

**RESPONSE TO THE  
COMMISSION OF THE EUROPEAN COMMUNITIES'  
GREEN PAPER  
ON  
ALTERNATIVE DISPUTE RESOLUTION IN CIVIL AND COMMERCIAL LAW**

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## INTRODUCTION

As a non-profit association working towards initiating intellectual interest and development in the field of ADR as well as the promotion of ADR as an important and effective means of dispute resolution, it gives us great pleasure to present this piece of work as a response to the questions posed by the Commission of European Communities' Green Paper on "Alternative Dispute Resolution in Civil and Commercial Law".

Understanding and appreciating the important role and tremendous potential of ADR in resolving disputes and providing access to justice, we express our admiration at the far sighted initiatives taken by the various Institutions of the European Union as well as the various bodies working in the field of ADR.

However, in the same vein, we believe that the functioning and the success of ADR depends fully on the willingness of the parties to the dispute, as has been stressed by the Commission in the instant Green Paper itself. As such, we fully agree that the best approach to promote the use of ADR would be to provide basic guarantees about the ADR process as well as the bodies or third parties conducting the process, so as to gain public confidence in ADR. We believe that it is very important to maintain the voluntary nature of submitting to an ADR process without giving it a very legalistic approach so that it does not bar the jurisdiction of the court as far as possible (*except for arbitration-proper, which is not the subject of this Green Paper*), least it might lead to a transgress of the basic and fundamental principles of access to justice enshrined among others, in the "European Convention on Human Rights" (*Article 6*) as well as the "Charter of Fundamental Rights of the European Union" (*Article 47*).

With the above basic goals and principles in mind, our association presents this response as a small contribution to the great pool of ideas and initiatives the instant Green Paper would generate.

## **ABOUT US**

The Association for International Arbitration works towards promotion of ADR in general and Arbitration in particular, as a means of dispute resolution and strives to bring together the global community in this field, be it as professionals in the form of Judges, Lawyers, Arbitrators, Mediators or as Academicians as well Research Scholars and Students with the ultimate aim of promoting the use of Arbitration and other efficient and appropriate, alternative means of dispute settlement at the International and Municipal level. With this unique blend of people, it is our endeavor to inculcate an interest in ADR, not only in the professional sphere but also create an awareness and interest in it among budding professionals in law schools/universities all around the globe.

We would thus be very eager to cooperate with with people and organisations sharing the same goals and ideals and we would be glad to answer any queries and discuss any proposals in this direction.

## **GENERAL COMMENTS ON THE GREEN PAPER**

In the light of the present trends and the sector specific initiatives of the Commission, we agree that the Green Paper should be a platform to suggest a culmination of thought and action towards the development and promotion of ADR in all the sector specific initiatives as well. One of the most recent initiatives of the Commission {COMMISSION REGULATION (EC) No 1400/2002 of 31 July 2002}, concerning vertical agreements and concerted practices in the motor vehicle sector, increases the scope of resort to ADR by the parties as Article 3(6) of the Regulation expands the scope of disputes that may be resolved by a third party. We would suggest a discussion on developing greater resort to ADR in this sector.

Though the Green Paper has a wide scope in initiating a discussion on development/promotion of ADR in all sectors and fields, we felt it would have been rather advantageous to have a express/specific mention or question on initiatives that could be taken in the field of resolving disputes citizens and Member States. We may need to have a thorough study/discussion on the scope of ADR in such disputes. For one, we would have been in favour of initiating a further a discussion on the scope of dispute resolution by an Ombudsman.

## ANSWERS TO SPECIFIC QUESTIONS

### Q. 1

**Are there problems such as to warrant Community action on ADR? If so, what are they? What is your opinion on the general approach to ADR that should be followed by the institutions of the European Union, and what might be the scope of such initiatives?**

Yes, we perceive that there are still some impediments to the development and promotion of ADR as 'Convenient and Effective means of dispute resolution' and which warrant Community action.

Most of these initiatives are in areas on which specific questions have been posed in this Green Paper and the same have been addressed in our answers to the respective questions. In addition, we would list some of the important fields/issues which may warrant additional Community action as: Competition Law and Court administered/ordered ADR (*So as to explore possibility of having a uniform policy, based on the pilot projects conducted as well as the initiatives taken by certain Member States, Associations etc., to increase resort to Court administered ADR by encouraging Judges to play conciliatory roles wherever appropriate and also provide for greater introduction of third party ADR processes by the court*)

The efforts and initiatives taken by the Institutions of the European in promoting ADR are very laudable. With respect to the distinction between the active and passive role of the third party, we feel that it may also be necessary to keep in mind that in practice there may be a number of instances where the third party may be required to play an active role on one issue while playing a passive or facilitative role in a subsequent issue in the same dispute (*for example, in a dispute involving a two parties, the third party may have to give his opinion as regards the first question of liability of either parties or whether one party will have to compensate the other at all, then the second point of the extent of liability or the amount of compensation may be decided by the parties to the dispute themselves and the third party may only facilitate such a process*).

Also, though we find no mention of it in the instant Green Paper, we feel that the commission should take an initiative for promoting ADR as a means of resolving disputes involving citizens and Member States.

### Q. 2

**Should the initiatives to be taken be confined to defining the principles applicable to one single field (such as commercial law or family law) – field by field – and in this way discriminate between these different fields, or should they as far as possible extend to all the fields governed by civil and commercial law?**

We feel that the basic and underlying principles are applicable to ADR in all fields of civil and commercial law, though it might be possible that there might be certain important and unique issues for ADR in different fields. For example, fields as electronic commerce and family law may pose some unique challenges on account of technological issues as in electronic commerce or on account of legal and sociolegal issues as in family law. However,

the basic principles for ADR in these fields would still be the same as other fields, though they may require a few new principles to be established to handle the new and unique issues.

**Suggestions:**

We suggest that there be a general Community Directive laying down the basic principles applicable to ADR in all fields of civil and commercial law, besides there could be separate initiatives, laying down the principles applicable to ADR in specific fields.

Thus:

1. The first level, the initiatives may focus on establishing basic principles applicable to ADR in general, to all fields governed by civil and commercial law;
2. At the second level, the initiatives should in addition, focus on establishing specific principles applicable to ADR in specific fields of law.

### Q. 3

**Should the initiatives to be undertaken deal separately with the methods of online dispute resolution (ODR) (an emerging sector which stands out because of its high rate of innovation and the rapid pace of development of new technologies) and the traditional methods, or on the contrary should they cover these methods without making any differentiation?**

We feel, that Online Dispute Resolution mode should be subject to the same basic principles as the traditional methods, though ODR would certainly require additional specific initiatives as briefly outlined below.

In case of ODR, it might possible that there is no personal, face-to-face contact between the parties and the ADR body or neutral third person, this would perhaps call for new explanations and requirements for satisfying principles such as principle of transparency and adversarial principle in the Commission Recommendation of 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/CE) and also principles such as principle of fairness in the Commission Recommendation of 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC).

Also, Online Dispute Resolution may pose additional challenges and require separate initiatives as compared to traditional mode, especially in the transnational context. For example:

1. The law applicable to the ODR and the validity, enforcement and other legal nuances involved in virtual agreements that might be concluded at the end of a successful ODR process  
*(since it is possible that the parties to the ODR as well as the the ODR service provider may all be in different Member States, there would have to be a policy on the law applicable to the ODR as well as to the virtual agreement that might be concluded.) ;*
2. Accreditation of ODR service providers so as to boost public confidence  
*(The general public awareness about the general ODR service providers is obviously not very high and parties cannot be expected to submit disputes to a service provider which they just locate on the internet unless the same is accredited or very well known and reputed.);*
3. Data security issues

*(for example, certain documents may be submitted by the parties to the ODR service provider electronically hence the ODR service provider should perhaps be required to destroy the electronic copies in order to protect the confidentiality of the parties, especially incase of failure of the ODR process.)*

4. Challenges posed by new technologies changes from time to time etc.

## **Q. 4                    How might recourse to ADR practices be developed in the field of family law?**

The issue of development of recourse to ADR in the field of family law needs to be dealt with in two different perspectives:

1. At this juncture, the most important step is to conduct a further, detailed examination of the sensitive needs of this field, with respect to laying down of specific principles on recourse, conduct and extent of the ADR process. This has to be done in the light of the fact that the parties do not enjoy a free disposal of their rights and also such sociolegal issues as victims of violence in the family, gender based discrimination, cases involving transnational and intercultural parties.  
Besides the differences in family law regimes in different Member States could pose a serious impediment to ADRs in family law, involving intercountry parties. *(for example the Dutch legal matrimonial property regime, which recognises complete community of property is very much unique and apart from the regimes in other Member States)*

The Commission on European Family Law is already working on the aspect of harmonisations of the basic principles in family law. Perhaps in addition, promoting fundamental academic research into the convergence of family law legislation within the EU Member States by means of the development and formulation of European norms on the basis of comparative law and treaty standards could also be done.

2. From the perspective of steps needed for the promotion of recourse to ADR in family law:  
ADR may be promoted an independent and out-of-court procedure or having a compulsory-introductory-session on exploring possibility of ADR as a first step before approaching the judiciary.  
Also, ADR may be a very useful tool in for the Judiciary, in handling family law disputes.

Thus the following steps could be suggested:

- a. Conduct seminars and training workshops for the benefit of persons involved in conducting ADR in family law, as well as for the Judges. Such persons may need to be given the basic training for understanding the delicate psychological issues involved.
- b. Creation of Legal Aid Centres, Centres for ADR etc.
- c. Provision for compulsorily providing information on ADR by the courts as well as lawyers, to persons approaching or seekig to approach courts for divorce.
- d. Compulsory session on ADR to those seeking and eligible for legal aid, with the free legal aid (Publicly funded) being extended to the ADR process as well.

**General introduction to Q.5, Q.6, Q.7 & Q.8:**

**Since Questions 5, 6, 7 and 8 are closely related, we would prefer to give our general view on the point of legal value of ADR clauses:**

The very concept of Alternative Dispute Resolution rests on a voluntary arrangement rather than the strictly legal and mostly compulsory disposition of Court Administered Justice. Also, the parties may or may not be able to settle the dispute in an ADR process (*except in case of an arbitration proper, which the parties consented to and are thus bound by the consent and which would certainly end in an award by the tribunal-- Arbitration not being the subject of this Green Paper*), as opposed to the Courts of Law, where all disputes will be necessarily settled by a decision of the court. Thus it is rather hard to accept that a party could be prevented from enforcing its legal rights in a court of law for failing to subject itself to a voluntary process which it no longer wishes to undertake, moreover, it may not not be of any benefit to force a party to participate in an ADR process against its will because the success of the ADR process depends on the will of the parties.

Also considering the point raised in the green paper, about the effects of unwillingness of a party to resort to an ADR even though it entered into a contract stipulating the same, it could be said that the party unwilling to take recourse to ADR has still not committed any legal wrong, this is so because of the fact that since the party may decide in the course of the ADR that it cannot settle the dispute in an ADR, it may as well come to the same conclusion right at the start by considering the issues and other aspects involved in the dispute. So the unwillingness to subject itself to the process any further is not against the law.

Hence, we believe that rather than imposing a legal compulsion to resort to ADR, we should rather strive to create infrastructure and conditions so that parties themselves resort to ADR voluntarily.

**Possible Exception**

As opposed to ADR clauses which are usually included in contracts before the dispute arose, we might have a post-dispute agreement between the parties to the dispute, wherein all parties to the dispute have expressly agreed to resort to an appropriate ADR method. In such a case the parties may be compelled to resort to ADR as a compulsory step before approaching the court since they have consciously undertaken an obligation to actually resort to ADR for that specific dispute.

**Q. 5**

**Should the legislation of the Member States be harmonised so that in each Member State ADR clauses have the same legal value?**

Yes, the legislations of the Member States need to be harmonised so that in each Member State ADR clauses have the same legal value. And the legal value in our opinion should be only as "enabling clauses" rather than being "disabling" clauses. That is, the ADR clauses should only be inferred to enable the parties to undertake the process, they should not be inferred so as to bar the parties from approaching appropriate jurisdictions of the court.

An uniform policy would be needed in all Member States because in absence of such uniformity, the parties may resort to forum shopping, in jurisdictions favourable to either of them.

## Q. 6

**If so, should the validity of such clauses be generally accepted or should such validity be limited where these clauses appear in membership contracts in general or in contracts with consumers in particular?**

As already stated, we favour treating these ADR clauses as enabling clauses providing for ADR rather than as disabling clauses which bar the jurisdiction of the Court.

However, it might be so that there might be certain fields such as consumer law where there is generally more scope for submitting disputes to an ADR process. It might also be so that in such fields there would be relatively less chances of any injustice or prejudice to any party by a slight delay in submitting a dispute before a court of law. Hence in such fields, it might be possible to give more emphasis on ADR.

## Q. 7

**What in any case should be the scope of such clauses?**

As regards the scope of the ADR clauses, as already hinted above, we would as far as possible not favour any infringement on the basic concept of party autonomy in resorting to ADR. Thus we would suggest the following four models, as regards the scope of ADR clauses and which may be used in appropriate circumstances:

1. An **"Optional ADR Clause"** - that parties may seek to settle any contractual dispute by ADR. (Here, there would be no obligation on the parties to even consider submitting the dispute to an ADR process before resorting to other means of dispute resolution, however they may submit the dispute to an ADR process if they deem fit.)
2. An **"ADR Clause Imposing an Obligation to consider ADR"** - here the parties would have an obligation to consider submitting a contractual dispute for possible settlement by ADR.
3. A **"Time-bound ADR Clause"** - this type of an ADR clause would involve compulsorily submitting a dispute to an ADR for a time bound period (*for example parties may agree that any dispute arising from a particular contract would be compulsorily submitted for an ADR process atleast for a fixed minimum period of time for example one, two... weeks*) failing which the parties may resort to other means of dispute resolution.
4. One more model, which could be perhaps used in commercial contracts is a **"Option to resort to ADR before submitting to Arbitration-proper"**. Here the parties would have an option to submit a contractual dispute for possible settlement by ADR before submitting the same for settlement by an arbitration-proper. This would mean that in case the parties do not submit their contractual dispute to an ADR process, they would have to submit the same compulsorily to an arbitration-proper and this agreement to submit to arbitration would be legally binding and possibly bar the jurisdiction of the court too. Hence parties may be more inclined to submit the dispute to an ADR process where they would be in charge of the decision making or agreement process.

## Q. 8

**Should we go as far as to consider that their violation would imply that the court has no jurisdiction to hear the dispute, for the time being at least?**

As stated in our introduction above, as well as in our answer to Q.6, ADR clauses could possibly be treated as only "enabling clauses" rather than being "disabling" clauses, so that such ADR clauses only serve the purpose of enabling the parties to resort to the ADR process, they should not be inferred so as to imply that the court has no jurisdiction to hear the dispute.

Rather than trying to resort to such extreme steps that bar the jurisdiction of the courts, we rather feel that the issue of recourse to ADR could possibly be handled by giving an option to the parties to have a free introductory session on possible ADR processes, before resorting to the court. We feel, even steps as making ADR as putting a legal compulsion to resort to ADR as a first step, before approaching the court, may not be appropriate.

Perhaps the only instance when it might be appropriate to bar jurisdiction of the court is in the case of existence of a valid post-dispute agreement between the parties to the dispute, wherein all parties to the dispute have expressly agreed to resort to an appropriate ADR method. In such a case the parties may be compelled to resort to ADR as a compulsory step before approaching the court they have consciously undertaken an obligation to actually resort to ADR for that specific dispute.

## Q. 9

**Should the legislation of the Member States be harmonised so that in each Member State recourse to an ADR mechanism entails suspension of the limitation periods for the seising of courts?**

There needs to be a uniform policy and harmonisation of the legislation of the Member States on suspension of the Limitation Period for seising of the courts during ADR process.

A failure to adopt such a uniform policy could lead to the following two scenarios:

1. A party might spend time in an unsuccessful ADR attempt and may thus be subsequently refused resort to Court on account of exceeding the statutory limitation period.
2. It might also be possible that a person be refused resort to Court in one Member State due to expiry of limitation period, while he had unsuccessfully resorted to an ADR process in another Member State because either the said Member State's legislation does not permit such suspension of the limitation period or that the said Member State does not recognise the third party or the ADR process resorted to by the person in the other Member State.

The above possible scenarios would be a big risk for the parties and thus they would not be willing to resort to ADR.

Also, such scenarios give rise to the possibility of a serious violation of Article 6(1) of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.

### **Suggestions:**

The adoption of such a policy may require that the third parties/ADR bodies be approved by the Judicial Administration (as is the case in Germany) or the law of the land. For this we would need to define an acceptable ADR process and ADR body at least for this procedure

**of seising** (as it may not be possible nor feasible to precisely and exclusively define an ADR body in general, for example if a parent is trying to resolve a dispute between two brothers, it would perhaps be difficult at times to say whether that be considered to be an acceptable ADR process and if so, would it really have precise points of commencement and ending).

Hence we would suggest the establishment of an Accreditation regime for third parties/ADR service providers where third party or ADR service provider may be accredited by special bodies set up by every Member State or by the reputed professional bodies in this field which are in turn recognised and approved by the respective Member States (and thus by all other Member States as well).

So, only the ADR processes conducted by these accredited third parties/ADR service providers could be used to effect suspension for the exact duration of the ADR process.

This step of accreditation would however be purely discretionary and all ADR processes conducted by third parties satisfying all other requirements, would be perfectly valid for all other purposes regardless of whether the third party is accredited or not.

However, it should be kept in mind that it may not be appropriate to suspend the limitation period for an exceedingly long time as it might be unfair to subject defendants to potential claims for an indefinite period of time. Thus we perhaps need to have a uniform policy on the maximum possible duration of suspension of the limitation period, bearing some proportionality to the duration of the limitation periods itself.

## **Q. 10**

### **What has been the experience of applying the Commission recommendations of 1998 and 2001?**

Though tremendous steps have been taken in regard to and to complement the 1998 recommendation, one of the basic doubts that persist in our minds throughout is with regard to the principle of independence in the 1998 recommendation, especially in case of a third party appointed by an institution, professional association or enterprise. Though a number of safeguards have been sought to be laid down in the recommendation itself, it is still not easy for most people to accept the independence of a third party who is on the payroll of the institution, professional association or enterprise itself.

Secondly, with respect to the principle of representation, it is interesting to discuss whether it is advisable for a party to be represented by a person other than a lawyer.

One of the arguments that could be rightly put forward against compulsory representation by a lawyer only is that if a party, not being a lawyer herself/himself can appear in person at the ADR process then she/he can be represented by a person who is not a lawyer either.

However, it would be again important to note that in certain instances of disputes involving for example a consumer and a big company which may be represented by highly reputed lawyers, there might be some imbalance or atleast the consumer might percieve imbalance in the process.

**Q. 11** **Could the principles set out in the two recommendations apply indiscriminately to fields other than consumer protection law and in particular be extended to civil and commercial law?**

As suggested in our answer to Q.2 above, we feel that the basic and underlying principles in the two recommendations should be extended to ADR in all fields of civil and commercial law, though it might be possible that there might be certain important and unique issues for ADR in different fields. For example, fields as electronic commerce and family law may pose some unique challenges on account of technological issues as in electronic commerce or on account of legal and sociolegal issues as in family law. It may also be possible that certain of these principles may need new or further explanations with respect to certain fields. However, the basic principles for ADR in these fields would still be the same.

**Q. 12** **Of the principles enshrined in the recommendations, which in your view could be incorporated in the legislation of all the Member States?**

We feel that all these basic principles merit incorporation the legislations of all Member States. Though some of these principles may seem more important than the others, we cannot have a hierarchy of importance of these principles, neither is it advisable to include only some of these in the legislations as in that case the other principles might be looked upon as optional principles.

**Q. 13** **In your opinion, should the legislation of the Member States in regulated areas such as family law be harmonised so that common principles may be laid down with regard to procedural guarantees?**

Yes, in our opinion, the Legislations of Member States in regulated areas such as family law needs to be harmonised so that common principles may be laid down with regard to procedural guarantees with respect to ADR.

In addition to the principles mentioned in the 1998 as well as the 2001 recommendations of the Commission with respect to ADR in consumer law, we may need to lay down some more principles in case of ADR in regulated areas such as family law.

This is so because, unlike in a field such as consumer law or even commercial law in general, the parties to an ADR process in regulated areas such as family do not enjoy the same degree of freedom with respect to the agreement. The parties may not enjoy the same degree of freedom to waive their rights. For example in a mediation in family law over custody of children, the parties do not enjoy the complete right to arrive at an agreement disregarding the interest of the children.

Thus mediations in such areas may involve an element of third party rights or public interest or public law and certain principles may have to be developed to demarcate such elements and to ensure procedural guarantees.

**Q. 14**                    **What initiative do you think the institutions of the European Union should take, in close cooperation with interested circles, as regards the ethical rules which would be binding on third parties?**

We believe that a set of uniform ethical rules are of utmost importance and these rules must favourably have a binding legal force. This is so because a lot of the difficulties faced in ADR, many of which have been discussed in this Green Paper, such as confidentiality, liability of third party, "period of reflection before or after signing the ADR agreement" etc. could perhaps be handled more easily without complications.

At this point of time, none of the Member States have a concrete set of ethical rules which are binding on third parties, though the various bodies, associations and institutions providing ADR services do have individual sets of brief ethical rules concerning third parties.

The possible initiatives that the institutions of the European could take, in close cooperation with interested circles concerning the ethical rules binding on third parties are as follows:

1. It may be suggested that a "Model Set of Ethical Rules, Binding on Third Parties", be drafted, after taking into consideration the individual set of rules drafted by the various bodies, associations and institutions providing ADR services. Preferably inputs must be invited from all interested circles so as to understand all the possible difficulties that arise in ADR and how best to prepare a comprehensive set of rules. This "Model Set of Ethical Rules, Binding on Third Parties" may then be adopted by all Member States in their legislations.
2. To make the Rules stated in the preceding paragraph more effective, the Rules may form the subject of a Directive and be binding in the all the Member States, regardless of whether they have been incorporated in the individual legislations of the Member States. All persons or bodies providing ADR services in the European Union should thus be bound by these uniform "Ethical Rules binding on third parties".

**Q. 15**                    **Should the legislation of the Member States be harmonised so that the confidentiality of ADRs is guaranteed in each Member State?**

Yes, we strongly feel that the legislation of the Member States be harmonised in order to guarantee confidentiality of ADR in each Member State. This is so because certain basic principles and guarantees with respect to confidentiality of ADRs should be uniform in all Member States or there could be a situation akin to Forum Shopping, where the either of the parties may try to undertake ADR in a Member State where the law is favourable to them. Thus the harmonisation may be with respect to the confidentiality of ADR process, to be maintained by the third party and also with respect to the confidentiality to be maintained by the parties reciprocally with respect to each other.

## Q. 16

If so, how and to what extent should such confidentiality be guaranteed? To what extent should guarantees of confidentiality apply also to publication of the results of ADRs?

To suggest how and to what extent confidentiality has to be guaranteed, we would need to first understand that the Third party/ADR service provider as well as the parties to the ADR process have the obligation to maintain confidentiality.

1. Obligation of the Third party/ADR service provider to maintain confidentiality:

The third party/ADR service provider has (*needs to have*) an obligation to maintain confidentiality between the parties to the extent (*in addition to other appropriate obligations*) that he should not disclose any relevant information about one party to the process, to the other party, except with the permission of the former and only to the extent authorised by the former. Thus if one party discloses some information to the third party in a caucus then he is bound not to disclose the same to the other party at any stage except when expressly permitted by the disclosing party and only to the extent permitted.

Besides, in the event the ADR process fails, the third party should not assist either of the parties in any manner relevant to the dispute nor should he be a witness in any subsequent proceeding. All related memoranda, work product, notes, or case files of the third party should be confidential and not subject to discovery or other means of legal compulsion, and not admissible in evidence in a judicial or administrative proceeding.

The third party would also have an obligation of confidentiality to maintain all information divulged by the parties (*to the ADR process*) in or in relation to the ADR process to the to any other party. Only that information which has been permitted to be divulged and only to the extent permitted by the respective parties, may be divulged by the third party.

Besides, the third party also has a strict obligation of confidentiality with respect to the trade secrets or such, of either of the parties, which are divulged or known to him in the course of the ADR process.

Publication of results: The condition of confidentiality may extend to the results of the ADR process as well, in case any of the parties request the third party in that regard.

This obligation of confidentiality should be made binding on the third party/ADR service provider by incorporating the same in the basic principles applicable to ADR as well as in the Ethical Rules binding on Third Parties/ADR service providers.

2. Obligation of the parties to the ADR process, to maintain confidentiality:

The parties to the ADR process also have an obligation of confidentiality towards each other. With a practical approach, we think this obligation of confidentiality should be restricted presently, to the following instances (*in addition to other appropriate obligations*):

None of the compromisory offers or admissions/acceptance of liability by any party should be used against it in any subsequent ADR or Judicial process. This would imply that in case of failure of the ADR, none of the compromisory offers or

admissions/acceptance of liability can be used against the party in a subsequent judicial proceeding; also it would be essential to add that even in case of a successful ADR process between two or more parties, none of the proceedings of this ADR process can be used against the other party in any other ADR process between the same or different parties.

Also the parties need to be under an obligation to keep any trade secrets etc about the other party or anything divulged by one party on the condition of confidentiality or in general anything that is not in public domain except with the permission of the party.

This obligation of confidentiality may be made binding on the parties to the ADR process by incorporating the same in the basic principles applicable to ADR as well as they may need to be given a binding legal force by being incorporated in the statutes of all Member States.

**Q. 17** **In your opinion, should there be a Community rule to the effect that there is a period of reflection following ADR procedures before the agreement is signed or a period for withdrawal after the signing of the agreement? Should this question be instead handled within the framework of the ethical rules to which the third parties are subject?**

We would like to answer this question with an alternative proposition.

- I. In our opinion there need not be any explicit period following ADR procedures before the agreement is signed but this issue may rather be handled within the framework of the ethical rules to which the third parties are subject.

This is so because, as ADRs are based on the general principles of contract law, the law of civil procedure and private international law, the rights of the parties are always protected in case of instances like misrepresentation, fraud, nondisclosure of a very relevant fact etc., by the other party or one of the parties.

- II. However, in the alternative we would present another model, which would perhaps satisfy this issue as well as the issue of recognition and enforcement of the ADR agreement in Member States as well:

The parties may sign the agreement following the normal ADR procedures. After a period of one week from the date of signing, the parties would be required to sign the same agreement before a Public Authority such as a Judge or Public Notary or other authority empowered for that purpose by that State, after verifying and accepting the contents of the instrument before the said Authority. The said Public Authority would in turn ensure that the parties have understood the full contents of the agreement and that it is not against Public Policy, but would not interfere nor debate on the merits of the agreement.

The agreement would be binding on all the parties only when such agreement has been finally signed by all the parties, before the Public Authority. Any party wishing to rescind its consent to a either a part or the whole of the contract may do so only within this one week period.

## Q. 18

**Is there a need to make ADR agreements more effective in the Member States?**

**What is the best solution to the question of recognition and enforcement of ADR agreements in other Member States of the European Union? Should specific rules be adopted to render ADR agreements enforceable? If so, subject to what guarantees?**

Considering that a variety of names are used in the Member States for agreements arising from ADR mechanisms; that all these arrangements are in fact “transactions” and that such agreements between parties can be implemented insofar as they are made enforceable, either because the judge gives his approval and issues an enforceable order or the parties have recourse to an authentic deed executed before a public official, such as Judge or a notary, our proposal in this regard is in substance stated while answering Q.17 on page 15. It is as follows:

The parties to the ADR process would sign the agreement following the normal ADR procedures. After a period of one week from the date of signing, the parties would be required to sign the same agreement before a Public Authority such as a Judge or Public Notary or other authority empowered for that purpose by the State, after verifying and accepting the contents of the instrument before the said Authority. The said Public Authority would in turn ensure that the parties have understood the full contents of the agreement and that it is not against Public Policy, but would not interfere nor debate on the merits of the agreement.

The agreement would be binding on all the parties only when such agreement has been finally signed by all the parties, before the Public Authority. Any party wishing to rescind its consent to a either a part or the whole of the contract may do so only within this one week period.

The above procedure will ensure that the agreement arose from the wishes of the parties and that it has received the approval of a public authority of the same State and would thus be an authentic instrument within the meaning of the Brussels I Regulation.

Preferably, specific rules should be adopted in this regard, in order to make the procedure explicit and mandatory.

## **QUESTION 19 & QUESTION 20:**

With respect to Q.19 & Q.20, which seem to overlap atleast with respect to training of third parties, we would prefer to give answer them together, so that there is a logical flow of thought and understanding, without many repetitions.

**Q. 19**                      **What initiatives in your view should the Community institutions take to support the training of third parties?**

**Q. 20**                      **Should support be given to initiatives to establish minimum training criteria with a view to the accreditation of third parties?**

### **Training :**

Firstly, as regards the requirement of training, we believe it is very much essential that we have trained people (*trained on their own accord and initiative or trained by community/ Member State initiatives-- for example a person may be trained in ADR techniques on his own initiative, by an association to which he is affiliated or associated with or by bodies set up or promoted by the Member States*) conducting the ADR process if the same has to be effective as a real alternative to the judicial process.

There could be perhaps be a number of steps which the Community institutions could take with a view to promote the training of third parties in ADR.

One possible suggestion could be drafting of a common policy for training in ADR, based on the results of pilot projects and the experiences in the ADR processes conducted in the Member States till date.

This could be done firstly with a view to conduct workshops and perhaps setup permanent bodies with qualified persons/experts in ADR to train Judges in promoting ADR in the Judicial process.

Secondly, people wishing to act as third parties in ADR should also be encouraged to undergo such workshops or training in the above said training centres.

The above said workshops may be conducted on the initiative of the by Official Bodies setup by the Member States, by reputed professional bodies, recognised and approved in the Member States and also be Educational Institutions imparting education in Law and related fields.

### **Accreditation :**

Accreditation of third parties is perhaps still an open question, even after the tremendous amount of work in the field of ADR.

It would be interesting to think for a moment, the consequence of making accreditation compulsory. At the same time it might be so that the ADR service provider or third party may need to be formally recognised, for example in the discussion on suspension of limitation period for the seising of courts (*please refer to our answer to Q.9 on page10*).

Thus, in an attempt to try and take a balanced view on accreditation, considering the pros and cons of making it compulsory, we would put forward the following solution:

A third party or ADR service provider may be accredited by special bodies set up by every Member State or by the reputed professional bodies in this field which are in turn recognised and approved by the respective Member States (*and thus by all other Member States as well*).

Accreditation would however be purely discretionary and all ADR processes conducted by third parties satisfying all other requirements, would be perfectly valid regardless of whether the third party is accredited or not.

However, only an ADR process conducted by an accredited third party/ADR service provider would be acceptable for the purpose of availing of "suspension of the limitation period for the seising of courts during the ADR process". Additional instances requiring the conduct of the process by an accredited third party/ADR body can also be added as required.

**Q. 21**      **Should special rules be adopted with regard to the liability of third parties? If so, which rules? What role should ethical codes play in this field?**

We understand that a proper initiative/study would be required on the subject of liability of third parties. However, we do not really favour having a separate set of rules outlining the liability of third parties, we would rather suggest that the liability of third parties form a part of the "Basic set of Principles" applicable to ADR in all fields of law.

The subject of liability may need to be looked from the point of a third party giving a binding or non-binding opinion and a third party which more or less just facilitates the ADR process.

The liability of the third party in the former instance may arise if he gives an opinion which is unjust and not in consonance with the law as it stands at the relevant point of time, or if he wilfully breaches any of the fundamental principles, causing damage to either of the parties. In the latter case, where the third party is more or less just a facilitator of the ADR process, liability may arise where he wilfully breaches any of the fundamental principles, causing damage to either of the parties.

However, in both instances, we do not feel that liability would arise if the third party merely fails to give an opinion on one of the relevant issues or points or that one of his bonafide or unintentional actions lead to a breach of one of the principles of ADR.

The role of the ethical rules for the third party would perhaps be most important in this regard. Besides being incorporated in the basic principles applicable to ADR, the rules of liability could be clearly and concretely incorporated in the ethical rules binding on third parties, so as to make the third parties more responsible in this regard.