

## *Guide for Regulating Dispute Resolution (GRDR): Principles and Comments*

FELIX STEFFEK AND HANNES UNBERATH (COORDINATORS),  
LIN ADRIAN, ALDO DE MATTEIS, GIUSEPPE DE PALO,  
FRÉDÉRIQUE FERRAND, REINHARD GREGER, JANA HÄRTLING,  
ULRIKE JANZEN,<sup>1</sup> SHUSUKE KAKIUCHI, LARS KIRCHHOFF,  
PETER G MAYR, ISAAK MEIER, KRISTIN NEMETH, MACHTELD  
PEL, ANNEKEN K SPERR AND IVAN VEROUGSTRAETE

**T**HIS DOCUMENT RECOMMENDS structures and principles for the regulation of dispute resolution in civil and commercial matters. The recommendations are a first attempt to provide guidelines for a value-based and coherent regulation of dispute resolution. The principles refer to court proceedings as well as to alternative dispute resolution (ADR). Since this is a Herculean task, the principles suggested are only a first starting point to inspire further development. They are not comprehensive and, instead, aim to encourage further discussion. The structures and principles are recommendations for the regulation of dispute resolution, not for the practice of dispute resolution. As a consequence, issues that are important in practice, for example methods of dispute resolution, but that should not be regulated are not mentioned. This is both in the interest of clarity and the avoidance of over-regulation.

The recommendations are formulated against a comparative and international background. They have an open structure in order to allow for regional and local adjustments and to allow further developments of dispute resolution practice. They may serve to inform the formulation of model rules, regional directives or specific legislative acts. The recommendations start with more general issues and proceed to more specific topics. Each recommendation is first introduced by a short explanation. The structures and principles proposed follow the explanation in italics.

<sup>1</sup> The views expressed are only the author's own opinions and may not in any circumstances be regarded as stating an official position of the German Federal Ministry of Justice.

14 *Guide for Regulating Dispute Resolution (GRDR)*

I.	Dispute Resolution Mechanisms	15
A.	Choice of Procedure	15
B.	Regulating Dispute Resolution	15
C.	Functional and Modular Approach	16
D.	Policy Choice	17
E.	Principles	17
II.	Infrastructure and Framework	18
III.	Costs	18
A.	General	18
B.	Cost Subsidies	19
C.	Legal Aid	19
IV.	Dispute Resolution Clauses	20
A.	General	20
B.	Specifics	20
V.	Choice of Dispute Resolution Procedure	21
A.	General	21
B.	Centralised or Decentralised Approach	21
C.	Sanctions	22
D.	Transfer to Other Dispute Resolution Mechanisms	22
E.	Good Practice	23
VI.	Confidentiality	23
A.	General	23
B.	Regulatory Tools and Approaches	24
VII.	Limitation and Prescription Periods	24
VIII.	Neutral	25
A.	General	25
B.	Neutrality	25
C.	Qualification	25
IX.	Procedure	27
X.	Counsel	27
XI.	State (Judicial) Review of Results	27
XII.	Enforceability	28
XIII.	Transparency	28
XIV.	Consumers	29
A.	General	29
B.	Specifics	29
XV.	Rule-maker	30
A.	General	30
B.	Choice	30
XVI.	Type of Rules	30
A.	General	30
B.	Good Practice	31
XVII.	Procedure Design	31

## I. DISPUTE RESOLUTION MECHANISMS

## A. Choice of Procedure

At the centre of dispute resolution are the individuals who are party to and affected by the dispute. These individuals know the dispute and their interests best; hence, they should be the starting point and focus of designing dispute resolution mechanisms. It follows that—as a starting point—the parties and not the state should choose the resolution mechanism. Thus, there is no general preference of one dispute resolution mechanism over another. While peaceful and consensual dispute resolution is to be preferred over resolution forced on (one of) the parties, consensual dispute resolution requires the consent of all involved. If one of the parties to the dispute does not cooperate, state dispute resolution, ultimately in the form of a court decision, may be necessary and appropriate. Hence, court proceedings are not better or worse than alternative dispute resolution procedures; they are simply more suited for some disputes and less suited for others. While, in principle, there is no preference for a certain type of dispute resolution mechanism, certain dispute resolution mechanisms may be particularly well suited for specific types of disputes.

*The regulation of dispute resolution should start with and focus on the parties. Generally, the parties and not the state should choose the dispute resolution mechanism (principle of self-determination or party choice of process). While consensual dispute resolution is preferable over resolution forced on (one of) the parties, there is no preference of one sort of dispute resolution mechanism over another. Regulation may reflect, however, that certain dispute resolution mechanisms may be particularly well suited for specific types of disputes.*

## B. Regulating Dispute Resolution

The advancement and institutionalisation of dispute resolution mechanisms displays a remarkably creative development and diversity. Common forms are negotiation, mediation, conciliation, ombudsman procedures, arbitration and court procedures. However, additional forms and variants of these procedures have been developed. Additional forms are, for example, neutral evaluation, fact-finding procedures, mini-trials, judgment proposals and adapted as well as hybrid court procedures. Variants include devices such as mandatory negotiation, mandatory mediation and combinations such as mediation-arbitration and conciliation-court proceedings. The regulatory approaches to be found are diverse both within legal systems, if one compares various mechanisms in any given jurisdiction, and across legal systems, when comparing internationally the approaches of different countries as regards any single form of dispute resolution.

Against this background, principled regulation of dispute resolution is desirable. This avoids distortions in the choice of dispute resolution mechanisms locally and internationally. The promise is better choices for the individuals as well as just and more efficient results for society. The great diversity in the practice and regulation of dispute resolution mechanisms should not lead to the conclusion that principled

regulation of dispute resolution is unattainable. It is possible if a functional and modular approach is taken which openly communicates the underlying policy choice.

*The regulation of dispute resolution mechanisms both within a single jurisdiction and internationally should follow principles that permit rational choices to be made by the parties and include clear criteria informing that choice.*

### C. Functional and Modular Approach

The variety of dispute resolution mechanisms can be characterised by referencing the following central functional features, which all relate to the control of the individuals: initiation control, procedure control, result-content control, result-effect control, neutral choice control and information control (privacy). Additional characteristics, such as whether the mechanism is interest-based (or rights-based) or whether an intermediary is involved, can be added. This approach is modular in two respects: further types of dispute resolution mechanisms and characteristics can be added depending on analytical and regulatory need. Regulatory questions can then be discussed referring to the control characteristics named above. For example, mediation and arbitration share the characteristics that their use is voluntary by the parties (initiation control), that the parties choose the neutral (neutral choice control) and that the procedure is private (information control), and as a consequence these characteristics pose similar regulatory questions. However, in mediation the parties have control over the content of the result (result-content control, ie non-evaluative), they have control over the effect of the result (result-effect control) and the procedure is interest-based; by contrast, in arbitration there is neither result-content nor result-effect control, and arbitration is usually rights-based. These different characteristics can be used to develop diverging regulatory principles.

The functional and modular approach suggested allows the formulation of regulatory principles that capture the essence of the procedures yet, at the same time, avoid getting lost in the jungle of intranational and international diversity. Also, the modular approach is able to capture changes in practice and law over time. It is a dynamic concept that allows adding procedures and characteristics, and by formulating the characteristics from the perspective of the individual it ensures that the individual's role as regulatory anchor is not forgotten. Hence, the characteristic 'initiation control' is used instead of 'mandatory'. For further explanation of this modular approach see Chapter 3.

*A modular approach referring to the characteristics of dispute resolution procedures facilitates principled regulation. The following characteristics can be used to classify dispute resolution mechanisms; they generally refer to the control of or choice by the parties:*

- *Initiation control: whether the parties' consent is needed to initiate the procedure;*
- *Procedure control: whether the parties determine the procedure;*
- *Result-content control: whether the parties determine the content of the result (ie whether the procedure is non-evaluative);*

- *Result-effect control: whether the parties' consent is needed for the result to be binding;*
- *Neutral choice control: whether the parties choose the neutral;*
- *Information control: whether the procedure and the information obtained during the procedure is private;*
- *Interest-based: whether the procedure is interest- or rights-based;*
- *Intermediary: whether the procedure includes intermediation by a third person.*

#### D. Policy Choice

The principles suggested here are based on the following fundamentals: normative individualism as well as just and efficient dispute resolution. The ethical concept of normative individualism puts the individual at the centre of regulatory questions and requires the state to justify the limitation of individual freedom. Normative individualism is the foundation of human and constitutional rights which govern local and regional procedural laws. It follows from normative individualism that the self-determined individual is primarily responsible for dealing with his or her conflicts. The self-determination of individuals is an open concept. The individuals take their decisions separately for themselves and collectively as a group. The expression 'party choice' may refer to both situations—decisions by separate individuals and decisions by groups of individuals. As a group the individuals have public interests and may decide to foster further-reaching values such as the interest of future generations in the environment. The individual interests inform the public interests. Conflicts between individual interests and between individual and group interests may, but need not always, require legislative solutions.

Efficient dispute resolution is necessary to allow the state to offer and maintain a sustainable system of dispute resolution. As the public means available for financing dispute resolution are not unlimited, the available means should be put to efficient use. In the interests of the individuals, process choices should be economically accessible and cost-efficient for the parties wherever possible. Individual interests and efficiency in the interest of society need to be balanced. This cannot be achieved by way of a mathematical algorithm, but is rather an exercise of educated judgement.

*Regulation of dispute resolution should be based on the following fundamentals: normative individualism (as expressed in human and constitutional rights), party choice, just dispute resolution for the parties and efficiency. Individuals have a right to effective and fair dispute resolution.*

#### E. Principles

The recommendations formulated here are general principles. With a view to the diversity of dispute resolution practice and law, and in order not to restrict the dynamic and creative development of dispute resolution, currently only general principles for ADR are desirable. They are, nonetheless, necessary to develop coherent and principled systems of dispute resolution. They can be used in two ways in par-

ticular. First, they can be referred to in formulating recommendations and model rules for the regulation of specific types of dispute resolution mechanisms, such as mediation, ombudsman procedure and arbitration. Second, they can be directly used as a basis to draft concrete laws, regulations and codes at a local or regional level.

*Currently, only general principles for the regulation of dispute resolution are desirable.*

## II. INFRASTRUCTURE AND FRAMEWORK

The self-determination of the parties places the responsibility for solving disputes primarily in the hands of the parties. The state is called on to provide the parties with the necessary enabling and—as necessary—conduct rules, ie an adequate normative framework for dispute resolution. In this sense, the citizens have a right of access to effective and fair dispute resolution. It also follows that the state is not responsible for organising and financing a comprehensive institutional *infrastructure* for dispute resolution that comprises all ADR mechanisms. The state merely has to provide a reliable legal *framework* for alternative dispute resolution mechanisms and should, within the means available, support alternative forms of dispute resolution.

Due to the state monopoly on the enforcement of rights, the situation is altogether different regarding court procedures. In this respect, the state is responsible not only for providing a normative framework but also for setting up—ie organising and financing—an adequate and comprehensive court and enforcement system. It is especially needed for those cases when a consensual dispute resolution is not possible. This system needs to be adequately accessible as regards its cost and time framework for the enforcement of rights. In this sense, citizens have a right of access to justice. ADR mechanisms should not be used by the state as a substitute for the adequate organisation and financing of court and enforcement procedures.

*Citizens have a right of access to effective and fair dispute resolution. The state is responsible for organising and financing an adequate court and enforcement system. Additionally, the state has to provide citizens with a reliable legal framework for alternative dispute resolution and should, within the means available, support such alternative forms of dispute resolution.*

## III. COSTS

### A. General

Generally, the parties to a dispute should carry the costs of resolving their dispute. However, since ensuring access to justice is required by the rule of law, the cost of court proceedings may be partially borne by the general public. The costs of the procedure (neutral, experts, clerks, etc) and reasonable party expenses in procedures without initiation control can be allocated with reference to the outcome (for example according to the degree of losing) or according to other principles. Previously established cost rules for court procedures can serve as a point of orientation to develop the

rules for alternative dispute resolution mechanisms where the parties do not control the initiation.

In procedures with initiation control of the parties a dispositive default rule should provide for the sharing of the costs of the procedure between the parties and the payment of party expenses by the relevant individual party. In alternative dispute resolution mechanisms where the parties do not have initiation control (mandatory ADR), the right of access to justice requires that the costs of alternative dispute resolution are not prohibitive so that as a consequence the parties would be hindered in their access to the courts.

*Generally the parties should carry the costs of resolving their dispute by the use of ADR procedures, while the cost of court proceedings may be partially borne by the general public. In procedures where the parties do not have initiation control, the costs of the procedure and reasonable party expenses should be borne according to the procedures for cost assessment appropriate in the legal system. In procedures with initiation control the parties should by default share the costs of the procedures and pay their own expenses. Mandatory extrajudicial dispute resolution may not impose costs to a degree that hinders access to the courts.*

## B. Cost Subsidies

States have to offer a court system that is accessible as regards costs. This finds its justification in the state's monopoly on power. Whether the state subsidises dispute resolution mechanisms other than the court system should depend on the following three aspects: (1) Do information and decision deficits exist as regards certain mechanisms? (2) Do certain mechanisms intrinsically offer more advantageous conditions for the resolution of specific disputes? (3) Do the subsidies create cost savings or even positive cost income effects for the state?

Cost subsidies should never reach a degree such that the parties to a dispute lose the self-interest to find a solution themselves or such that an incentive is created to prefer one kind of dispute resolution mechanism over another merely for cost reasons.

*Access to courts must not be impeded by prohibitive costs. Subsidies for alternative dispute resolution mechanisms may be justified if information and decision deficits exist, if certain procedures have intrinsic advantages or more generally on grounds of efficiency. Cost subsidies should avoid setting incentives favouring one kind of resolution mechanism merely for cost reasons.*

## C. Legal Aid

Legal aid for court proceedings should be given to parties who for financial reasons would otherwise not be in a position to bring or defend a claim in instances where they can show a strong claim, ie a more likely than not probability of being successful. Beyond this, the state may opt to provide legal aid based only on economic need without regard to the strength of the claim. The specific requirement for legal aid

for court proceedings is justified due to the specific function of the court procedure as a counterweight to the state's monopoly on power.

With respect to legal aid for court proceedings, care needs to be taken, however, that no incentives are set so that parties in financial need opt for court proceedings instead of alternative dispute resolution for monetary reasons only. This would breach the principle that generally the party should be in a position to choose the dispute resolution mechanism according to the suitability of its intrinsic characteristics in relation to the specific dispute. Depending on the level of legal aid for court proceedings, legal aid for alternative dispute resolution mechanisms should be provided. The focus of legal aid for alternative dispute resolution should not be on whether a party has a more likely than not chance to win in court, but rather on whether the dispute is well suited for the characteristics of the dispute mechanism envisaged.

*Legal aid for court proceedings should be provided to parties in financial need if they can demonstrate a more likely than not probability of being successful. Alternatively, legal aid could be provided based on the sole criteria of demonstrated financial need. Legal aid should not set incentives for parties to opt for court proceedings instead of alternative dispute resolution for cost reasons only. A necessary reaction may be the introduction of legal aid for alternative dispute resolution mechanisms.*

#### IV. DISPUTE RESOLUTION CLAUSES

##### A. General

Dispute resolution clauses should be binding and enforceable. Such clauses are based on the voluntary decision of the parties. Their consent carries the presumption of efficiency and justice. The obligations undertaken under an individual clause should be central to its effect. Legislatures should enable parties to use clauses with effect in procedural law, such as the (temporary or permanent) unavailability of court and other dispute resolution procedures. Generally, however, interim or conservation measures should be possible in spite of a dispute resolution clause. Consideration should be given to allow parties to exclude such measures contractually within certain limits.

*Dispute resolution clauses should be binding and enforceable in the same manner as other contracts are binding and enforced. Interim or conservation measures should generally remain possible as a dispositive default rule.*

##### B. Specifics

Parties can waive their right to insist on a dispute resolution clause as long as it is based on the autonomous decision of the parties. The waiver of rights based on dispute resolution clauses operates against the background of constitutional law, contract law and the law in other areas. The protection of the right of access to justice requires that dispute resolution clauses can be challenged before the state courts. The more control the parties have as regards (1) the procedure, (2) the choice of the neutral, (3) the content and (4) the effect of the result, the less there is a need for policing dispute



resolution clauses. Particular relevance needs to be given to the result-effect control of the parties in this regard. Hence, for example, arbitration clauses need to be subject to a higher degree of scrutiny than mediation clauses because mediation results require the consent of the parties; arbitration results do not. There may be complex issues of consent and enforcement if all parties are not in agreement.

*The invalidation or later modification of dispute resolution clauses should follow general legal principles. The more control the parties have as regards (1) the procedure, (2) the choice of the neutral, (3) the content and (4) the effect of the result, the less there is a need for restricting and policing the validity of dispute resolution clauses.*

## V. CHOICE OF DISPUTE RESOLUTION PROCEDURE

### A. General

An early, informed and undistorted choice of the adequate dispute resolution procedure by the parties is essential. Additionally, transaction costs, for example the cost for acquiring the necessary information and understanding the resolution mechanisms available, should be as low as possible. Legal rules should ensure that the parties take these decisions based on the adequacy of the intrinsic characteristics of the resolution procedure for the resolution of the conflict. Legal systems should to the extent possible avoid that external factors not connected to the dispute and the intrinsic characteristics of the resolution mechanism distort this choice.

If information and decision deficits relating to the choice of dispute resolution mechanisms exist, rule-makers should, first of all, put the parties themselves in a position to make the best choice. It is the dispute and the interests of the parties which are concerned; hence the party's decision-making process should be at the centre of possible regulatory intervention. Conflict diagnosis and dispute resolution choice should be an important and integral part of procedural and substantial law. When the parties' preferred choices do not coincide, the state may provide options and alternatives.

*Regulation should ensure an early, informed and undistorted choice of a dispute resolution procedure with the lowest possible transaction costs. Regulation should ensure that the parties are in a position to choose by matching their interests with the intrinsic characteristics of the resolution procedures. The state may provide options and alternatives for situations where the parties do not prefer the same dispute resolution mechanism.*

### B. Centralised or Decentralised Approach

The choice of the appropriate dispute resolution procedure can be facilitated either by more centralised or more decentralised approaches. More centralised approaches establish means such as dispute boards, early dispute conferences, settlement conferences with judicial personnel and multi-door fora that foster the early and informed decision-making process of the parties by establishing a rather centralised dispute dis-

tribution mechanism. More decentralised approaches employ obligations of the parties to inform themselves as well as each other and duties of their counsel to inform and advise. Currently, either of these approaches seems reasonable. Both approaches can be combined.

In any case, counsel and the neutral overseeing the various dispute resolution procedures should be under a duty to constantly monitor the adequacy of the choice taken and point out to the parties if their choice turns out to be questionable. Depending on the degree of information and decision deficits experienced, the setting of cost incentives to modify the choice should be considered. In appropriate cases, the parties may choose to modify or change their initial choice of process. Only if this does not cure information and decision deficits should mandatory referrals be considered. Mandatory prescription of certain procedures may in particular be considered in the interest of third parties that are affected by the dispute, for example children in custody disputes. Mandatory ADR needs to be regulated in such a way that access to court justice is not overly restricted in terms of time and costs. Some legal systems have prohibited mandatory ADR procedures for certain classes of cases, eg constitutional challenges to laws.

*Centralised and decentralised approaches to facilitate an early, informed, undistorted and less expensive choice of a dispute resolution mechanism are both reasonable. Counsel and the neutral should be under a duty to monitor the adequacy of the choice and point out if the choice needs to be modified. In case of information and decision deficits as regards choice, primarily incentives and subsidiarily mandatory rules may be necessary.*

### C. Sanctions

The dispute between two or more persons creates a monopoly for dispute resolution. The individual needs the cooperation of the other party to solve the dispute consensually. This can justify cost and damage sanctions for those parties who hinder or prolong dispute resolution without a good and proportionate reason. One consequence is the loser-pays principle in court proceedings (in legal systems that use a loser-pays rule); another consequence may be cost, damage or procedural sanctions if one party proposes a suitable dispute resolution mechanism that the other party rejects without a good and proportionate cause. However, cost sanctions should be a means of last resort. Before establishing such sanctions, other less intrusive legislative approaches, such as information improvement and positive incentives, should be considered.

*Cost, damage and procedural sanctions for parties who hinder or prolong dispute resolution without a good and proportionate reason can be justified. Before turning to cost sanctions, however, alternative and less intrusive means to correct decision deficits should be considered.*

### D. Transfer to Other Dispute Resolution Mechanisms

Ideally, the parties should be in a position to transfer from one dispute resolution

mechanism to another if the initial choice turns out to be inappropriate. Here, the above-mentioned principles should equally apply, which means the transfer should happen without delay, on an informed basis, without decision distortions and at low transaction costs. These principles should be implemented in substantive and in procedural law. The above principles as regards incentives for transfer or mandating transfer also apply.

In order to set incentives for a correct initial choice of the dispute resolution mechanism, the costs for dispute resolution may rise for the parties due to the transfer. The increase in costs should not, however, be prohibitive to transfer.

*The above principles apply equally to a transfer between dispute resolution mechanisms.*

## E. Good Practice

The following tools may facilitate the early and correct choice of dispute resolution procedures:

- In centralised as well as decentralised approaches, easily accessible, understandable information about possible resolution options is important. Low-barrier steps for starting resolution procedures are also key. Here, information and connection providers can help.
- Self-tests, check lists, questionnaires and counselling for the parties that help the individuals to understand the characteristics of the dispute and match these characteristics with the appropriate dispute resolution mechanism. Such self-tests can be distributed in paper form or be offered online.
- Rules to deal with information and decision deficits need to be concrete and designed in a way that compliance is ensured. Example: instead of a general duty of lawyers to advise clients on dispute resolution possibilities, it is better to have a concrete duty which not only specifies what information is to be acquired and the point(s) in time at which advice needs to be provided to the client, but also requires documentation (eg in a form to be submitted to court).
- Double summons by courts, which means that the court sets two dates—the first for the start of an ADR mechanism and the second for the resumption of court proceedings.

*Comparative analysis and empirical research reveal good practice models for regulating the choice of dispute resolution procedures. Research and assessment are essential for continued monitoring of what are the best ways to ensure early and good choices of dispute resolution procedures.*

## VI. CONFIDENTIALITY

### A. General

Dispute resolution procedures, where the parties have information control, should be

facilitated by enabling rules that allow the parties to keep the information pertaining to the dispute confidential, unless prohibited by appropriate law.

*Dispute resolution procedures, where the parties have information control, should be facilitated by enabling confidentiality rules.*

## **B. Regulatory Tools and Approaches**

The legal basis for confidentiality can be state and contract law, but it needs to be ensured in both substantive and procedural law. Confidentiality needs to be guaranteed in all subsequent dispute resolution procedures. Rules on confidentiality need to cover all relevant persons: the parties, the neutral(s), counsel, translators, experts, other third parties and the assistants of all such persons. The substantive law needs to allow the parties to contract for discretion and other confidentiality duties; here dispositive law is generally well suited. Procedural law needs to equip parties with a right to refuse to testify as well as with restrictions on the later submission of facts and evidence insofar as they have been obtained in the alternative dispute resolution procedure. As regards the scope of the confidentiality rules, they need to cover different types of information carriers and transmission. However, the abusive use of a certain dispute resolution procedure with the sole intent to exclude information from another procedure needs to be addressed, as well as the protection of third parties and the prevention and detection of crime. In this regard, the right to submit evidence needs to be respected. Hence, the confidentiality rules should, in particular, be limited to the matter of the dispute submitted to a certain procedure. Information the other party had access to before the initiation of the procedure should not fall under the confidentiality rules.

*Confidentiality of dispute resolution procedures, where the parties have information control, needs to be ensured in both substantive and procedural law. Confidentiality rules should cover all relevant persons and different types of information carriers. The subject matter to which the rules on confidentiality apply should be delineated. However, limits to confidentiality may be necessary. In particular, abuse of the confidentiality rules needs to be addressed, as well as the protection of third parties and the prevention and detection of crime.*

## VII. LIMITATION AND PRESCRIPTION PERIODS

Limitation and prescription periods should be suspended from the start until the end of any dispute resolution procedure. The suspension should refer to legal claims as well as other rights (particularly substantive and procedural limitation and prescription periods). The suspension should only have legal effect for the parties to the procedure and not have legal effects on third parties. The scope of affected claims and rights is determined by the matter submitted to the dispute resolution procedure.

The suspension should start with the agreement of the parties to start a specific procedure where they have initiation control and with the unilateral action of one party where the parties do not have initiation control. Where the parties have agreed to use one or certain procedures in a dispute resolution clause, the suspension should

generally start with the initiation of the specified procedure(s) by one of the parties. Where the parties have result-effect control, the suspension should end with the statement of one party, both parties or (if possible) the neutral that the procedure has ended or when an agreement is reached. Where the parties do not have result-effect control, the suspension should end when the result becomes finally binding. To allow for a determination of the start and the end of a procedure where the parties have result-effect control, presumptions and documentation obligations can be used.

*Limitation and prescription periods should be suspended from the start until the end of any dispute resolution procedure. For all procedures the details of regulation should refer to the characteristics of initiation control and result-effect control.*

## VIII. NEUTRAL

### A. General

The appropriate regulatory intensity for ensuring the neutrality and qualification of the intermediary depends on four characteristics of the dispute resolution mechanism, namely whether the parties have (1) initiation control, (2) neutral choice control, (3) result-content control and (4) result-effect control. The more control the parties have as regards these four issues, the less intensive the regulation needs to be of the intermediary's neutrality and qualification. Among these characteristics, neutral choice control and result-effect control have the greatest importance.

*The more control the parties have as regards initiation control, neutral choice control, result-content control and result-effect control, the less intensive the regulation of the intermediary's neutrality and qualification needs to be.*

### B. Neutrality

Where the parties have common neutral choice control, the legislature has to ensure that the parties' choice does not suffer from information asymmetry or decision deficits. This requires ex ante information and ex post updating if necessary. Particular attention as regards neutrality needs to be given to industry-financed dispute resolution schemes. If the parties have neutral choice control and result-effect control, there is a presumption for relaxing the intensity of regulation.

*The legislature has to ensure that the parties' choice of the neutral does not suffer from information asymmetry or decision deficits. If the parties have neutral choice control and result-effect control, the intensity of regulation may be lower.*

### C. Qualification

The less control the parties have as regards the choice of the neutral, the initiation, the result-content and the result-effect of a procedure, the more the state needs to ensure

the qualification of the neutral. For conflict resolution procedures where the parties have common control over the choice of the neutral and the initiation or the effect of the procedure, two types of regulatory approaches can be recommended: the market approach and the incentive approach. When choosing the market approach, the state does not regulate the corresponding education and admission to the activity of serving as a neutral in the particular ADR procedure. Instead, the neutrals, their organisations, the parties and academia develop practice standards and guidelines for their implementation. When choosing the incentive approach, the state does not require authorisation as a precondition for acting as a neutral, but sets incentives in order to fulfil certain qualification criteria. This can be done by awarding a qualification seal to those who fulfil certain qualification criteria or by creating advantageous legal consequences for those who fulfil such criteria, for example as regards confidentiality standards and professional duties. If the market of those offering neutral services and those requesting them consistently fails to develop stable quality and information systems, the legislature should consider trying the incentive approach. The authorisation approach, under which the state sets up a state-administered (ministry, courts, etc) admission procedure to the activity of serving as a neutral, may not be advisable for the procedures defined above. It should generally be respected that party self-determination entails the right to choose the neutral. Hence, it is generally recommended to opt for as little intrusive regulation as possible. Dispute resolution procedures that are based not on rights but on interests should not be restricted to professionals with a legal education.

For conflict resolution procedures where the parties have neutral choice control but do not have control over the initiation of the procedure, the use of one of two regulatory approaches is recommended, namely the incentive model or the authorisation model. If the parties do not have control over the choice of the neutral and no initiation control, the authorisation approach is recommended. If the parties do not control the initiation, neutral choice and result-effect of a procedure, then the state needs to opt for an authorisation approach. If the procedure is rights-based, the admission requirements need to ensure legal qualification.

*The less the parties control the choice of the neutral, the initiation, the result-content and the result-effect of a dispute resolution mechanism, the more the state needs to ensure the qualification of the neutral. Generally, however, it is recommended to opt for as little intrusive regulation as necessary.*

*If the parties control the choice of the neutral and the initiation or the effect of the procedure, a market approach or an incentive approach may be advisable.*

*If the parties have neutral choice control, but do not have control over the initiation of the procedure, either the incentive approach or the authorisation approach is recommended.*

*If the parties neither control the choice of the neutral nor the initiation, an authorisation approach is recommended.*

*If the parties have no control over initiation, neutral choice and result-effect, the state needs to opt for an authorisation approach.*

## IX. PROCEDURE

The individual's private autonomy encompasses not only the right to contract over substance but also the right to contract over procedure. Hence, it is only where the individual has neither initiation control nor both result-content and effect control that procedural safeguards aiming for a correct and just result become necessary. If the parties have initiation control but no result-content or effect control, a weaker form of state-ensured procedural safeguards is advisable. Legal justice and fairness as regards the procedure need to be adapted to the various characteristics of the dispute resolution procedures (procedural integrity). In particular, in case of evaluative procedures, ie procedures where the parties do not have result-content control, the neutral needs to explain to the parties the evaluation standards applied, and the neutral has to hear the parties as regards the evaluation.

*If the parties have neither initiation control nor both result-content and effect control, procedural safeguards are necessary. If the parties have initiation control but no result-content or effect control, a weaker form of state-ensured procedural safeguards is advisable.*

## X. COUNSEL

As regards the role of counsel, it needs to be distinguished whether counsel accompanies the party or whether counsel represents the party (ie the party need not be present). Generally, parties should have the right to be accompanied and advised by counsel in all procedures.

Full representation in procedural acts should also generally be allowed. However, where the procedure specifically depends on the personal participation of the parties to the dispute, the state may require the parties to appear and act personally.

*Generally, parties should have the right to be accompanied and advised by counsel. Full representation in procedural acts should also generally be allowed. Where the procedure specifically depends on personal participation of the parties, regulation may require the parties to appear in person.*

## XI. STATE (JUDICIAL) REVIEW OF RESULTS

If the parties have control over the result-content and effect of the procedure, there should not be a state (judicial) review of the result beyond that applying to contracts in general. If the parties do not have control over the result-content and effect, there should be the possibility for a state review of the results, particularly in the form of judicial review. The degree of the state review needs, however, to distinguish whether the individual bound to the result has control over the initiation of the procedure or not. If the parties have control over the initiation of the procedure, then a lower degree of state review is recommended while a high degree of review should be offered by the state if the parties do not have initiation control. The state review should also distinguish whether the underlying procedure is rights-based or interest-based. The

result of an interest-based procedure should only be submitted to a weak rights-based review that checks for public policy infringements.

*If the parties have control over the result-content and effect of the procedure, a state (judicial) review of the result beyond that applying to contracts in general is not recommended. If the parties do not control the result-content and effect, there should be the possibility for a state review of the results. The degree of the state review should distinguish whether the party bound to the result had control over the initiation of the procedure or not.*

## XII. ENFORCEABILITY

Formal state enforcement of the results of a conflict resolution procedure may not always be necessary and desired. Where desired by the parties, enforceability should be possible. The enforceability of the result of a dispute resolution procedure should generally require the participation of the state. This is based on the state's monopoly on power and the necessary protection afforded by this principle to the debtor. The participation of the state can take the form of representative participation, for example in the form of public notaries charged with equivalent protective functions. The degree of state monitoring to which the content of the to-be-enforced result is subjected should not have the effect that results controlled by the parties are submitted ex post to a court-like result review of the subject matter.

For procedures with result-effect control, the parties should be offered as many paths to enforceability as are necessary to allow them to choose the dispute resolution mechanism initially without being influenced by the availability of enforceability. In particular, the parties to a dispute should not indirectly be forced to turn to lawyers or public notaries for enforceability by requiring their participation in the procedure as precondition for enforcement. One solution would be the possibility of submitting the result of a dispute resolution procedure to a court which declares its enforceability and only checks for the validity of the agreement and—possibly—breach of public policy rules. In addition, enforceability might be denied if the agreement affects third parties (eg children).

*Enforceability should require the participation of the state or a representative charged with state functions. Results controlled by the parties should not ex post be submitted to a court-like result review. The availability and the path to enforceability should generally not be designed in a way that it indirectly influences the choice of a dispute resolution mechanism.*

## XIII. TRANSPARENCY

Transparency can be used to regulate the behaviour of neutrals and their organisations indirectly. If the state requires neutrals and their organisations to publish information on their structures and practice, care needs to be taken not to infringe the confidentiality interests of the parties.



*Transparency can be used to indirectly control the quality of procedures. Care needs to be taken not to infringe the justified confidentiality interests of the parties.*

#### XIV. CONSUMERS

##### A. General

Information and decision deficits as well as rational ignorance can affect consumers as regards the choice and conduct of dispute resolution. Hence, specific rules for consumer dispute resolution are required. Consumers are, in particular, natural persons acting for purposes outside their trade or profession with professional counterparts, ie persons acting for commercial or professional purposes. Often rules pertaining to dispute resolution concerning consumers can take the form of complementary rules, so that it is not necessary to establish a separate dispute resolution system for consumers. Instead, the existing systems can be modified if necessary.

##### B. Specifics

A specific issue for consumer protection is initiation control. Here, for procedures where the parties have initiation control, the regulatory solution can be mandatory rules as regards unfair contract terms (in particular as regards dispute resolution clauses). Particular attention is merited by procedures where the parties do not have control over the effect of the result. If consumers are still directed by asymmetric information and decision structures towards a certain type of dispute resolution mechanism, then this mechanism can be reclassified from initiation-control to no-initiation-control with the consequence of the higher regulatory safeguards described here.

Close regulatory supervision of governance structures is needed for consumer dispute resolution mechanisms such as ombudsman procedures that are financed by the relevant industry. Also, state monitoring and possibly action may be necessary in cases where such or other institutions work together with repeat players on the industry side while the consumers are not repeat players. This becomes relevant in particular if the repeat industry players generate a substantial proportion of the mechanism's fee income. A possible solution to governance issues of privately funded consumer dispute resolution bodies can be the requirement of (at least) equal representation of consumer representatives on the governing boards.

*Specific rules for consumer dispute resolution are required concerning, in particular, initiation control through dispute resolution clauses and the governance structures of industry-financed resolution systems.*

## XV. RULE-MAKER

### A. General

Possible state rule-makers are, inter alia, the parliament, the executive branch and the courts. Possible private rule-makers are, inter alia, chartered associations, private dispute resolution providers, independent institutions, the parties and the neutral in a particular case.

### B. Choice

The research and assessment regarding the identification and assessment of rule-makers as regards dispute resolution has just begun. While such knowledge is desirable in the interest of informed rule-making, at this stage it is difficult to develop a coherent set of principles. A first starting point could be that those dispute resolution mechanisms with procedure control by the parties should generally not be influenced unnecessarily by mandatory state law. Instead, the development of rules and practice might be left to the parties, the neutral and the professional organisations, unless otherwise mentioned here (see, for example, the principles above regarding confidentiality and neutrals). Rules with an enabling and protection function should generally be made by actors with high-level regulatory authority as well as accountability and wide geographical reach.

*Further research as regards the identification and assessment of rule-makers is desirable. Dispute resolution mechanisms with procedure control by the parties should generally not be influenced unnecessarily by mandatory state law. Rules with an enabling and protection function should generally be made by actors with high-level regulatory authority and wide geographical reach.*

## XVI. TYPE OF RULES

### A. General

The following types of rules can be distinguished at a first level: (1) enabling rules that empower the individuals to shape their relationships; and (2) conduct rules that set boundaries on individual behaviour and prescribe, forbid or allow a specific form of conduct directly. Conduct rules that require or prohibit certain conduct are in general accompanied by sanctions in case of their breach. At a second level, the following types can be distinguished: mandatory, semi-mandatory and dispositive statutory law, regulations, codes, model agreements, contracts, etc.

In general, it cannot be said whether a comprehensive and detailed regulatory approach is better than a restricted approach. As regards the regulation of ADR through conduct rules, in cases of doubt, a softer approach (for example dispositive rules rather than mandatory rules) or even no regulation should be preferred. As regards regulation of ADR through enabling rules, state regulation is sometimes

needed to create the necessary tools and rights for the individuals. Examples include the above recommendations as regards confidentiality and enforcement. Finally, to remedy information and decision deficits, regulations setting incentives or even imposing mandatory rules may be (temporarily) advisable. The enabling and guiding rules necessary should integrate ADR institutionally in substantive and procedural law.

*As regards conduct rules, in cases of doubt, dispositive rules over mandatory rules or even no regulation should be preferred. As regards enabling rules, state regulation is always needed to create the necessary tools and rights. To remedy information and decision deficits, regulations setting incentives or even imposing mandatory rules may be (temporarily) advisable.*

## B. Good Practice

Rules should be clear and accessible. Regulation should also follow a principled and systematic approach in order to be understood and embraced by parties to a dispute and professionals. When regulating, care should be taken not to give preference to one dispute resolution mechanism through the wording of the rules. To avoid this, in drafting general rules ADR could be defined as comprising mediation, conciliation, ombudsman procedure, arbitration, etc, as well as combinations of these procedures, and then the term ADR could be used subsequently. If, however, preference is to be given to one procedure for reasons of particular positive characteristics or in response to information and decision deficits, emphasis on this particular procedure is (temporarily) in order.

There is a considerable amount of new developments in practice and research. It is important to publicise and study ‘best practices’ in respect of assessment, research and evaluation. This is additional and supplementary to any regulation, and can lead to changes in regulatory schemes. Dispute resolution is a flexible field and its development should not be hampered by overly rigid regulation.

*Rules should be principled, clear and accessible. The development of dispute resolution practice should not be hampered by overly rigid regulation.*

## XVII. PROCEDURE DESIGN

Comparative empirical evidence shows that it is essential to incentivise lawyers, judges, accountants, notaries, tax advisers, insurance companies and other gatekeepers to act in the parties’ dispute resolution interest. Principal-agent problems arise all too easily, ie situations in which the gatekeepers influence the course of dispute resolution in their own interests instead of the parties’ interest. Countermeasures can be taken on the side of the parties as well as on the side of the gatekeepers. The parties can be equipped with information and decision rights to influence the choice and course of dispute resolution. The gatekeepers can be positively incentivised by aligning their financial and temporal interests with the parties’ interests, or their actions can be guided through procedural rules and substantive duties.

Further measures can be directed to the public in the form of information cam-

paigns, institutionalised information boards and mandatory dispute resolution training within the university and education sector. Also, giving ADR programmes a physical presence in court buildings should be considered in order to allow for easy access and information. When institutionalising methods for conflict diagnosis, internet-based platforms should be considered. Moreover, within its own organisational realm, the state can take a leading role in interest- and efficiency-based dispute resolution.

The characteristics and effects of dispute resolution need to be understandable, which very often is not the case. At times, locally diverse and confusing dispute resolution structures should be simplified and unified at a higher geographical level. Where unification is not needed, the rule-making can be left to the parties, the neutrals and their organisations.

Communication by electronic means should be an integral part of dispute resolution and its regulation. Online dispute resolution requires particular thought and may require specific regulation.

*It is essential to incentivise lawyers, judges, accountants, notaries, tax advisers, insurance companies and other gatekeepers to act in the parties' dispute resolution interest. Further measures can be information campaigns, institutionalised information boards and mandatory dispute resolution training within the university and education sector. The characteristics and effects of dispute resolution mechanisms need to be understandable. Online dispute resolution requires particular thought and may require specific regulation.*

# Regulating Dispute Resolution

## ADR and Access to Justice at the Crossroads

Edited by  
Felix Steffek and Hannes Unberath

in cooperation with  
Hazel Genn, Reinhard Greger  
and Carrie Menkel-Meadow



• H A R T •  
PUBLISHING

OXFORD AND PORTLAND, OREGON  
2013