

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?

For the German government and especially for the Ministry for Consumer Protection, ADR systems appear as an attractive alternative to solve civil disputes between traders and consumers.

ADR should not replace court procedures, but it can be a welcome complement. Both consumers and businesses can profit from the advantages of a well-established out-of-court settlement system.

The most important question that needs to be answered is which criteria are essential for an ADR system if sustainable success is to be achieved.

I would like to illustrate the key factors with a few facts from one of the most successful ADR bodies in Germany, the “Versicherungsbundmann” (Insurance Ombudsman), who is dealing with disputes between consumers and insurance companies.

#### 1. 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). However, you never know before court. Therefore, a good attorney will tell his client about the financial risk of a claim. For a 1,000 € value of the claim with attorneys on both sides, the total risk is about 717 € for the first instance in Germany. You certainly can do the math for your respective jurisdictions.

At the Insurance ombudsman, the consumer can file a complaint for free, no matter if the complaint is successful in the end or not. However, he has to cover his own costs. If he is represented by an attorney who helps to settle the case, the legal standard fee for an out-of-court representation is less than half the fee for a lost court case. If the consumer is not represented by an attorney, there are no costs at all except for mailing costs. When the case is not 100 % clear, it is recommendable to choose the ombudsman option first.

Other ADR-systems might not be totally free of charge. While minimal filing fees for consumers have the advantage to keep away notoric grumblers, the acceptance of a free-of-charge ADR body is higher.

#### 2. Speed

In 2010 it took 4.4 months in average to decide on a complaint by the Insurance Ombudsman. In Berlin, an average civil law case took 11.3 months to be resolved at the local courts. Again, less than half.

### 3. Flexibility

ADR mechanisms are often more successful in creating legal peace between the parties than courts. In general, they have more instruments to find a solution that is accepted by both parties or to help the parties finding such a solution by themselves. The insurance ombudsman will tell the consumer if his submissions are incomplete. A civil court will not necessarily help to make a claim conclusive. Furthermore, the ombudsman may suggest a voluntary payment of the insurance company.

These advantages of ADR only come to into its own when the decision-making bodies and procedural rules of these bodies meet certain principles. Many of those principles have already been laid down in two Recommendations of the European Commission (98/25/EC and 2001/310/EC).

All relevant ADR-bodies in Germany act in accordance with these recommendations. Those principles include:

- Independence, impartiality and competence  
These criterias are necessary so that the parties may have confidence in an appropriate resolution of the dispute.
- Transparency  
The parties must know about the procedures and its consequences. Also ADR bodies should report annually about its activities.
- Effectiveness  
This reflects the main practical advantages already mentioned: within the internal rules, it must be ensured, that the procedure is easy to handle, free or low-cost, fast and flexible.
- Legality  
If the ADR body is making a decision, it must abide to the relevant legal principles and mandatory consumer protection laws. Parties must be sufficiently informed about the decision.
- Fair proceedings  
Every party must have the chance to submit any facts and must be informed about the facts and arguments submitted by the other party.

On behalf of the Federal Ministry for Consumer Protection, we regard three of the above mentioned criteria as most important:

- Legality,
- Effectiveness,
- Independence, impartiality and competence.

For Germany, certain other elements are also important:

- Awareness

A key point to the acceptance and success of ADR systems is the information of the consumer about the existence and the advantage of ADR systems. This information should be given by businesses and should be comprehensive, yet easy to understand and easy to access.

- Voluntariness:

The system should be voluntary for business as far as possible. The mandatory creation of ADR bodies are only an option in certain branches with only a few competitors – for example train transportation or airlines.

- Defeasibility

Access to official court procedures for consumers after the ADR procedure should be possible. We are sceptical about binding ADR decisions. Only if there is no practical alternative to go to court, binding ADR decisions might be a solution. Transatlantic consumer contracts might be an example for that. However, the businesses might obligate themselves to accept an ADR ruling. Insurance companies in Germany accept the ruling of the Insurance Ombudsman as binding up to a value of 10,000 €

Governments, however, can only create the preconditions 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. First and foremost, it's up to the businesses to be convinced of the advantages of ADR.