
OMBUDSMANN.DE

THE GERMAN ALTERNATIVE



*ONLINE DISPUTE RESOLUTION SYSTEM FOR
CONSUMER-TO-BUSINESS DISPUTES*

Bond University ▪ Dispute Systems Design ▪ LAWS 73-763

By Vala Setareh ▪ email: valasetareh@web.de

Table of Contents

1. Introduction	3
1.1 Electronic commerce transactions	3
1.2 Consumer Rights	4
1.3 The nature of consumer disputes and litigation	4
1.4 The suggested alternative	6
2. Ombudsmann.de – Description of the System	7
2.1 Process	8
2.2 Time	9
2.3 Independence and Impartiality	10
2.4 Accessibility	10
2.5 Hearing and right to respond	10
2.6 Confidentiality	11
2.7 Right of Representation	11
2.8 Costs	11
2.9 Transparency	11
3. Examination of the system	12
3.1 Categories of Dispute Resolution Procedures	12
3.2 Dispute Systems Design Principles	13
3.2.1 Accessibility and Low-Cost Dispute Resolution Procedures	14
3.2.2 Time Limits	16
3.2.3 loop-forward and backward features	16
3.3 Further recommendations by the EC	19
3.3.1 Transparency	19
3.3.2 Independence and impartiality	21
3.3.3 Effectiveness	23
3.3.4 Enforceability	24
3.3.5 Fairness and Liberty	25
3.3.6 Publicity and Confidentiality	26
4. Recommendation for improvement	28
4.1 Independence, Impartiality and Transparency	28
4.2 Fairness and Liberty	29
4.3 Publicity and Confidentiality	29
4.4 Enforceability, Liberty and Cost	30
5. Conclusion	33
Bibliography	35

Figures

<i>Figure 1: Source: Evaluation of the pilot project on use of the European consumer complaint form for consumer disputes (2000).</i>	5
<i>Figure 2: Approach and Registration phase</i>	18
<i>Figure 3: The alternative dispute processes</i>	18
<i>Figure 4: Source: www.ombudsmann.de</i>	20
<i>Figure 5: Source: www.ombudsmann.de</i>	23

1. Introduction

1.1 Electronic commerce transactions

The involvement of consumers in online shopping is constantly increasing. In the year 2001, more than one half (56 percent) of all Internet users purchased goods online^{1,2}. The global electronic commerce market is growing extremely fast and was generously estimated to be worth \$1.4 trillion by the year 2003.³ In Europe alone, electronic commerce (e-commerce) was worth 17 billion Euro in 2002 and was expected to reach an estimated worth of 340 billion Euro by 2003. It should be noted that 57% of European citizens are still not connected to the online world, and hence the value of e-commerce is expected to rise considerably.⁴

The trend of online consumer driven business is growing continuously. Nearly all big retailers, including grocery stores, have an online presence and offer alternative means for trade.

Since disputes⁵ occur in the online market just as they do off-line, it is inevitable that as Internet commercial transactions increase, so will the number of disputes between consumers and retailers/dealers (hereinafter referred to as “professionals”).⁶

In particular, the European consumer has some significant opportunities in purchasing goods via the Internet, since a harmonized currency is utilized by many European nations and also free movement of goods and services within the European market is ensured by the Community law. Therefore, it is simple to order and purchase goods and services from another European Union (EU) member state.

¹ “Online” is a colloquial term that refers to communication through an electronic medium, in particular the Internet.

² Source: Forrester Research viewed in Pastor M, *E-commerce, mobile access drawing interest from net users* (2000), http://www.clickz.com/stats/big_picture/geographics/article.php/5911_494701, at 13 April 2004

³ European Commission, *Electronic commerce: Commission welcomes final adoption of legal framework Directive*, http://europa.eu.int/comm/internal_market/en/ecommerce/2k-442.htm, at 13 April 2004

⁴ Ibid; see also The European Research Group, *Eurobarometer: European Union Public Opinion on Issues Relating to Business to Consumer E-Commerce* (2004), http://europa.eu.int/comm/consumers/topics/btoc_ecomm.pdf, at 6 April 2004

⁵ Where a “claim” is the consumer expressing dissatisfaction with the goods/service received from the professional, a “dispute” involves the professional denying the “claim” of a consumer.

⁶ In 2000, the biggest online-auction provider had mediated 30,000 disputes between sellers and bidders through their service provider Squard Trade, see Yuan Y, Head M, Michael G, Du M, ‘The Effects of Multimedia Communication on Web-Based Negotiation’ (2003), 12 (2) *Group Decision and Negotiation*, 89-109,

1.2 Consumer Rights

The European regulation has further provided consumers with relevant laws, which protect them from certain deceptive and unfair behaviour perpetrated by professionals. The laws are designed to enable the consumers to derive the benefit from the European market as a whole. Some of these regulations, which are important in the context of Internet transactions, are:

- disclosure of a business's identity and location,
- fair terms and conditions and their adequate representation on the website,
- the power of revocation (after receiving goods, the consumer has a right to return them within 14 days to the professionals with no additional cost).

Although the consumer is powered with these rights, 25% of all consumers do not trust online transactions.⁷ They are also sceptical of the accuracy of information provided online.⁸ For that reason, it is vital to strengthen consumer confidence in order to boost the e-commerce sector and take advantage of the free European market.⁹

1.3 The nature of consumer disputes and litigation

The *Evaluation of the pilot project on use of the European consumer complaint form for consumer disputes*¹⁰ demonstrates, that the nature of consumer claims are of low value and do not include major damages or compensations. Notably (see figure 1), 54.1% of cases were concerned with the failure of professionals to perform their contractual obligations, such as unsatisfactory provision of services (20%) and late or

⁷ A research into Business to Consumer e-commerce in the EU was conducted in autumn 2003 and involved face-to-face interviews with 16.124 citizens of all EU Member States, for further information see: The European Research Group, Eurobarometer, *European Union Public Opinion on Issues Relating to Business to Consumer E-Commerce* (2004), http://europa.eu.int/comm/consumers/topics/btoc_ecomm.pdf, at 6, April 2004; the whole report can be viewed on http://europa.eu.int/comm/consumers/topics/facts_en.htm

⁸ One of the big concerns that small and mid-sized retailer face is the fact that it is difficult for consumers to estimate the credibility of the respective online-shop. In order to be successful in the market, the retailer needs to enhance the trust and confidence of the consumer in the online market, *ibid.*

⁹ *ibid.*

¹⁰ European Commission, *Evaluation of the pilot project on use of the European consumer complaint form for consumer disputes* (2000) http://europa.eu.int/comm/consumers/redress/compl/cons_compl/acce_just13_en.pdf, at 13 April 2004

non-delivery of products/provision of services (18%). Another area of claims is related to unilateral failure by the professionals to meet their obligations, such as unjustified billing prices 22.3%, and incorrect or inadequate information provision 14.2%.¹¹

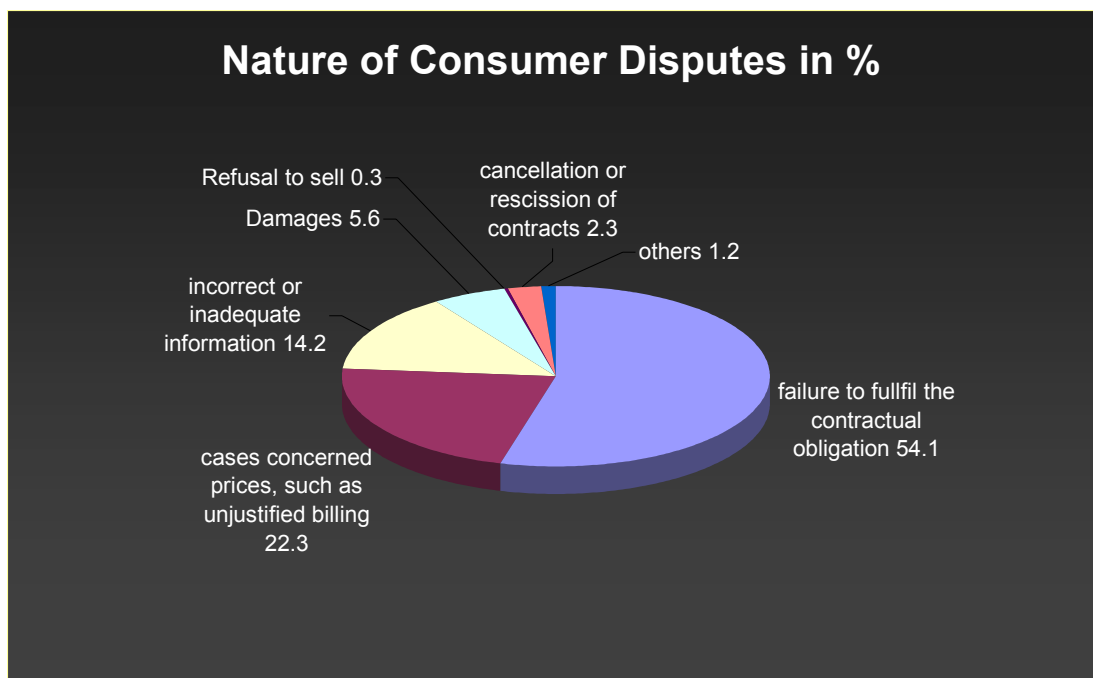


Figure 1. Source: Evaluation of the pilot project on use of the European consumer complaint form for consumer disputes (2000).

The opportunity to access shops online, at any time, from nearly any part of the world, makes it difficult to handle arising disputes between consumers and professionals. Professionals can be located some 1000 kilometres from the consumer, speak another language and have different cultural backgrounds. The diversity of cultures, differences in language and communication styles can create misunderstandings between parties, resulting in different expectations regarding quality of services and goods.

The **main obstacles** for the consumers to make use of their rights include:

1. That it is not evident for the consumer which body has the jurisdiction.

¹¹ Ibid.

2. The court fee.
3. The high cost of legal consultation and representation.
4. Long delays before a case is judged.
5. Psychological barriers while facing complex and formal court procedures.
6. Psychological barriers particularly in the case of cross-border disputes.
7. Language barriers in cross-border disputes.¹²

Since most of the purchased goods and services are of low value, the consumer's biggest concerns are the excessive length and cost of the legal procedure, which are out of proportion to the limited value of the case.¹³ Therefore, many consumers are discouraged to assert their rights, because litigation is inconvenient, complicated, costly and time consuming. Finally, most professionals require pre-payment before sending their goods or providing the services. Consequently, the "weak" consumer with less financial resources will be the party who will be the claimant.

However, rules and regulations are not sufficient for ensuring the consumer's rights and opportunities within the EU market. What is more important is the access to justice.¹⁴ Thus, exercising of consumer's rights must be provided and ensured by the EU and its member states.

1.4 The suggested alternative

A practical and efficient way for overcoming difficulties in resolving consumer disputes, and also acting as an important catalyst for consumer confidence in electronic commerce, could be the implementation of **alternative dispute resolution services**. The European Commission (EC) recommends and fosters the development of these procedures, such as mediation, conciliation or arbitration for business-to-consumer disputes.¹⁵ These types of services need to address the limitations of

¹² Information Sheet of the EU, *Out-of-court settlement of consumer disputes* (1998), <http://europa.eu.int/scadplus/leg/en/lvb/l32031.htm>, at 6 April 2004

¹³ Ibid.

¹⁴ European Union Booklet, *Consumers dispute Labyrinthian thread*, europa.eu.int/comm/consumers/redress/compl/cons_compl/acce_just05_en.pdf at 13 April 2004

¹⁵ European Commission, *Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/CE)*, http://europa.eu.int/comm/consumers/redress/out_of_court/commu/acce_just02_en.html, at 13 April 2004

litigation, therefore they must be convenient to handle, readily accessible, and cost and time efficient.

Ombudsmann.de is one of the service providers that is currently supported by the EC. This paper aims to analyse the dispute system of ombudsmann.de, as one of the first alternative online *consumer-to-business* dispute systems in Germany. The first section will describe the functioning of the system, followed by an examination considering the basic dispute system principles. A further study focuses on the EC recommendation for online dispute systems. Finally, recommendations are proposed for the improvement of the ombudsmann.de system.

2. Ombudsmann.de – Description of the System

Ombudsmann.de is a German alternative dispute service provider initiated by VERBRAUCHER INITIATIVE e.V., located in Berlin.¹⁶ The project is sponsored by the EC and the German Federal Ministry of Consumer Protection, Food and Agriculture. Ombudsmann.de is indirectly part of the European Extra-Judicial Network (EEJ-NET) that includes central contact points in each Member State. The central points can facilitate the consumer with relevant alternative dispute systems (ADS) in the country the professionals are associated with.

Ombudsmann.de is designed for minor-value-disputes and provides online-assistant negotiation and arbitration services. Consumer-to-consumer disputes are not covered by ombudsman.de.¹⁷ Ombudsmann.de commenced providing services in January 2004 and is currently limited to German consumers, and EU-member state professionals. The communication is limited to English and German, but ombudsmann.de aims to include more EU-languages.

The sources consulted to prepare section 2 include the ombudsmann.de website, and the author's personal correspondence with the director of the system.

¹⁶ see for further information www.verbraucher.org

¹⁷ Therefore, consumers of Internet-auction, such as ebay transactions, can only request the service of ombudsman.de when the seller is a professional. In fact, ombudsman.de is designed in a way that attracts consumers rather than professionals, although a request of a professional will be accepted.

In order to approach ombudsman.de as a consumer the basic rule is that a legal claim is not pending in the civil-court.

The consumer has to go through the following steps to present his/her case to ombudsmann.de:

2.1 Process

Firstly, the consumer must register with ombudsmann.de via the website. The consumer will then be provided with a personal access code and an explanation of the dispute system procedure. This code allows access to the “personal site” which offers several options, including the standardised complaint form designed by the EC. As this form explains in its headline, “it is intended to improve communication between consumers and professionals in order, as far as possible, to reach an amicable solution to the problems which they may encounter in their various transactions”.¹⁸ A step-by-step process for filling out the complaint form is provided by the system. Following this, ombudsmann.de reviews the facts and assesses its competency regarding the dispute. If the dispute does not involve German consumers and a EU professional, the dispute will be rejected.

Following the review, ombudsmann.de sets up an electronic file and informs the consumer about access to this file. Next, the neutral third party approaches the professional and invites him to take part in an alternative dispute process. When professionals repetitively refuse to participate in the present ADS, the company name is published by ombudsmann.de on a “black list”. Where professionals, either suggest a different ADS, or are willing to approach the dispute on the basis of unassisted negotiation¹⁹, or have reasonable arguments for refusal²⁰, ombudsmann.de does not regard the behaviour as a refusal. If the professional decides to participate, the actual alternative dispute processes begin. There are two stages:

1. Stage: The administrator, as an independent third party, tries to clarify the facts of the present case and to assist the parties to reach an agreement.

¹⁸ The form is available in all the official languages of the European Union www.europa.eu.int/comm/dg24, at 13 April 2004

¹⁹ The parties conferring with each other with a view to reach agreement, see: Henderson S, *The Dispute Resolution Manual* (1993), 30

²⁰ Such as consumer misuse of the system to submit a fraudulent claim.

However, if the situation requires “interfering assistance”, the administrator will provide the parties with recommendations and explanations. This situation occurs in particular when both parties are unfamiliar or unclear with the applicable rules and regulations.

If the parties cannot agree, they can proceed to the second stage.

2. Stage: ombudsmann.de offers a document-based arbitration, which will be terminated by a binding constituted *settlement proposal* or *decision*²¹. The parties will be informed about the grounds of the decision. The decision has the quality of a legal verdict according to §²² 1055 ZPO²³ and can be enforced by the respective party in the EU member states.²⁴ The arbitrator (hereinafter referred to as “administrator”) plays an active role, as he can submit a *settlement proposal* whenever the situation between the parties indicates that they could agree on a compromise. The settlement proposal may be voluntarily accepted by the parties. If they do so, the settlement agreement is binding.

However, if the parties do not agree to proceed with the second stage, ombudsmann.de will withdraw.

2.2 Time

The administrator makes an effort to find a settlement as soon as possible. After ombudsmann.de has received the complaint, the respective administrator will inform the other party within the next 48 hours. During the first and second stage the administrator will attempt to reach an agreement/decision within the first 14 days.

²¹ The terms *settlement proposal* and *decision* will be further discussed under Section 3.3.1

²² The symbol means “paragraph” and reflects the equivalent Australian legal term “section”

²³ ZPO is used generally as an abbreviation for “Zivil Prozessordnung”, which is the Civil Procedures Act of the German legal system.

²⁴ There is no right of appeal. However, the unsatisfied party can challenge the decision through an action for the annulment of the arbitral judgment submitted to the state court. The state court can challenge the judgment only from formal point of view.

2.3 Independence and Impartiality

Each dispute is directed by attorneys of law (equivalent to an Australian barrister or solicitor). They receive an inclusive fee for their services by ombudsmann.de. The agreement between ombudsmann.de and the attorney states that the attorney has to fulfil his service independently, without being bound to any directive or order, and has not consulted any party prior to the present function. The attorneys have to facilitate the respective process until its end. This should ensure the consistency and impartiality of the process. The parties have the possibility of identifying the attorney, as they sign the agreement or decision. However, this particular information is not described on the website at all and was received through the author's direct contact with ombudsmann.de.

2.4 Accessibility

Only the parties and the administrator have access to the electronic file through the personal access code. The access is secured by a 128 bit SSL (Secure Socket Layer) connection. The correspondence between the parties occurs mainly via the electronic delivery of documents and emails. As such, the electronic file includes all the information of the case. This ensures a complete review of the whole case by both parties. However, if ombudsmann.de requires a document that cannot be submitted via email, it is permissible to send it via fax. Ombudsmann.de informs the parties via email of any new documents received. After the completion of the service the file is saved for one year.

Greater access is provided for the attorney, the liable person for the project of VERBRAUCHER INITIATIVE e.V. and the employees of the software company Digramm, who store the electronic files.

2.5 Hearing and right to respond

The right of the parties to be heard by ombudsman.de and to respond or submit any counterstatement is guaranteed at any time during the dispute resolution process.

2.6 Confidentiality

The information provided by the parties and all the other information in the course of the case will be kept confidential by ombudsmann.de. Abiding to the data protection regulations, ombudsmann.de will review and analyse the results of the disputes. These regulations also ensure fair use of the data by all parties who have access, as they are obliged to treat the information as confidential. However, the notion of confidentiality is limited by the applicable law. The data has to be revealed to those state institutions such as courts, public prosecutors, and tax authorities, which have a legal right to request them. In addition, data will be revealed to the public prosecutor, if there is a strong suspicion for a committed crime.

Finally, as stated above, ombudsmann.de presents a public accessible “black list” of professionals who refused to participate in any ADS (see above, 2.1).

2.7 Right of Representation

The parties have the right to be presented by an attorney of law or any other person they wish to assign with the power of attorney. However, the process is designed in a way that the service of a legal representative is not necessary.

2.8 Costs

Since the service of ombudsmann.de is subsidised by the EC and the German Federal Ministry of Consumer Protection, Food and Agriculture, the service offered to the consumer and the professional is free of charge. The parties have only to cover their own costs.

2.9 Transparency

Before the consumers submit their dispute, ombudsmann.de informs them on its homepage about the conditions of access, the possible dispute processes (mediation/conciliation, and arbitration), the costs, the outcome as an agreement, decision or settlement, and recourses to the court.

3. Examination of the system

For purposes of the examination, the ombudsmann.de dispute system has been categorised, and the crucial standards and principles for dispute systems in general have been taken into account. In particular, the standards established by the EC are considered in Section 3.3. These are the *Commission recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/CE)*, and *recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC)*.

3.1 Categories of Dispute Resolution Procedures

According to the categories of dispute resolution procedures the designed dispute system by ombudsmann.de can be classified as a two step process focusing on either an “interest-based” or a “right-based” approach.

An **interest-based process** concentrates on the needs and interests of the parties and aims to produce a solution that satisfies both parties.²⁵ In the first stage ombudsmann.de makes use of a combination of mediation and conciliation, which are two forms of assisted negotiation. Although the terms mediation and conciliation are not precisely defined, it can be stated that in a mediation process an independent third party guides the parties towards an agreement or compromise.²⁶ The impartial party does not intervene, rather helps the disputants to communicate and reach their own solution.²⁷ The successful result can be designed as a contract and is enforceable in this capacity. Conciliation is observed as a more interfering process.²⁸ A conciliator will express their view, evaluate the case, and make recommendations or submit settlement solutions.²⁹ The proposals are non-binding. As in the first stage ombudsmann.de assists the parties to reach an agreement, or proposes solutions, or explanations and recommendations, this stage focus on an interest-based process.

²⁵ Fisher R and Ury W, *Getting to Yes: Negotiation an Agreement Without Giving In*, (2nd edition, 1991), 4

²⁶ Astor H and Christine M, *Dispute resolution in Australia* (2nd Edition 2002), 83-85

²⁷ Charlot R and Dewdney M, *The Mediator's Handbook: Skills and Strategies for Practitioners* (1997), 11

²⁸ Boulle L, *Mediation: Principles, Process, Practice* (1996), 220-221

²⁹ Ibid.

During the second stage of the present dispute system, ombudsmann.de makes use of a **right-based process**. This consists of an independent third party making a decision regarding the dispute, on the basis of legal rules, equity and codes of conduct. In the present system the dispute is directed by an attorney of law, who focuses on the facts of the case and the rights of the disputants. The settlement process ends with an enforceable binding decision which is equivalent to a court verdict. Since the statements, evidences and representations are purely submitted via the secure online server, such a process is known as “documents only” arbitration.³⁰

The fact that the arbitrator has the power to submit a settlement proposal does not turn this stage to a concilio-arbitrator process. A concilio-arbitration process requires that the concilio-arbitrator *initially* produces an opinion as a basis for settlement negotiation for the parties and if the parties fail to reach an agreement, a binding decision follows.³¹ It can also not be regarded as an advisory-arbitration model, in which a third party produces a non-binding decision to demonstrate how a case might be resolved in court.³² In the present dispute system the administrator is not acting as such. His preliminary function is to produce a decision, rather than an opinion or forecast. Ombudsmann.de understands the term *settlement proposal* as being a proposition of a possible agreement, whilst considering the underlining interest of the parties. Therefore, this additional option can be regarded as a *loop-back* feature to an interest-based process (see 3.2.3 for more details regarding loop-back). Thus, the second stage can be qualified as arbitration, with an incorporated loop-back element.

3.2 Dispute Systems Design Principles

The present system can be evaluated on recognized dispute systems design principles. The principles are not a necessity or binding, however, it is worth mentioning the relevant principles, which would be useful within the ombudsmann.de system.

³⁰ Clark B, ‘The new Kid in Town’ (2002), *New Law Journal*, 2; see also American Arbitration Association, *Resolution Processes*, <http://www.adr.org/index2.1.jsp?JSPssid=15781&JSPsrc=upload%5CLIVESITE%5CfocusArea%5CeCommerce%5CMy%20eCS%20Claims.htm>, at 13 April 2004

³¹ Astor H and Christine M, *Dispute resolution in Australia* (2nd Edition 2002), 93

³² Ury WL, Brett JM and Goldberg SB, ‘Designing Systems for Resolving Disputes in Organizations’ (1990), *American Psychologist*, 166

3.2.1 Accessibility and Low-Cost Dispute Resolution Procedures

A system should encourage low-cost dispute resolution procedures, which means primarily focusing on interest-based processes which is easily accessible by the relevant parties.³³ In an online dispute system such a process will allow the consumers to communicate their rights and more importantly their underlying concerns, without being restricted to the demands of evidence. As such, it offers greater comfort with, and control over the process of problem resolution.³⁴ In the present case, it is very simple for the consumers to make use of the service of ombudsmann.de, as they only need to register their names, telephone numbers and email addresses in order to receive the access codes to submit complaints. This convenient accessibility is enhanced by making use of the *European consumer complaint form*, which “has been designed with a view to guiding and orienting consumers wishing to formulate claims”³⁵. This makes it uncomplicated to articulate complaints fast and clearly. In addition, the third party facilitator assists with the communication and clarification of certain issues, facts and dispute reasoning where the *consumer complaint form* is insufficient. Since ombudsmann.de tries to end a dispute within the first 14 days after filing the claim, the present system is prompt and swift in its outcome. Finally, the service is free of charge so that the consumer has no cost barriers. Consequently, the consumers are equipped with the necessary resources to raise their claims and will be encouraged to make use of ombudsmann.de. However, it is essential that in the future this system develops its capacity to address disputes in languages other than German and English, as European consumer-to-business disputes can occur in any European language.

Since two persons are required “to tango”, it is inevitable to convince the professional to participate in the ADS. The fact that most professionals insist on pre-payment, makes it easy for them to ignore the claims of the consumer.³⁶ This issue needs to be tackled in a legally permissible way. An incentive is necessary to convince the more

³³ Ibid 168; Constantino C A, ‘Using Interest-Based Techniques to Design Conflict Management Systems’ (1996), 12, *Negotiation Journal*, 211

³⁴ Row M P, *Dispute Resolution in the Non-union Environment: An Evolution Toward Integrated System for Conflict Management?* (1996) in Gleason S, *Frontiers in Dispute Resolution in Labour Relations and Human Resources* (1997); Australian Consumer Affairs Division, The Treasury, *Dispute Resolution in Electronic Commerce* (2001), <http://www.ecommerce.treasury.gov.au/publications/DisputeResolutioninElectronicCommerceDiscussionPaper/dispute.pdf>, at 11, April 2004

³⁵ Information Sheet of the EU, *Out-of-court settlement of consumer disputes*, above n.10

³⁶ Ombudsmann.de, Homepage, www.ombudsmann.de, at 3 April, 2004

“powerful” professionals to take part in the interest-based process.³⁷ Ombudsmann.de has implemented such an incentive by making use of the “black list” policy. This motivates professionals to take the concerns of their consumers more seriously. The “black-list” policy encourages parties to avoid listing by choosing other means to resolve the dispute, such as to choose another alternative dispute service provider that offers an initial interest-based process. The opportunity of free choice reduces the chance that disputants are resistant to a dispute system process.³⁸ Moreover, the strategy of a “black list” will be quite effective, because a major issue for professionals is to convince the consumers about their trustworthiness. The main disadvantage of an online shop is the lack of a physical form, where the consumers cannot judge the service and goods according to what they perceive with their senses. The consumer has difficulties relating to the professional.³⁹ In the offline world it is easier to convince the customer. The possibility of assessing the product, to use and experience it in the shop, may convince the consumer about the quality and effectiveness of the product. Moreover, the well designed storefront or the apparent high volume of sales-transactions in the store, reveal some information about the financial situation and the general consumer satisfaction with the company. A personal face-to-face approach builds up a relationship between the consumer and the professional.⁴⁰ It may increase the consumer’s confidence as they feel they can pursue their rights and interests and resolve a problem instantly by visiting the store and talking to the manager. Therefore, the reputation of an online-shop is the crucial parameter, because it can promote trust and credibility and hence increase consumer transactions. However, although credibility can be enhanced and developed through advertisement and promotion campaigns, these means are very costly and are limited to the “big players” in the online-world. The average small and mid-sized company will only survive if its credibility is promoted from a satisfied customer base. The participation in an interest-based process signifies to the consumer that the professional is willing to listen to his/her concerns. This increases the consumer’s

³⁷ It is one of the most challenging aspects of alternative dispute design to motivate the potential disputant to make use of the interest-based approach as a first step, provided the facts of the case do not require a right-based approach, such as in relation to harassment or criminal behaviour, see also Ury WL, Brett JM and Goldberg SB, above n.27,168

³⁸ Cathy C A, ‘Using Interest-Based Techniques to Design Conflict Management Systems’ (1996) 12, *Negotiation Journal*, 209

³⁹ Katsh M, *Online Dispute Resolution: Resolving conflicts in Cyberspace*, (2000), 85

⁴⁰ Nadler J, ‘Electronically-Mediated Dispute Resolution and E-Commerce’ (2001), *Negotiation Journal*, 337-339

trust in the online-shop. Thus, the ombudsmann.de policy motivates professionals to try an alternative dispute process in order to avoid any negative publicity. Moreover, since, at least for the time being, the system is free of charge, there is no apparent risk for the parties. Thus, the parties are motivated to accept and make use of a readily accessible system with an interest-based approach in its first stage.

3.2.2 Time Limits

Another important principle is to set certain time limits for each process and the path for determining how each process leads to the next step.⁴¹ This helps to avoid later discussions about timing and delays and makes the resolution path more predictable to the involved parties. Ombudsmann.de has set these time limits for each stage by making the effort to reach an agreement within the first 14 days. The website describes the two stages and how each stage leads to the next. In doing so, ombudsmann.de has set time periods and clarified to the parties of what they should expect during the dispute resolution process. The time limits are also reasonable and adequate. The business transaction/communication between the consumer and the professional is usually stored on the server of the latter. This data and the information on the website, viewed by the consumer, will usually contain most parts of (if not all) the facts of the case, because online-shopping is generally executed and conveyed through online-communication means. After ombudsmann.de has received the stored information and some details of the consumer, the administrator will be provided with most of the relevant information of the case. The exchange of explanations and arguments will be therefore rare, so that the case can be reviewed and discussed in a short time period.

3.2.3 loop-forward and backward features

The possibility of a **loop-forward** feature allows the parties to move directly to a right-based procedure. The benefit of such a procedure is that some disputes are more appropriately treated within a right-based process.⁴² However, in ombudsmann.de ADS the disputes are generally low-value by nature and the facts are thin, and hence a right-based approach is not usually appropriate as a first step. Yet, within the

⁴¹ Cormick GW, 'Crafting the Language of Consensus' (1991), 7, *Negotiation Journal*, 367

⁴² Ury WL, Brett JM and Goldberg SB, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, Program on Negotiation, Harvard Law School Report (1993), 52

ombudsmann.de system, a loop-forward can be used if the professional refuses to participate in the first stage. However, time or resources are not wasted if the first stage is not successful. Ombudsmann.de aims to finish the first stage within a time period of 14 days, during which the facts and complaints are evaluated; hence this stage can be regarded as a pre-step for arbitration processes that may follow. It is highly unlikely that the professional will opt for arbitration as the first step as, although money and time will not be lost, the professional definitely risks gaining a reputation of not being consumer oriented/friendly (see 3.2.1; the importance of consumer service will be further discussed under section 4.3).

The function of a **loop-back** feature allows the parties to revert to interest-based procedures⁴³ and is implemented in the ombudsmann.de system. During the second stage of the system, the administrator has the power not only to make a binding decision, but also to submit a settlement proposal. This proposal can incorporate the underlining interests of the parties, therefore permitting creative and flexible solutions. This loop-back possibility is subject to the administrator, his experiences and sensitivity, and is regarded as an exception of the second stage. However, as an individual contact of the author with ombudsman.de revealed, within the second stage the ombudsmann.de system is flexible enough to recognize a party's settlement proposal, evaluate the proposition and, if reasonable, to communicate it to the other side. Since amicable dispute resolutions are potentially possible in online consumer disputes, it is preferable to achieve them, provided that the circumstances allow such an interest-based approach. The outcome will enhance trust and credibility between the consumer and the professional. It is more likely that the consumer will have an ongoing relationship with the shop, as he/she feels the professional is flexible and creative enough to solve a potential dispute.

⁴³ Ury WL, Brett JM and Goldberg SB, see above n.27, 166

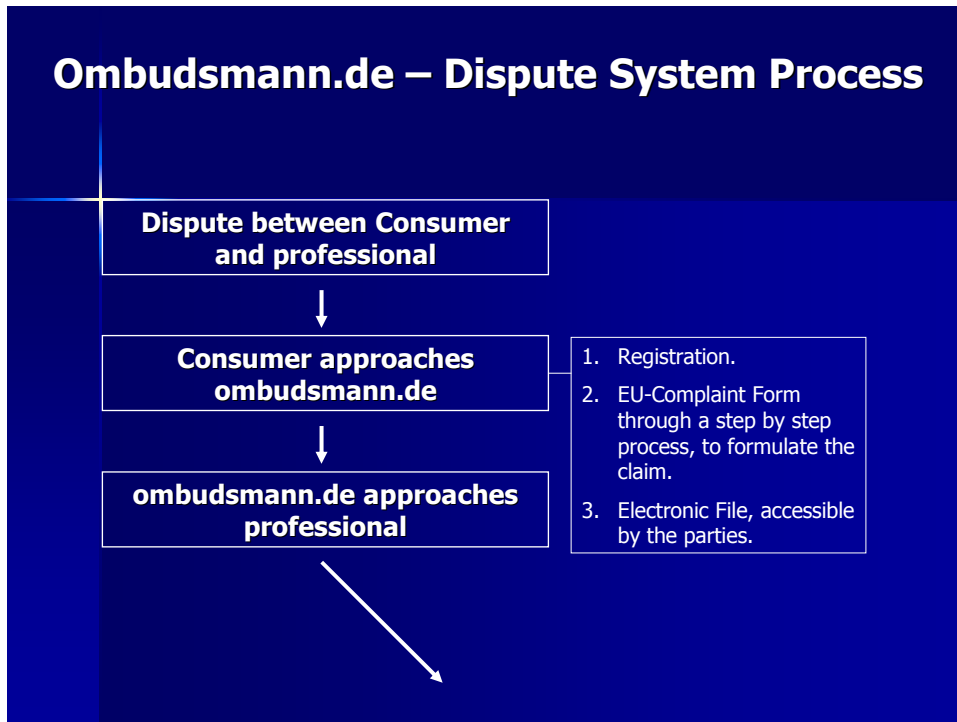


Figure 1: Approach and Registration phase

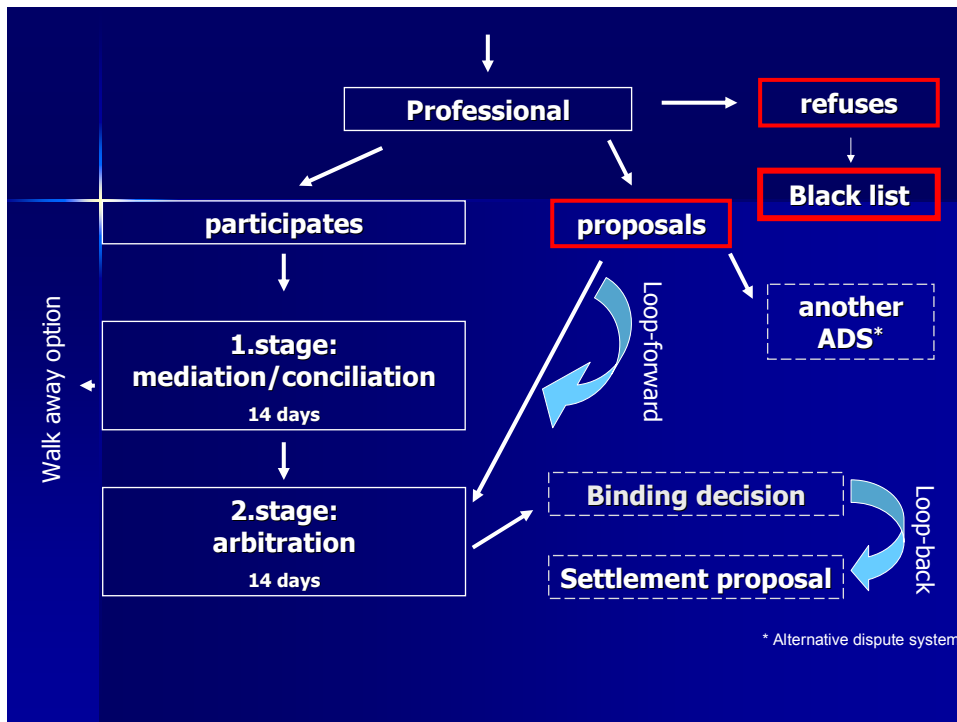


Figure 2: The alternative dispute processes

3.3 Further recommendations by the EC

It is worth mentioning additional principles recommended by the EC for ADS. However, these additional recommendations can also be found in the literature of scholars of dispute system designers⁴⁴, in the Australian Standard on Complaints Handling AS 4269-1995 and the *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*⁴⁵ by the Australian Minister for Customs and Consumer Affairs. As such, the recommendations are not something novel. The EC has, however, compiled the relevant principles in relation to the European market, which should be followed by ADS bodies in order to participate in the EEJ-Net. The recommendation can be summarised as the following further principles:

3.3.1 Transparency

The principle of transparency is to define and clarify the procedures and procedural rules.⁴⁶ The parties must understand what the meaning of certain *terminus technicus* are, and more importantly, how the system itself comprehends these terms. Furthermore, the *types of dispute* which may be referred to the body concerned, the *possible cost and time* of the procedure for the parties, *the rules* serving as a basis for the body's decisions, and finally, the *legal force of the decision* and its *grounds* must be communicated clearly to the potential party.⁴⁷ Under the “frequently answered questions” (FAQ), ombudsmann.de explains the concept of an ombudsman and the present dispute system. The website describes the types of dispute, the two step process of mediation/conciliation as an interest-based and the arbitration as the second stage. Additionally to this, all final decisions will state the grounds upon which they are based. The website also mentions the timetable for each process and that the service is free of charge for both parties. Therefore, the operation of the system and the *basic* procedural rules are transparent to the parties.

⁴⁴ Ury, Brett and Goldberg coined the phrase ‘dispute systems design’, see Ury WL, Brett JM and Goldberg SB, above n.27, 166; Important designer are, besides the above Constantino CA, Merchant CS, Rowe MP, Slaikeu KA and Hasson.

⁴⁵ Australian Minister for Customs and Consumer Affairs, ‘Benchmarks for Industry-Based Customer Dispute Resolution Schemes’ (1997), <http://www.selfregulation.gov.au/publications/benchmarksforindustry-basedcustomerdisputeresolutionschemes/index.asp>, at 13 April 2004

⁴⁶ European Commission, *Commission recommendation* (98/257/CE), above n. 13

⁴⁷ *EC Commission recommendation* (98/257/CE) and (2001/310/EC).

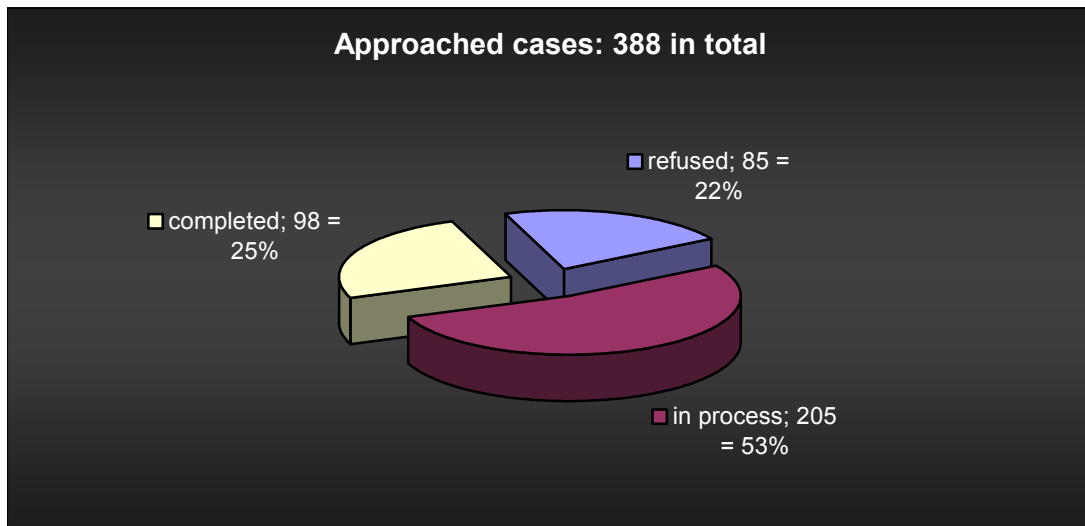


Figure 3. Source: www.ombudsmann.de

However, the evaluation of the project demonstrates that 22 % of the approached cases had been refused. The grounds for refusing these cases are based on the fact that for the time being the service is only accessible for consumer-to-business disputes, where the consumer resides in Germany. The restriction will be relaxed in future. The high number of refused cases indicates that ombudsmann.de can improve its communication to the public by clarifying their scope of service.

Furthermore, the website fails to explain clearly the substantial rules serving as a basis for the processes. In particular, it is not mentioned that the legal and procedural rules of the German arbitration law governs the second stage.⁴⁸

The meaning of “settlement proposals” and “decision”, which occur during the second stage, are not clarified on the websites. The phrase “settlement proposals” indicates that it may be a non-binding suggestion, whereas the word “decision” could be regarded as binding or not-binding. It is also not mentioned on the websites, under which circumstances “settlement proposals” or “decisions” terminate the dispute.

However, a request by the author revealed that ombudsmann.de will generally end the dispute in the second stage by a *binding decision*, which is enforceable like a verdict of a judge according to §⁴⁹1055 ZPO⁵⁰. Regarding the phrase “settlement proposal”

⁴⁸ The arbitration law is incorporated in the Civil Procedures Act of the German legal system

⁴⁹ this symbol reflects the equivalent Australian legal term “section”

⁵⁰ ZPO is a used generally as an abbreviation for “Zivil Prozessordnung”, which is the Civil Procedures Act of the German legal system.

the request revealed that it is merely a suggestion as long as the parties do not agree to it. If they do so, the settlement becomes binding.

Finally, it remains unclear to the parties, whether they can “walk away” any time during the dispute procedure and make use of the right to submit the dispute to a court. It may occur to the parties that the basic rule, not having a legal claim submitted at a court, remains valid. According to the applicable law of the ZPO, §1032 states that the filing of an action which is subject-matter to an agreed arbitration process, shall be rejected by the court. Thus, if the parties did agree to resolve the dispute through arbitration they cannot approach the civil court anymore. Such an agreement between a professional and a consumer must be in writing, where an electronic agreement is regarded as sufficient according to §1031 ZPO, §126a BGB⁵¹. This concept is not revealed on the website of ombudsmann.de. The parties will be unaware of their rights and options, when entering the arbitration process. Therefore, the essential procedural rule during the second stage, the limitation of the “walk away” option, and the quality of the final decision as a court title-equivalent remains unknown to the parties.

3.3.2 Independence and impartiality

The ADS service provider and the administrator must be impartial in order to safeguard that the decisions are recognized as being independently derived.⁵² This will help the disputants have confidence in the fairness of the process.

The administrators should provide information about their qualification and competence, particularly in the field of law required to carry out this function.⁵³ They should indicate their independency, such as not having a conflict of interest. The administrator should be *properly identified* to allow evaluation of their independence and integrity. The consumer and provider should have an equal voice in the selection of neutrals in connection with a specific dispute.⁵⁴ Another possibility is that the

⁵¹ BGB is used generally as an abbreviation for “Bürgerliches Gesetzbuch”, which is the Civil Rights Act of the German legal system. Lack of this formal requirement can be “healed” if the parties become involved in the arbitration process.

⁵² European Commission, *Commission recommendation (98/257/CE)*, above n.13; European Commission, *recommendation (2001/310/EC)*, http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just12_en.pdf, at 13 April 2004

⁵³ *ibid.*

⁵⁴ suggested principle No. 3 by the American Arbitration Association, *Due Process Protocol for Mediation and Arbitration of Consumer Disputes*, 1998

selection of the administrator could be made in a random fashion, so that no party has control over the selection process.⁵⁵

The Ombudsmann.de website does not provide information about the professional background of the administrators and their relationship to ombudsmann.de. It also fails to give details on how the administrators are selected. However, after a request by the author, the director of the ombudsman.de explained that the administrators are in fact attorneys of laws and have an agreement with ombudsmann.de, stating that they have to fulfil their services independently and without being bound to any directive or order. Another requirement is that they did not work for any party prior to the present function to avoid any conflict of interest. The attorneys of laws have to facilitate the respective process until the end. This ensures the independence of their action and the stability of the dispute resolution process. Their professional education as experienced lawyers is sufficient enough to regard them as a competent body to facilitate disputes between consumers and professionals.⁵⁶ Finally, the respective attorney will sign the outcome of the agreement. As such, the identity of the administrator is later transparent to the parties. Yet, the information that indicates their selection, independency, identity and profession is not exposed in the beginning of the process.

On the other hand, ombudsmann.de, as the institutional body, does fulfil the requirements of being independent and impartial. The system is merely funded by the Federal Ministry of Consumer Protection, Food and Agriculture and the EC and therefore not controlled through a biased third party. Furthermore, ombudsman.de ensures its independency by setting the above mentioned criteria in their system.

Although ombudsmann.de has incorporated the respective principles and criteria for being impartial, it fails to reveal them to the public. As such, ombudsmann.de has to increase the level of transparency in this matter. Finally, the selection of the administrator must be clarified.

⁵⁵ European Commission, *Commission recommendation* (98/257/CE) and (2001/310/EC), above n.13 and n.47

⁵⁶ Although it could be an asset if they attorney have some experiences in interest-based conflict resolution

3.3.3 Effectiveness

To be effective requires, according to the EC recommendation, that the dispute system is quick in its outcome, does not need legal representatives and that the service is free of charge/reasonable in its costs.⁵⁷

Ombudsmann.de does fulfil this principle, as it sets reasonable time limits of 14 days on each stage. In addition, the present system provides the parties with the EC complaint form, which makes it easy to communicate the complaint and the facts of the dispute. The administrator assists the parties to enhance the understanding of legal issues and the relevant facts of the case. Finally, the service is free of charge for the time being. The following evaluation of ombudsman underlines the effectiveness of the system:

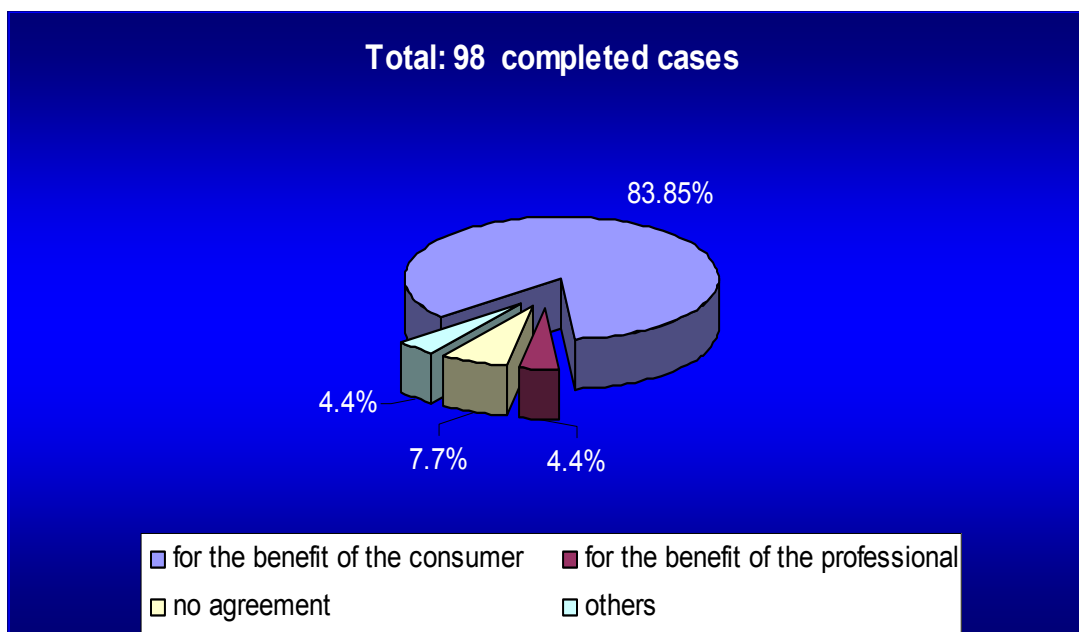


Figure 5. Source: www.ombudsmann.de

As demonstrated, approximately 88% of the accepted disputes are resolved. A significant fact, unfortunately not reflected in the diagram as it is not available on the website, is that *none* of the resolved cases were terminated by a binding decision (!).⁵⁸ This indicates that the authority and the conduct during the interest-based stage, applied by the administrator is very effective.

⁵⁷ European Commission, *Commission recommendation* (2001/310/EC), above n.13; see also Australian Standard on Complaints Handling AS 4269-1995, Section 3.7 and 3.8

⁵⁸ An individual request by the author revealed certain facts that are not displayed on the website of www.ombudsmann.de.

Furthermore, the director of ombudsmann.de revealed that most of the consumers approached the service after they unsuccessfully contacted the professional. As most of the solutions ended for the benefit of the consumers (83.85 %) it seems, once the professionals accept the alternative dispute process, they are consumer friendly/service oriented or they may recognize their (unfair) behaviour when illustrated by an independent third party.⁵⁹ Therefore, ombudsmann.de appears to offer a very effective first step process.

3.3.4 Enforceability

Another issue is the challenge of enforceability of the outcome of the resolution process. Even if the parties come to an agreement during the first stage, the consumer may fear that the professional will not execute it, since the outcome is not binding. This may be regarded as an obstacle to approaching ombudsmann.de any other ADS.⁶⁰ However, ombudsmann.de designs the agreement as a contract, so that the respective party could seek a court to institute legal proceedings based on a breach of contract. Since the decision of the second stage is binding and regarded as a court-verdict, it can be directly enforced in all other member States under the Brussels Convention.⁶¹ In the case of a contractual agreement the dilemma of the disadvantages of litigation arises once again, such as legal representation and consultation costs. Ombudsmann.de will make use of the “black list” also regarding professionals who do not fulfil the agreement.⁶² As such, the system designed an incentive for the professional to put the agreement into practice. In addition, ombudsmann.de offers a service to assist the parties with the implementation of the agreement. Nevertheless, the issue of enforceability or compliance with the term of the settlement can be further improved, and is therefore addressed in the recommendation of this research paper.

⁵⁹ The main advantage of the interest-based approach in contrast to the right based, is that it increases mutual understanding and benefits the relationship of the parties, see for further details Ury WL, Brett JM and Goldberg SB, above n.27, 165-166

⁶⁰ As this problem is based on the nature of the outcome of non-binding agreements, the challenge is universal and as such also incorporated in other alternative dispute systems.

⁶¹ The court process with its evidence procedures can be circumvented, since the party can directly authorize the executor to take the respective action.

⁶² However, the publication of a black list should not be designed in a way that it indicates a boycott or another act of unfair competition. As such, the list must be presented on a fact based and neutral way.

3.3.5 Fairness and Liberty

A further principle includes the right to bring an action before the court and consequently to refuse to participate in the process anytime.⁶³ Furthermore, the parties shall have the right to be heard⁶⁴, to respond to each other, and be represented.⁶⁵

Regarding accessibility of the court system, this is in fact incorporated in most jurisdictions, but more important in Article 6 of the European Human Rights Convention (EHRC). The EC recommendation (98/257/CE) underlines this issue by stating that the “use of the out-of-court alternative may not deprive consumers of their right to bring the matter before the courts, *unless* they expressly agree to do so, in full awareness of the facts and only *after* the dispute has materialised”. The same applies for a binding decision. If a decision is binding, the court cannot be sought by the parties and thus Article 6 EHRC is circumvented. The present system allows the disputant to leave the ADS process during the first stage. However, as mentioned above (see Transparency 3.3.1), ombudsmann.de fails to explain that by entering the arbitration process (the second stage), the parties have agreed that they will not approach the civil court (§ 1032 ZPO: the filing of an action which is subject-matter to an agreed arbitration process, shall be rejected by the court). Furthermore, the quality of the arbitration decision, as having the quality of a court verdict, is not explained. Thus, it can not be stated that the consumer expressly agreed “in full awareness of the facts” and the consequences of his/her decision. The principle of fairness and liberty is therefore not optimised and needs to be improved.

Regarding the right to be heard and to be represented, ombudsmann.de permits the parties to submit any information to the administrator anytime they wish and to make use of third party representation. Additionally, the parties will be informed when the electronic file is provided with new information. Thus, the parties are always up to date and are able to decide whether they want to reply or wait for a proposal/decision.

⁶³ Also known as the “walk way” feature; European Commission, *Commission recommendation* (98/257/CE), above n. 47

⁶⁴ European Commission, *recommendation* (98/257/CE), above n.47; see also the Australian Standard on Complaints Handling AS 4269-1995, Section 3.2; Australian Minister for Customs and Consumer Affairs, ‘Benchmarks for Industry-Based Customer Dispute Resolution Schemes’, above n. 40

⁶⁵ This principle includes at the same time the important feature of “listing”. It ensures that the disputants feel that they are acknowledged with their wants and needs, see for further details Row M P, above n.29, 9-10; Ury WL, Brett JM and Goldberg SB, above n.27, 163;

3.3.6 Publicity and Confidentiality

The principle of publicity and confidentiality is an important factor for a functioning ADS, since confidentiality secures privacy of the disputants, and publicity the transparency of the dispute system provider. According the EC recommendation the dispute system should make public the decisions through an annual report. The results should be an open source to assess the results obtained and the nature of the disputes.⁶⁶

As to privacy, ombudsmann.de explains on its website that the communication between the parties, in particular the electronic file, is kept confidential and guaranteed within the limits of the applicable law. Hence, the public prosecutor and authorities have the right to access the filed information by law. Ombudsmann.de will present any criminal or suspicious cases directly to the public prosecutor. This policy is in accordance with the German constitution, because it ensures that criminal investigation is not delayed and that the public is protected against criminal behaviour.⁶⁷ The parties details of business matters or privacy is therefore adequately protected. The access to the file is secured by a 128 bit SSL⁶⁸ (Secure Socket Layer) connection, which is an industry-standard method for protecting web communications.⁶⁹ This ensures authorized access to the electronic file, and minimizes the chance of fraudulent use of the service.

Ombudsmann.de does not provide the public with sufficient information regarding the cases. Only the numbers of cases and their outcomes (agreed/non-agreed solutions etc.) are mentioned on the website, however, the EC recommendation requires the publication of further information, namely the types of complaints and the time taken to resolve them.⁷⁰

⁶⁶ European Commission, *recommendation* (98/257/CE), above n.47; see also the Australian Standard on Complaints Handling AS 4269-1995, Section 3.12

⁶⁷ A similar policy is also reflected under Section 5 of the Australian Standard on Complaints Handling AS 4269-1995

⁶⁸ SSL works by using a private key to encrypt data that's transferred over the SSL connection. SSL creates a secure connection between a client and a server, over which any amount of data can be sent securely

⁶⁹ Netscape, *Secure Sockets Layer*, <http://wp.netscape.com/security/techbriefs/ssl.html>, at 6 April 2004

⁷⁰ European Commission, *recommendation* (98/257/CE), above n.47; another issue is, that the public will not have insight in the concrete dispute. This could be desirable, for example in the case of negligence by the professional or a product defect which may affect a large number of other people. Thus, there might be cases where the public interest is more important than the interest of the individual professional in selling goods, while the circumstances do not justify that ombudsmann.de reveals it to the public prosecutor. As a result, an amicable agreement between the consumer and the professional could be regarded as positive in the outcome for the individual consumer, but harmful to the public. There is another important issue, which may affect the near future. If ombudsmann.de's

Furthermore, since the decisions are not published, the experienced ombudsmann.de-system-user will have an advantage against the one-shot user. The advantage rests on the fact that he/she knows how their former cases were resolved and what the arguments were (the digital files make it easy to track each case and to review the reasons for each solution). The experienced party will be the professional, because he generates more contracts than the consumer and consequently more potential disputes. Therefore, the consumer will face an unbalanced state of affairs, in particular regarding the arbitration process, where rights prevail and the same facts usually result in a similar outcome. Consequently, this issue needs to be compensated for and challenged by ombudsmann.de and is addressed in the recommendation section.

alternative system becomes a famous and attractive way of resolving consumer disputes, most of the disputes will be solved out of court and therefore under the curtain of privacy and confidentiality. This will decrease court decisions in the field of consumer-to-business disputes and consequently the use of the new designed EU-Regulations and National Statues. The application of laws and regulations through courts, similar to the common-law system, is a fundamental part of the process that helps to shape and to define provisions. In civil-law systems the interpretation of the law (that means for example, to define the scope of the word “consumer”) is mainly formed by scholars and more important by the court. Similar to the common-law system, the lower court will follow the decision and interpretation of the respective regulation of the higher court, although it is not obliged by law. Since these two problems cannot be solve by a single service provider and is beyond the scope of this report, the issue is not further discussed in the recommendation section.

4. Recommendation for improvement

As a result of the above examination, the dispute system should address some improvement in the field of independency, impartiality and transparency, publicity and confidentiality, and enforceability. Since the funding of the system is only secured for the time being, possibilities of cost cutting and future financial support are also considered:

4.1 Independence, Impartiality and Transparency

As examined above, ombudsmann.de does not explain thoroughly the terms (“settlement proposals” and “decision”), and consequences of the respective outcome. It fails to clarify the rules serving as a basis and in particular the quality of the arbitration decision. Above all, consumers expect to find accurate but brief content on a website.⁷¹ Therefore, it is recommended to provide the website with a clear and brief explanation of the consequence of the second stage regarding the binding decision and the loss of the “walk away” option. In addition, a graphical overview of the whole ADS may be an asset and would make it much more convenient to study the procedures of the system. Ombudsmann.de could provide the consumer with information about possible reactions in the case the professional does not fulfil the agreed outcome or decision.

Furthermore, the independence of the administrator, its selection process and the contractual agreement is not revealed to the public, although ombudsmann.de has implemented most of the respective criteria in its system. Ombudsmann.de needs to disclose these criteria, the principles of the contractual agreement and the identity of the administrator prior to the resolution process, so that the parties can assess the level of independency and impartiality. To enhance transparency, ombudsmann.de could provide short biographies of the staff and board members.⁷² Regarding the selection of the administrator, ombudsmann.de should design a concept that allows the parties to have an equal voice in the choice of the administrator or that the selection is founded on a random basis.

⁷¹ Forrester Research, *Web Content That Sells* (2004), <http://www.forrester.com/Research/Document/Excerpt/0,7211,33749,00.html>, at 13 April 2004

⁷² Two online dispute systems have implemented this feature: ‘Online Resolution’ and ‘WebMediate’

4.2 Fairness and Liberty

As the consumer is not completely aware of the “walk away” option and the opportunity to seek the court, the liberty of the consumer becomes compromised. Therefore, the website should include in clear and simple language the legal impact and background for the second stage, so that the consumer is able to perceive the scope of his action by entering the arbitration process. However, the “walk away” option can be further improved by tackling the arbitration rules. As arbitration proceedings are flexible, ombudsmann.de can alter the general provision that regulates the termination of the process. Ombudsmann.de may design a clause that allows the consumer to stop the process anytime, thus providing the consumer with greater control over the process. As such, the use of arbitration will not deprive the consumers of their right to bring the matter before the courts. Only the binding decision will do so. As the consumers are free to leave arbitration at any time, it will motivate them to try the new implemented ADS, with which they are not familiar. However, this is a mere psychological tool, as consumers are mainly the claimants and hence their interest lies in finding a satisfying solution, therefore they are unlikely to “walk away”. Simultaneously, the credibility of the professional is enhanced, as the professional, who participates under conditions of the above mentioned clause, confirms serious commitment to dispute resolution.

4.3 Publicity and Confidentiality

Ombudsmann.de must provide the public with more detailed information about the complete cases. In particular, besides numbers of cases and their outcome, the time required for the resolution process and type of cases must be mentioned in order to have sufficient parameters to evaluate the system as a consumer. In addition, ombudsmann.de could exploit the function of the electronic file. The file makes it very comfortable to review cases and how the respective outcomes developed. As such, ombudsmann.de could summarize the essence and outcome of a case in a brief summary, comparable with the notion to extract the *ratio decidendi* of a case. As they do not reveal names, or other private and confidential information, the principle of confidentiality is not violated. Such *case surveys* exist in civil law countries regarding court verdicts. An equivalent type could be designed by ombudsmann.de, so that the individual consumers may find, for example through a particular search engine, a

claim similar to theirs. This would allow them to evaluate their disputes and the understanding of their case. In particular, in the line of arbitration decisions, which are right-based, the case survey is very useful, since the same facts will very likely result in a similar outcome. ICANN⁷³, an institution that manages domain names, is doing so in the context of disputes, arising from registered domain names.⁷⁴ In addition, a *case survey* feature could help to balance the above mentioned advantage of an experienced ombudsmann.de-system-user, who knows how similar cases were resolved. Thus, the parties would have the chance to dispute with equal “weapons”.

4.4 Enforceability, Liberty and Cost

For the time being ombudsmann.de is subsidised, but the system needs to be funded in the near future by other means. Thus, it is worthwhile to seek possibilities of a funding policy or ways to be more cost-effective.

A proposal to secure the funding of ombudsmann.de is the design of a membership model that allows receiving fees from professionals. As such, the fees could cover the costs of a dispute process, so that the use of the service will be still free for the consumer. Since the main disadvantage that pure online-shops face is that the consumer cannot assess the trustworthiness of the online-shop, the professional has an interest in finding ways that compensate this deficiency.⁷⁵ Interpersonal communication and face-to-face-dialog usually help to build rapport and may result in increased confidence and trust. These trust-cues do not exist in the online world. Therefore, the professional is happy to make use of facilities that assist in improving the trust of potential consumers in online transactions. The membership model would convey to consumers, the willingness of the member to listen to complaints, and readiness to participate in alternative dispute processes. Thus, the consumer gains confidence in buying goods from such a member.

⁷³ The Internet Corporation for Assigned Names and Numbers (ICANN) is responsible for managing and coordinating the Domain Name System (DNS) to ensure that every address is unique and that all users of the Internet can find all valid addresses. It does this by overseeing the distribution of unique IP addresses and domain names. It also ensures that each domain name maps to the correct IP address, see further details www.icann.org, last visited 6, April 2004

⁷⁴ All (non-binding) decisions by the Uniform Name Dispute Resolution Procedure are presented on the ICANN's website

⁷⁵ Nadler J, *Electronically-Mediated Dispute Resolution and E-Commerce*, Negotiation Journal, 2001, p. 334

The credibility of the membership model can be further enhanced by fashioning a code of conduct⁷⁶ that is imposed on their members. The code should incorporate certain guarantees and good practice guidelines, such as following an agreement within a certain time period.⁷⁷ In doing so, a further need for improvement is addressed, namely the issue of *creating an incentive* that motivates the professional to pursue non-binding outcomes. The membership model, combined with the code of conduct and the “black list”, puts pressure on the professional to co-operate in any dispute resolution procedure and to comply with its outcome.

On the other hand, the professionals gain a lot of valuable assets. As stated above most of the “trouble makers” are small and midsize online shops, which do not have a powerful branding and reputation in the off-line world. The membership model enhances their customer service, because the professional makes use of a (future) multilingual system that addresses the claims of EU-Consumers, whilst also opening the door to a larger consumer pool. Ninety percent of online consumers consider good customer service to be critical, when choosing an online-shop.⁷⁸ Good service increases consumer total satisfaction, which encourages repeat visits and word-of-mouth recommendations.⁷⁹ Small and midsize online shops are not financially able to finance their own in-house-complaint-handling-scheme. Therefore, the suggested membership model will be regarded as very attractive tool to build up consumer confidence.

However, the question of independency will arise, if the system provider is funded purely by professionals. This issue can be addressed, if ombudsmann.de includes a *balanced* stakeholder representation in its governing body and releases case results, as the suggested *case surveys*, to the public. It will allow assessing of the recorded cases and sustaining (if not increasing) the transparency of the system.

An instrument to cut the costs of the dispute system will be the implementation of a **blind-bidding**.⁸⁰ This process does not involve the service of a third human party and

⁷⁶ A code of conduct is not legally binding but, in some legal environments, the non-compliance with voluntary codes of conduct may also give rise to legal remedies available to an injured party.

⁷⁷ similar to trusted shop.de, which is not a dispute system but a institution that guarantees moe

⁷⁸ Forrester Research, 2000, viewed in *Future of E-Commerce May Rest on Customer Service*, http://www.clickz.com/stats/markets/retailing/article.php/6061_274891 at 13 April 2003

⁷⁹ *ibid.*

⁸⁰ cybersettle (www.cybersettle.com), settleonline (www.settleonline.com) and clicknsettle (www.clicknsettle.com) offer such a service on their websites, last visited 30, March 2004

is therefore very cost-effective. The disputants have to submit their proposals to a computer. The proposal is concealed to the other party. The computer software keeps the offers confidential and calculates the range of the proposals. If the proposals are within a certain range (for example, $\pm 30\%$) a settlement is automatically reached and indicated by the software.

Blind-bidding is cost-saving, fast and convenient to handle. As such, it addresses the requirements for effective online consumer dispute resolutions. On the other hand, it is limited to very specific disputes where the parties have agreed that some payment has to be made. Therefore, it is restricted to a very specific area of consumer disputes. However, based on the evaluation report of the EC demonstrating that unjustified billing and prices make 22.3% of the consumer claims, it is a significant quantity of disputes, which could be potentially managed through the blind-bidding system and consequently reduce costs.⁸¹

⁸¹ Since the author is not familiar with the submitted types of disputes by ombudsmann.de it is not possible to give precise numbers of potential disputes and the valuable use of the proposed blind bidding system.

5. Conclusion

The examination of the present system demonstrated that ombudsmann.de is a functioning alternative resolution system for low-value disputes, which needs to improve and follow more closely certain dispute system design principles, especially the aspect of transparency.

The accessibility of ombudsmann.de is simple, as it takes the advantage of the standardised complaint form, designed by the EU-Commission. Furthermore, the system is offered at no cost to the participants and allows dispute resolution in a time effective manner. As consumer-to-business disputes occur in languages other than German or English, it is important that ombudsmann.de develops its capacity to be available in other European languages in order to adapt to the cultural needs in the market.

Regarding the principle of transparency, independence and impartiality the system needs to disclose the rules serving as a basis for the processes, and facts about the independency and identity of the administrators. It would be useful to include a graphical display of the system on the website, to make biographies of the administrators available, and the board-structure known to the public.

The question of compliance and enforcement is addressed by ombudsmann.de, as it incorporates an incentive for compliance by making use of the “black list”. Regarding fairness and liberty, ombudsmann.de has its limitations in the “walk away” option, since with entering the arbitration process the option is lost. However, the arbitration rules can be altered and the “walk away” option could be included for the benefit of the consumer. This would strengthen the trust of the consumer in approaching ombudsman.de’s system and the credibility of the professional, who takes part in such an alternative resolution process.

Privacy and confidentiality of the dispute is ensured by ombudsmann.de, because the access to the electronic file is limited to the administrator and the disputants through a SSL 128 bit system. The main issue that may arise from a strong confidentiality policy is that the experienced professional has a knowledge-advantage over the consumer, due to familiarity with similar claims. This imbalance can be compensated for, if survey-case-summaries are drafted, while respecting the privacy of the disputants. This will help the consumers evaluate their disputes and the increase

understanding of their case, especially regarding the fact and right oriented arbitration decisions.

A membership model could boost ombudsmann.de to a powerful system. It could address the challenge of future funding by collecting fees from professionals, enhance the quality of enforceability by incorporating a code of conduct that guarantees the compliance of the agreements, and increase the credibility of the professionals.

If ombudsmann.de is able to promote their system to the consumer, build up a reputation and incorporate the membership model, whilst enhancing the language capability, it may develop to one of the leading alternative dispute resolution systems in the field of consumer-to-business e-disputes in Germany. Such a model will attract consumers to make use of their rights more effectively. On the other hand, the professional profits from participating in a powerful system that promotes their credibility and helps them gain new customers.

Bibliography

Journals

Cathy C A, 'Using Interest-Based Techniques to Design Conflict Management Systems' (1996) 12, *Negotiation Journal*, 209

Clark B, 'The new Kid in Town' (2002), *New Law Journal*

Constantino C A, 'Using Interest-Based Techniques to Design Conflict Management Systems' (1996), 12, *Negotiation Journal*

Cormick GW, 'Crafting the Language of Consensus' (1991), 7, *Negotiation Journal*, 367

Nadler J, 'Electronically-Mediated Dispute Resolution and E-Commerce' (2001), 10, *Negotiation Journal*

Row M P, *Dispute Resolution in the Non-union Environment: An Evolution Toward Integrated System for Conflict Management?* (1996) in Gleason S, *Frontiers in Dispute Resolution in Labour Relations and Human Resources* (1997)

Ury WL, Brett JM and Goldberg SB, 'Designing Systems for Resolving Disputes in Organizations' (1990), *American Psychologist*

Yuan Y, Head M, Michael G, Du M, 'The Effects of Multimedia Communication on Web-Based Negotiation' (2003), 12 (7), *Group Decision and Negotiation*,

Web Sources

American Arbitration Association, *Due Process Protocol for Mediation and Arbitration of Consumer Disputes* (1998), <http://www.adr.org/index2.1.jsp>, at 20 March 2004

American Arbitration Association, *Resolution Processes*,
<http://www.adr.org/index2.1.jsp?JSPssid=15781&JSPsrc=upload%5CLIVESITE%5CfocusArea%5CeCommerce%5CMy%20eCS%20Claims.htm>, at 13 April 2004

Australian Consumer Affairs Division, The Treasury, *Dispute Resolution in Electronic Commerce* (2001),
<http://www.ecommerce.treasury.gov.au/publications/DisputeResolutioninElectronicCommerceDiscussionPaper/dispute.pdf>, at 11, April 2004

Australian Minister for Customs and Consumer Affairs, 'Benchmarks for Industry-Based Customer Dispute Resolution Schemes' (1997),
<http://www.selfregulation.gov.au/publications/benchmarksforindustry-basedcustomerdisputeresolutionschemes/index.asp>, at 13 April 2004

Australian Standard on Complaints Handling AS 4269-1995,
<http://www.dpc.wa.gov.au/psmd/pubs/psrd/complaintguide.pdf>, at 13 April 2004

European Commission, recommendation (2001/310/EC),
http://europa.eu.int/comm/consumers/policy/developments/acce_just/acce_just12_en.pdf, at 13 April 2004

European Commission, *Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/CE)*,
http://europa.eu.int/comm/consumers/redress/out_of_court/commu/acce_just02_en.html, at 13 April 2004

European Commission, *Evaluation of the pilot project on use of the European consumer complaint form for consumer disputes* (2000),
http://europa.eu.int/comm/consumers/redress/compl/cons_compl/acce_just13_en.pdf, at 13 April 2004

Forrester Research, *Web Content That Sells* (2004),
<http://www.forrester.com/Research/Document/Excerpt/0,7211,33749,00.html>, at 13 April 2004

Forrester Research, viewed in *Future of E-Commerce May Rest on Customer Service* (2000), http://www.clickz.com/stats/markets/retailing/article.php/6061_274891, at 13 April 2003

Forrester Research, viewed in Pastor M, *E-commerce, mobile access drawing interest from net users* (2000), http://www.clickz.com/stats/big_picture/geographics/article.php/5911_494701, at 13 April 2004

Gangoly J H, *Außergerichtliche Streitschlichtung in B2C-Konflikten im E-Commerce*, available on the website <http://www.rechtsprobleme.at/doks/streitschlichtung-gangoly.html>, at 20t March 2004

Netscape, *Secure Sockets Layer*, <http://wp.netscape.com/security/techbriefs/ssl.html>, at 6 April 2004

Ombudsmann.de, Homepage, <http://www.ombudsmann.de>, at 3 April, 2004

Schultz T, Kaufmann-Kohler G, Langer D, Bonnet V, *Online Dispute Resolution: The State of the Art and the Issues* (2001), <http://www.online-adr.org/reports/TheBlueBook-2001.pdf>, at 13 April 2004

The Internet Corporation for Assigned Names and Numbers (ICANN), www.icann.org, at 13 April 2004

The European Research Group, *Eurobarometer: European Union Public Opinion on Issues Relating to Business to Consumer E-Commerce* (2004), http://europa.eu.int/comm/consumers/topics/btoc_ecomm.pdf, at 6 April 2004

Vahrenwald A, *Out-of-court dispute settlement systems for e-commerce. Report on legal issues. Part III: Types of Out-of-court Dispute Settlement* (2000), www.odr.info, at 26 March 2004

Books

Astor H and Christine M, *Dispute resolution in Australia* (2nd Edition 2002)

Henderson S, *The Dispute Resolution Manual* (1993)

Katsh M, *Online Dispute Resolution: Resolving conflicts in Cyberspace* (2000)

Ury WL, Brett JM and Goldberg SB, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, Program on Negotiation, Harvard Law School Report (1993)