea, Mexico, Netherlands, Spain, Sweden, and Switzerland reported such government-run schemes. For example, in Mexico the National Commission for Medical Arbitration has been established to deal with the arbitration of disputes related to the provision of medical services. Mexico also reported legislation that mandates presentation of claims in the financial services area before the National Commission for the Defence of Financial Services Users.<sup>13</sup> In Canada, the Financial Services Commission of Ontario has been established with a mandate to resolve motor vehicle insurance disputes through mediation and arbitration. In Italy, the law<sup>14</sup> provides for arbitration and conciliation committees to be set up to resolve B2B as well as B2C disputes in respect of the provision of tourism services.

Canada, Korea and New Zealand mentioned government-run or funded schemes in the privacy area. In Korea, the law<sup>15</sup> provides that any person who wants a dispute over his/her personal information mediated can file an application with the Dispute Mediation Committee<sup>16</sup> that investigates the case and proposes a draft mediation to the parties within a 60-day period. In Canada, legal provisions provide that the Privacy Commissioner may either encourage complainants to try to settle privacy complaints directly with the organisation, or initiate his/her own investigations. The Commissioner can make recommendations to an organisation, make public any information about the personal privacy practices of an organisation, or take a complaint to the federal court of Canada. In New Zealand, the law<sup>17</sup> requires the Privacy Commissioner<sup>18</sup> to use his best endeavours to secure a settlement. The method of ADR is not prescribed. In practice, the Privacy Commissioner's complaints process mostly utilises assisted negotiation in conjunction with an inquisitorial process. Where appropriate, the Commissioner will use mediation.

In addition, Australia, Austria, France, Netherlands, and Sweden described special requirements for tenancy disputes. In the Netherlands, the Act on Rental of Public Housing gives tenants the option of bringing their complaint before one of the Tenants Complaints Boards. The parties are deemed to have reached an agreement, as laid down in the decision of the Board, if none of them resorts to the court in the same matter within two months.

### ***Court-annexed ADR***

As regards court-annexed or court-referred ADR, Australia, Canada, France, Germany, Italy, Japan, the United Kingdom and the United States described programmes through which courts could refer disputes to

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13. See *Law for the Protection and Defence of the Financial Services User*.

14. Act n° 580 of the 29/12/1993.

15. Act on the promotion of information and communications network utilisation and information protection (last amendment on 16 January 2001).

16. Established under the Ministry of Information and Communication.

17. Privacy Act, 1993.

18. The Privacy Commissioner is government funded, but is structurally an independent Crown entity.

ADR. As an example, France mentioned a scheme that provides for judicial conciliation under which a judge may designate a conciliator to assist in amicable dispute resolution if the parties agree. The conciliator must hear the submissions of the parties and at the end of the procedure, inform the judge of the outcome of the process. If an agreement is reached, it is submitted to the judge for formal approval; otherwise, the case continues before the court.

### **C. Regulation of ADR outside the B2C realm**

Although not a key focus of this research, some Member countries briefly discussed regulation outside the B2C realm and referred to specific provisions applying to the ADR of B2B, consumer-to-consumer (C2C), B2G, and consumer-to-government (C2G) disputes.

In particular, Australia, France, Italy, Korea, and Switzerland reported government-run ADR schemes for disputes involving government. For example, Australian provisions<sup>19</sup> prescribe conferences (conciliation) and mediation with respect to administrative decisions by the Commonwealth that may involve business, or consumer, to government matters (for example, taxation), or for the conciliation of consumer complaints against government agencies (for example, disability access, racial discrimination). In Switzerland, some Cantons (regional administrations) have established ombudsman systems for resolution of C2G disputes and disputes between government employees and superiors. Further in Korea, the Environment Dispute Resolution Committee and the Administrative Appeals Committee have been established to manage a range of disputes involving B2G and C2G disputes in the environmental area.

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19. The Commonwealth *Administrative Appeals Tribunal Act* 1975 and human rights legislation.

## CONCLUSION

The results of the questionnaire highlight that there is not a single set of rules governing ADR. Different rules have developed in different contexts. In a number of areas the existing legal framework provides guidance to potential parties to an ADR procedure at the national level. For example, many countries regulate the provision of arbitration services. However, there are fewer regulations that would generally govern the provision of less formal types of B2C ADR. What regulation there is typically addresses the provision of ADR through mechanisms established, funded or run by governments.

The OECD has focussed on flexible and informal ADR mechanisms designed for the online world. Here, no Member country reported the existence of specific legal provisions although most expressed an interest in promoting fair and effective online ADR as a way to resolve small value B2C disputes, particularly cross-border disputes. Looking more specifically at the cross-border context, there do appear to be national differences as to the validity of agreements to submit to ADR, the procedural principles for use during an ADR, confidentiality and security of proceedings, validity of settlement agreements arising out of an ADR, and the availability of enforcement mechanisms.

The OECD *Guidelines for Consumer Protection in the Context of Electronic Commerce* suggest that ADR may provide a means for addressing consumer concerns in the electronic marketplace. National differences in existing legal frameworks on ADR may affect the operability of ADR in the cross-border context. Member countries, businesses and consumers need to be aware of what kinds of ADR programmes are offered in different countries and what rules they operate under. This document provides an important tool to facilitate such awareness.

## ANNEX

### QUESTIONNAIRE ON LEGAL PROVISIONS RELATED TO BUSINESS-TO-CONSUMER ALTERNATIVE DISPUTE RESOLUTION IN RELATION TO PRIVACY AND CONSUMER PROTECTION

For governments, please answer the questions with regard to any “legal provisions” – any domestic laws or regulations, including court decisions (case law), or conventions, treaties or other international legal instruments to which your country is party.

For non-government stakeholders, please answer with regard to any “legal provisions” – any domestic laws or regulations, including court decisions (case law), or conventions, treaties or other international legal instruments of which you are aware.

#### Questions

*When answering the questions below, please:*

- Focus on business-to-consumer (B2C) alternative dispute resolution (ADR). However, where informative for the B2C environment, answers may discuss other forms of ADR, such as business-to-business, consumer-to-consumer, business-to-government or consumer-to-government ADR.
- Focus on any legal provisions, but as they particularly apply to privacy and consumer protection.
- Focus on informal B2C ADR mechanisms (such as assisted negotiation and mediation). However, where appropriate, answers may discuss B2C arbitration.
- Distinguish, where appropriate, among: legal provisions addressing B2C ADR generally; legal provisions addressing B2C ADR on a sectoral basis; and legal provisions that may not mention ADR, but that could nonetheless impact ADR (for privacy and consumer protection disputes, in particular).
- Indicate any differences between use of B2C ADR for disputes arising in a domestic context as opposed to those with a cross-border element.

*In addition, please recall that we use the term “legal provisions” in a generic, general and inclusive sense.*

#### **A. Specific ADR provisions**

1. Are there legal provisions that specifically address B2C ADR (either addressing B2C ADR generally or addressing B2C ADR on a sectoral basis)? If yes, please describe the provisions.

2. Are there legal provisions that specifically address other forms of ADR (either generally or on a sectoral basis), such as business-to-business, consumer-to-consumer, business-to-government or consumer-to-government ADR? If yes, please describe the provisions.

**B. *Recourse to ADR***

3. Are there legal provisions that would prevent or inhibit recourse to ADR for certain types or categories of disputes?<sup>1</sup> If so, please explain the provisions and their application.

4. Are there provisions that would require or encourage recourse to ADR for certain types or categories of disputes? If so, please explain the provisions and their application.

**C. *Exhaustion of remedies through ADR***

5. Would a contractual agreement by the parties (such as a business and a consumer) to exhaust recourse through ADR before they can seek redress through courts be against any legal provisions? If so, please reference the provisions.

6. Are there legal provisions that would require or encourage parties to exhaust recourse to ADR before seeking redress in courts? If so, please reference the provisions.

**D. *Contractually binding ADR***

7. Are there legal provisions that would prevent or inhibit a contractual agreement by parties (such as by a business and a consumer) to be bound by the outcome of ADR, if agreement to the contract came:

- a. Prior to a dispute arising?
- b. After a dispute arose, but before an ADR process had begun?
- c. At the end of the ADR process (transaction)?

8. Are there legal provisions that would encourage or explicitly permit a contractual agreement by parties (such as by a business and a consumer) to be bound by the outcome of ADR, if agreement to the contract came:

- a. Prior to a dispute arising?
- b. After a dispute arose, but before an ADR process had begun?
- c. At the end of the ADR process (transaction)?

9. If the parties can agree to be bound, are there legal provisions that could prevent or inhibit, totally or partially, implementation of the ADR outcome?<sup>2</sup> Please state under which circumstances this could be so.

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1. For instance, one area to possibly consider are disputes where there has been a high level of harm to a user or consumer, such as a severe privacy infringement, bodily harm to a consumer or user, or the loss of a large amount of money by a consumer or user.

**E. Judicial enforcement**

10. Can an ADR outcome be judicially enforced? Under which circumstances?

**F. Procedure**

11. Are there legal provisions that would require certain procedural safeguards<sup>3</sup> to be in place during an ADR process?
- a. In general?
  - b. Any special, or particular, rights for consumers or users?
  - c. Any special, or particular, rights for businesses?

**G. Confidentiality**

12. If the parties and ADR provider agree to keep information on an ADR proceeding and/or outcome confidential, are there legal provisions that would require disclosure under any circumstances? If so, which circumstances?

**H. ADR services**

13. Are there any legal provisions that address who can offer B2C ADR services?
14. Are there any legal provisions that address who can serve as a neutral in an ADR proceeding?
15. Are there any other legal provisions relating to the activity of ADR providers, including the cost of ADR for either users and consumers or businesses?

**I. Other**

16. Are there any other legal requirements or restrictions applicable to ADR that have not been addressed above?<sup>4</sup>

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2. For instance: could the terms of Article 5 of the Rome Convention affect a consumer's obligation to implement an outcome?

3. These procedural safeguards might include, for example, transparency, timeliness, accessibility and affordability, the ability to be represented by a lawyer, the guarantee of an adversarial process, and the independence and/or impartiality of the ADR provider.

4. For example, please discuss any government commitments and accords, including administrative recommendations, or other items that could significantly affect an understanding of whether and how existing legal provisions impact recourse to ADR.