

**ID number: 5610333409-62**

Brussels, March 2011

## **Consultation on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union**

### **The view of Legal Protection Insurers**

RIAD, the International Association of Legal Protection Insurance, considers that alternative dispute resolution (ADR) mechanisms, in particular mediation procedures<sup>1</sup>, can be an effective, efficient, affordable and quick way of settling certain disputes between conflicting parties. Evidently, many stakeholders share this view and, subsequently, the benefits of ADR have been broadly promoted over the past years. Therefore, it is disappointing that ADR is still not fully accepted by consumers and businesses and that it is still relatively unknown. It should also be kept in mind that ADR includes all kinds of procedures (e.g. arbitration, sectoral arbitration schemes, mediation etc.) which must be approached differently and call for different prerequisites and features. Therefore, there will be no one-fits-all solution for the shortcomings identified by the consultation paper.

#### **I. Key messages**

ADR has many advantages in comparison to other means of dispute resolution. Presently, legal protection insurers explore how to exploit especially mediation to the full benefit of their insureds<sup>2</sup>. Recent surveys have shown that, in principle, mediation is received positively<sup>3</sup> and that, if it is known to the interviewee, a majority of citizens would rather settle their case via mediation than taking it to court.

In its consultation paper the European Commission identified a number of shortcomings which prevent that ADR can unfold its full potentials. Legal protection insurers might solve some of the problems which the Commission addresses since in many Member States they have undertaken to develop insurance products which facilitate access to ADR and provide cover for mediation.

For instance, legal protection insurers would raise their insureds' awareness of the availability of ADR by informing their clients about these means of dispute resolution. Moreover, it would be possible to bridge geographical as well as sectoral gaps because settling a dispute by alternative means would be proposed no matter where the parties reside or what area of law is concerned. Last but not least, costs of mediation would be covered by insurance premiums and subsequently the use of ADR would not incur any additional costs for the insured persons.

---

<sup>1</sup> Article 3 (a) of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters defines: "Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State."

<sup>2</sup> On 29 and 30 September 2011 RIAD organises a conference in Verona which will tackle these issues: Why does mediation work in some countries but not in others? What is needed to make mediation a success?

<sup>3</sup> See "Roland Rechtsreport 2010: Einstellung der Bevölkerung zum deutschen Rechtssystem und zur Mediation" (2010 Legal report of Roland: Opinion of Germans in regard of the legislative system and mediation)

## **II. Consumer and business awareness of ADR**

### **1) What are the most efficient ways to raise the awareness of national consumers and consumers from other Member States about ADR schemes?**

More promotion and presentation of the characteristics and advantages of ADR in the Press and all kinds of informative brochures are necessary. Also, the introduction of new products and contracts by legal protection insurance companies will increase the awareness of consumers because insurers and intermediaries will inform about and explain the features of ADR.

### **2) What should be the role of the European Consumer Centres Network, national authorities (including regulators) and NGOs in raising consumer and business awareness of ADR?**

All the aforementioned institutions should be able to give information concerning the potential of ADR and lead consumers to institutions that are eligible for launching ADR procedures, e.g. legal protection insurance companies.

### **3) Should businesses be required to inform consumers when they are part of an ADR scheme? If so, what would be the most efficient ways?**

Mandatory notification of consumers about traders' participation in an ADR scheme would definitely promote this option for dispute resolution. Information could be provided within specifically formulated notes, a footnote in the receipt or invoice form and/ or prominent information on the trader's website. In any case, information must enjoy a maximum of publicity and should be easily accessible.

### **4) How should ADR schemes inform their users about their main features?**

Printed documentary and new technologies like the Internet should be employed.

## **III. Involvement of traders/ suppliers**

### **5) What means could be effective in persuading consumers and traders to use ADR for individual or multiple claims and to comply with ADR decisions?**

Detailed information emphasising the main advantages (low cost, time-saving procedures, depending on the kind of mechanism: confidentiality of proceedings and/ or binding nature of decisions).

### **6) Should adherence by the industry to an ADR scheme be made mandatory? If so, under what conditions? In which sectors?**

Whether mandatory adherence has a positive effect on traders and clients depends very much on the nature of the scheme (e.g. ombudsman scheme, arbitration or mediation procedures), on the quality of such schemes and which sectors are concerned. In essence, adherence to an ADR scheme would only take effect if resolving the dispute via the scheme was equally made obligatory which would not necessarily be beneficial (see question 7). Therefore, adherence should not be mandatory; traders and their clients should rather remain flexible and be able to pick the procedure which fits best to solve their respective disputes.

### **7) Should an attempt to resolve a dispute via individual or collective ADR be a mandatory first step before going to court? If so, under what conditions? In which sectors?**

Again, if dispute resolution via ADR was made a mandatory first step before going to court, the quality of the schemes and its assurance would be essential. Furthermore, not all disputes are fit for ADR or, at least, not all cases can be solved via ADR. For instance,

it is often very difficult to negotiate a solution in complex and legally difficult cases or if the evidential issue is litigious. Consequently, Member States should be very cautious about introducing an obligation to resort to ADR and should foresee exit clauses.

**8) Should ADR decisions be binding on the trader? On both parties? If so, under what conditions? In which sectors?**

ADR should be complementary to legal proceedings and it seems therefore problematic if it cuts off the way to the courts. On the other hand, as a trade-off for adhering to the procedure, the parties involved can agree to make the decision or agreement binding on either both parties or at least on the trader. Such an agreement would end the dispute and provide legal certainty. This prospect of settling a case permanently would be positive and serve as an incentive for using ADR. In any case, decisions should only be binding underneath a certain threshold (e.g. 3 000 €) and it must be ascertained that the decisions or agreements between the parties can be enforced.

**IV. ADR coverage**

**9) What are the most efficient ways of improving consumer ADR coverage? Would it be feasible to run an ADR scheme which is open for consumer disputes as well as for disputes of SMEs?**

Most importantly, it is necessary to enact a clear, transparent and unequivocal legislative framework, including simplification of procedural issues. In particular, the involvement of legal protection insurers in mediation could play a determining role and could facilitate the use of mediation for consumers and SMEs.

**10) How could ADR coverage for e-commerce transactions be improved? Do you think that a centralised ADR scheme for cross-border e-commerce transactions would help consumers to resolve disputes and obtain compensation?**

It seems more promising to improve existing cross-border schemes like FIN-Net and EEC-Net. The advantage would be that consumers could contact the schemes in their home countries, using their own language.

**11) Do you think that the existence of a "single entry point" or "umbrella organisations" could improve consumers' access to ADR? Should their role be limited to providing information or should they also deal with disputes when no specific ADR scheme exists?**

We feel that the "umbrella organisations" role should only be and remain purely informative.

The specific ADR procedures should be dealt with by highly qualified and specialised institutions or individuals which can guarantee and safeguard its reliability and transparency. Doubts about independence or competence might seriously undermine the schemes' credibility.

**12) Which particular features should ADR schemes include to deal with collective claims?**

It must be possible to assess the aggregate claim, establish the group of claimants and identify the defendant. Claimants must opt-in to participate in the procedure and all parties should agree that the agreement or decision is binding on them to avoid duplications of procedures. An electronic notification system should provide information on key features of the case, i.e. the defendant's name, the underpinning factual background, names of claimants involved. In case the dispute is settled by means of mediation, confidentiality must be assured.

**13) What are the most efficient ways to improve the resolution of cross-border disputes via ADR? Are there any particular forms of ADR that are more suitable for cross-border disputes?**

Cross-border dispute resolution is particularly cumbersome because it often implies the use of a foreign language as well as the determination of the applicable law and jurisdiction. Therefore, sectoral ADR schemes in cooperation with European networks like FIN-Net or EEC-Net are most likely best qualified to solve cross-border disputes since they have the relevant expertise.

However, legal protection insurers want to stress that mediation provides a flexible dispute solution procedure which makes questions of applicable law and jurisdiction obsolete. Mediation rather allows the parties to find creative solutions which are tailor-made and detached from rigid legal provisions. The procedure does not require translation of official documents but it is in the hands of the parties to negotiate with the help of an interpreter or the mediator and mutually agree on a solution that satisfies them.

**V. Funding**

**14) What is the most efficient way to fund an ADR scheme?**

Sectoral schemes can be self-funded by the industry. Additionally, mediation can be subsidised by fees.

**15) How best to maintain independence, when the ADR scheme is totally or partially funded by the industry?**

The Commission's recommendations No 98/257/EC and No 2001/310/EC establish distinct criteria to assure the independence of ADR schemes. Also, legal protection insurers are skilled to provide the necessary services to guarantee that the insureds' rights are respected and their claims are pursued.

**16) What should be the cost of ADR for consumers?**

In the framework of a legal protection insurance contract the insurance premium would cover mediation and the dispute resolution would not incur additional costs for the insured. However, efforts and incentives are necessary to keep the aggregate costs low, for instance by accelerating the procedure and avoiding frivolous delays which unnecessarily prolong the dispute.

**RIAD** represents legal protection insurance companies from 17 European countries, Australia, Canada, South Africa and South America. RIAD members are specialised in insurance and/or services linked to legal protection insurance. Most of RIAD's members are SMEs offering a very specific product: they offer to their clients, through an insurance policy, the resources that are necessary for access to high-quality and easily accessible legal advice and services. They also protect their clients effectively against financial risks associated with engaging legal experts and gaining access to the law.