

seeking resolution

the availability and usage of consumer-to-business alternative dispute
resolution in the United Kingdom

by Margaret Doyle, Katrina Ritters and Steve Brooker

dti

NCC National
Consumer Council
Making all consumers matter

URN 03/1616

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National Consumer Council
20 Grosvenor Gardens
London SW1W 0DH
Telephone 020 7730 3469
Facsimile 020 7730 0191

www.ncc.org.uk
www.epolitix.com/forum/ncc

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1. Summary

This report describes the findings of a month-long study into the provision and usage of independent alternative dispute resolution (ADR) for specific sectors of consumer disputes. Its focus is on the use of arbitration, mediation, and ombudsmen services.

Potential of ADR

ADR for consumer disputes is a welcome development. It can save the consumer time and money, offer a range of remedies and is perceived as less daunting than the court system. In addition, ADR can help to drive up business standards. It is timely to reflect on the progress ADR for consumer disputes has made so far – what exists, what works well and what future directions ADR should go in next.

Lottery of ADR provision

Our research revealed that provision of ADR for consumer problems is ad hoc and presents a lottery for the consumer. The nature of the lottery depends either on the type of problem faced or where the problem arises, and sometimes on the ability of the consumer to afford the fees. Aside from a few active schemes, consumers with an unresolved complaint over goods and services face very little in the way of a choice between using ADR and going to court.

This multi-level lottery also means there is a major gap between government policy of promoting ADR and the on-the-ground reality of access to effective, affordable ADR for consumers.

Of the thirteen sectors of consumer detriment we identified (using the Office of Fair Trading system), the sectors or parts of sectors well served by ADR – in the sense that there is an existing ADR scheme with adequate coverage – include travel agents/holidays, upholstered furniture, glass and glazing, floor coverings and telecommunications. Other sectors have limited coverage, for example estate agents, funerals, consumer credit, internet issues and direct selling. However, some problematic sectors, for example home maintenance and repairs (excluding the DTI Quality Mark Scheme), electrical appliances and second-hand cars, have little or no ADR provision at all¹.

¹ The Ford scheme is for new cars only.

Low usage

Although a number of free or low-cost sector-specific ADR schemes exist, our research found a very low level of usage of ADR for consumer problems even where the service is offered free. Consumer disputes vary sector by sector, but for each sector the number of cases going to an existing relevant ADR service is a microscopically small fraction of the total number of complaints. While recorded complaint levels are in the thousands, use of ADR schemes is in the double digits only for most ADR schemes, and lower for many others.

For good or bad, by far the majority of consumer complaints that go via a trade association are concluded through the association's internal complaints-handling process, which can range from very informal shuttle work to a more structured 'assisted negotiation'. Generally very few of these cases overall are proceeding to arbitration. The Association of British Travel Agents (ABTA) is an example: it receives 17,500 complaints every year, and 1400 (fewer than 10%) go to arbitration.

This role of 'gatekeeper' can be helpful or harmful depending on how sound the trade association's procedures are. Trade associations potentially offer advantages to the consumer, for example provision of advice and technical expertise, speed and low cost. Also, by dealing with complaints themselves in the first instance, trade associations learn of any problems or areas of bad practice, allowing them to police the relevant code of practice covering their members. However, there are possible disadvantages too: the procedures are rarely independent and lack transparency. The extent to which schemes meet recognised quality criteria for ADR or other standards also varies. There may be implications for the effectiveness of the Office of Fair Trading Code of Practice scheme if code sponsors are concluding the majority of complaints at a stage before the independent redress stage, without adequate independent scrutiny.

Barriers to overcome

Despite its potential, our research identified hurdles for ADR to overcome.

Awareness and understanding

Awareness among advisers about ADR schemes is low. Consumers require advice from someone with knowledge of their rights and of the various ADR options. Both advisers and the business community also displayed confusion about what ADR is. For example, is the complaints-handling or informal conciliation role played by many trade associations ADR or not? Is the work on assisted negotiation done by many Trading Standards departments actually mediation? More work needs to be done on communicating with these audiences what is and what is not an independent dispute resolution scheme.

Status of decisions/enforceability

Very few schemes are non-binding on the consumer but legally binding on the trader, which is one of the OFT criteria. There were concerns among advisers we spoke to about traders leaving their trade association to avoid complying with an award. Should the consumer have to enforce an award through a court, this can be expensive as there are additional fees to pay and expenses such as lost wages and legal representation costs are non-recoverable.

Quality assurance

There is currently no single quality assurance mechanism for ADR provision. Consumers have no way of knowing whether the ADR scheme they choose offers an effective and fair consideration of their dispute and adequate means of address. The European Extra Judicial Network (EEJ-Net) – the system of clearing houses set up by the European Commission (EC) and run in the UK by Citizens Advice Specialist Support Unit - plays an important role in helping consumers obtain redress when things go wrong with a purchase made from a supplier in another EU country. It provides consumers with information on available ADR schemes and legal advice and practical help on pursuing a complaint by this means. However, BEUC – the European consumers' organisation – has raised the concern that not all the ADR schemes listed on the EEJ-Net databases appear to meet the EC's seven principles for out-of-court dispute resolution. This is a concern if it raises expectations in advisers and consumers about the quality of schemes to which they might be referred.

Funding

Funding is one of the key issues for ADR provision in the consumer field. Our research found a huge range of costs to access the ADR schemes, from no fee to fees of several hundred pounds. Most consumer disputes are of relatively low value, and the cost of trying to resolve them privately is often disproportionate to the value of the claim. Even using the small claims procedure can entail costly risks, such as the cost of expert reports. For claims above the small claims limit, however, there is no protection against heavy costs in court.

If industry is expected to pay for ADR provision of consumer disputes, there are questions as to whether the independence of the service is at risk and whether consumers have direct and unlimited access to it. We found that interesting ADR schemes are being developed locally, offering services free to the consumer, usually linked to a source of consumer advice. Generally, however, funding from local and central government of ADR appears to be patchy, often local, and usually short

term. Some schemes are relying on the ADR providers offering their services pro bono, which also is likely to be a short-term solution.

Many consumer disputes have a 'why bother' factor that may not be the case for other types of disputes, such as those relating to housing, education, or health care. As a result consumers will be less likely to pursue a resolution of the dispute if it is costly, inconvenient, time consuming or difficult to access.

We also identified several areas where we believe further research would be valuable. Because this has been essentially a fact-finding study, we have not been able to examine these areas in-depth. We describe these areas briefly in Chapter 9.

Looking to the future

Our research uncovered a variety of models of ADR provision, and it is clear that there is no 'one size fits all' in terms of ADR for consumer disputes. Some types of disputes may be more suited to local provision of arbitration or mediation – for example, problems with local traders. Others may be best dealt with by a national scheme – for example, problems with large national chains.

Each of the ADR processes used by the schemes responding to our questionnaire (see Methodology) – mediation, arbitration, and ombudsmen – offers very different levels of service and types of process. Some ADR schemes appear to be providing a valuable service to consumers; they publicise their schemes, enjoy good coverage of a sector, have few eligibility limits and make information on cases available in an anonymised format. In order to measure properly the effectiveness of schemes, however, more information is needed on processes and outcomes. In addition, more needs to be known about consumers' aspirations and expectations as well as their experiences of actual ADR processes.

In thinking about how to best develop and promote ADR in the UK, a number of areas emerged that merit further research. In addition to consumer surveys and evaluation of existing schemes, we could learn much from other countries' experiences of ADR. The role of trade association conciliation and complaints handling – which for good or bad acts as a gatekeeper to independent ADR services – is a critical area to unveil. There is also an opportunity to consider how to link ADR with recent developments in advice provision, including at local level. Devising ways of enabling access to ADR by disadvantaged consumers, who are often at the highest risk of detriment, is also imperative.

ADR has tremendous potential, alongside other means of resolving disputes, to provide consumers with redress when things go wrong. This research project has shed some light on the current state of ADR provision for consumer disputes in the UK, which we found to be ad hoc and patchy. It has also identified areas

where further research is needed in order to provide a sound knowledge base from which to plan where and how consumer ADR should develop in future.

2. Background to the Project

ADR in the civil justice context

Reforms to the civil justice system, increased emphasis on consumer rights and redress, and frustration with the costs and delays associated with going to court have led in the past 25 years to the growth of alternative dispute resolution (ADR). In recent years the UK government has promoted ADR as the first choice for resolving legal disputes. Lord Woolf, in his 1996 report *Access to Justice*, envisaged a new legal landscape in which people would be encouraged to start civil court action only as a last resort, after using other, more appropriate means.

In England and Wales, the Civil Procedure Act 1997 set up the new Rule Committee and paved the way for procedural reforms. The Access to Justice Act 1999 established the Legal Services Commission, rules on conditional fee agreements and changes to funding. Since then ADR has increasingly been brought into the mainstream. In Scotland, although the same legal reforms have not taken place, attention is being paid to the best way to encourage greater use of mediation and other out-of-court dispute resolution, and there are interesting developments proceeding, with the close involvement of the Scottish Consumer Council (SCC). Scotland had the first court-annexed mediation scheme in the UK, which is linked to the in-court advice service at Edinburgh Sheriff Court. In Northern Ireland, too, consideration is being given to how ADR initiatives might be incorporated into the civil justice system.

New impetus

New impetus for ADR in the consumer field is appearing on three fronts: from the courts, from the consumer protection field, and with increases in cross-border consumer transactions and the need for cross-jurisdiction methods of resolution.

On the civil justice front, several recent court decisions have suggested that the judiciary in England and Wales is increasingly looking to penalise those parties who do not at least attempt ADR before taking court action. Although these particular cases have not involved consumer disputes, they do indicate that judges are beginning to take a more directive stand in encouraging ADR use and keeping court action as a last resort. The use of ADR is also being encouraged by restrictions on public funding of court action. The Legal Services Commission sets out in its Funding Code requirements to try ADR in a range of case types in England and Wales.

The push for independent means of dispute resolution for consumer problems is also being driven by the Office of Fair Trading (OFT), which published in May 2002 its '*Core criteria for consumer codes of practice*', one of which requires access to independent redress. The OFT has set out the necessary provisions for any independent redress scheme, in particular in relation to guaranteeing its independence². The OFT has identified priority sectors and is in the process of encouraging the trade associations and professional bodies in those sectors to submit Code of Practices for approval.

An increase in cross-border transactions, both online (e-commerce) and in the offline world, has led to the need for dispute resolution methods that transcend differences in legal jurisdictions. Although ADR outcomes still sometimes need to be enforced in law, they can be achieved without using judicial processes. The establishment of the European Extra-Judicial Network (EEJ-Net) reflects this growing recognition that ADR processes are well suited to cross-border transactions.

In addition, the establishment of Consumer Direct – a UK-wide telephone helpline to provide consumer advice to the public, due to have pathfinders in summer 2004 and rolled out nationwide in 2006/7 – presents an opportunity to reconsider the way that complaints-handling and dispute resolution services are provided for consumer problems.

Why ADR for consumer disputes?

Litigation is rarely a preferred option for consumer disputes. For many individuals going to court can be stressful and time consuming. There are positives: when the claim's value is within the small claims limit, going to court can be less daunting than it sounds, and consumers on certain benefits can get help with their court fees. Furthermore, with small claims the risk of having to pay the other side's costs is generally low, although some costs such as witness expenses are allowed.

On the other hand, court actions have three main disadvantages for consumers:

- Any award has to be enforced by the consumer – winning does not necessarily mean you get your money. Enforcement can require another fee and can have an uncertain degree of success.
- Remedies in court are limited to financial awards. In many types of ADR processes, however, a wide range of remedies is possible – apologies,

² These are: (i) low cost, and ideally no cost, to the consumer (ii) direct access by the consumer (iii) binding on business but not the consumer (iv) transparency of decisions (v) independent scrutiny (v) independence from the code sponsor.

explanations, a change in practice. For some consumers, these remedies are more important than a monetary award.

- Many consumers have difficulties in understanding the law and presenting their case to a court.

The National Consumer Council has been a strong advocate of *appropriate* models of dispute resolution for many years. In theory, ADR is a welcome development for consumers because:

- Different disputes need different solutions
- Many consumer disputes do not involve large amounts of money or points of law but nonetheless raise important issues for the consumer and maybe others, and deserve independent review or adjudication and/or structured debate between the parties
- Litigation can be expensive, time consuming, complex and stressful, and therefore should be a last resort

There is a need to explore what exists, how it works and how it serves consumers' needs, and where consumers are being let down – either because there is no provision or the provision is of poor quality or inaccessible. This research project aims to begin to provide answers to these questions.

The DTI project

The Consumer and Competition Policy Directorate (CCP) of the Department of Trade and Industry (DTI) is responsible for government policy on consumer redress and for the UK contribution to the EEJ-Net. Following a competitive tendering exercise, in August 2003 it commissioned the National Consumer Council to research the current state of alternative dispute resolution (ADR) for consumer disputes in the UK and to suggest ways in which it might be promoted and developed.

The research was essentially fact-finding in nature, which was achieved principally through a questionnaire distributed to 63 organisations and conducting interviews with a range of stakeholders. The DTI requested details of existing UK ADR schemes for consumers with economic and safety problems – including their scope, rules, usage, results and quality. It also asked for information about which parts of the goods and services economy are not covered by ADR and the significance of such gaps. In addition, advice was also sought on barriers to the provision or use of ADR. Views were also welcomed on measures that might be taken by the public and private sectors to develop ADR provision and use, and on the scope for the

introduction of new or different forms of ADR to address consumer and business needs. The terms of reference for the project are provided in Appendix 1.

Research definitions

ADR encompasses a wide range of methods of resolving disputes outside of courts and tribunals but the focus of this project, at the request of the DTI, is on ombudsmen, arbitration and mediation. We concentrate specifically on *independent* ADR services, by which we mean independent of industry and consumer organisations or other private stakeholders, rather than neutral. If the DTI is to nominate schemes to EEJ-Net then they must be consistent with the European Commission Recommendation on the seven principles for ADR, which include independence. Other dispute resolution routes such as trade association conciliation and complaints procedures are taken into account but not explored in detail. The project also only covers disputes in the goods and services economy and excludes sectors such as financial services, legal services and health services. This was also at the request of the DTI. Please see the Appendix 2 for detailed explanations of the methodological approach and research definitions.

3. Consumer problems

Lack of redress options is one of a number of causes of consumer detriment. The purpose of this section of the report is to identify which parts of the goods and services economy present the worst problems for consumers as a basis for assessing the adequacy of ADR provision. For more on general research into what consumers do when faced with a problem, see Appendix 3, Literature Review.

Estimates of consumer detriment

The Office of Fair Trading (OFT) has estimated that consumer detriment is running at a minimum of £8.3 billion per annum (pa).³ This figure is only based on those problems of which consumers are aware. It does not cover those areas where the consumer has suffered detriment, but did not have the information to enable them to judge that this was the case.

This figure of £8.3 billion pa equates to 1.1% of gross domestic product.⁴

The four largest components of the OFT figure of £8.3bn are:

- Loss of value – nearly £3bn
- Use of personal time – valued at £1.3bn
- Costs of repairing or resolving problems at owner's expense – £1bn
- Loss of earnings – around £1bn⁵

The average cost of resolving a consumer problem was just under £100 per problem.⁶ However, individual problems are highly variable, both in terms of cost and complexity.

³ OFT, Consumer Detriment, February 2000 (OFT 296), p.3.

⁴ Ibid, p.3.

⁵ Ibid, p.20.

⁶ Ibid, p.20.

Dealing with complaints is stressful. The OFT found that in 45% of cases the emotional impact of dealing with the problem was assessed as 'severe', in 30% as 'medium' and in 26% as 'mild'.⁷

*'The most stressful circumstances were found to be those in which it has proved impossible to get the supplier or manufacturer to take any effective action. So complete inactivity – nothing done so far – or cases where the consumer has had no option but to seek a remedy by his own efforts were the three most prominent causes of emotional stress.'*⁸

Types of consumer problem

OFT statistics

Only around 2% of consumer problems resulting in detriment are reported to Trading Standards services and so are captured in the annual OFT statistics.⁹

The Trading Standards annual returns to the OFT, which cover the entire UK, continue to be the most authoritative set of statistics for us to measure detriment in the field of ADR because they are most likely to capture areas where consumers have experienced high levels of dissatisfaction due to the inability to resolve problems with traders. The statistics break down consumer problems by trading practice, one category of which is '*Difficulty in getting faults put right or offers of inadequate redress*'. In 2002-3 around 9% of recorded complaints fell into this category.¹⁰

Note that not all sectors or types of dispute are necessarily suitable for ADR processes, for example disputes that have nil monetary value. It follows that an area of current detriment without ADR provision does not automatically justify new ADR schemes in future. But figures on problems in obtaining redress do provide useful *indicators* about where dispute resolution processes are needed most.

The top five areas of complaint in 2002-3, in terms of category of goods or services, were:¹¹

⁷ Ibid, p.30.

⁸ Consumer Detriment, OFT, February 2000 (OFT 296), p.31.

⁹ Consumer Detriment, OFT, February 2000 (OFT 296), p.14.

¹⁰ Office of Fair Trading Consumer Complaints Statistics, 2002/3.

¹¹ Office of Fair Trading Consumer Complaints Statistics, 2002/3.

| <i>Category</i> | <i>Percentage of complaints</i> |
|--|--|
| Second-hand motor vehicles | 8% |
| Other personal goods and services | 6% |
| Upholstered furniture | 4% |
| Radio, TV and audiovisual equipment etc. | 4% |

However, in the OFT's consumer detriment survey¹² the top five areas giving rise to complaints (but not necessarily being reported to Trading Standards) were:

- Food and drink
- Telephone and mobile phone services
- Personal clothing, shoes and jewellery
- Gas, water and electricity
- Bank and building society services

The most common types of complaint reported to the OFT in 2002-3 were:

| <i>Type of complaint</i> | <i>Percentage of complaints</i> |
|--|--|
| Defective goods or substandard service | 48% |
| Selling techniques | 25% |
| Difficulty in getting faults put right or offers of inadequate redress | 9% |
| Non-delivery of goods and delay or non-completion of services | 8% |
| Age-restricted sales | 4% |

Looking at the OFT category of 'difficulty in getting faults put right or offers of inadequate redress', the types of goods and services this was most likely to relate to in 2002-3 were:

¹² Consumer Detriment, OFT, February 2000 (OFT 296), p.11.

| <i>Types of goods and services</i> | <i>Percentage of complaints</i> |
|--|---------------------------------|
| Home maintenance, repairs and improvements | 12% |
| Second-hand motor vehicles | 8% |
| Large white goods and major fixed appliances | 6% |
| Radio, TV and audiovisual equipment etc. | 6% |
| Upholstered furniture | 6% |

Problems according to consumer advisers

The consumer advisers we spoke to as part of our research suggested the following areas were most in need of an effective ADR procedure:

- Consumer electrical goods – particularly large white electrical goods and computers
- Home improvements
- E-commerce
- Mobile phones
- Non-status lending¹³ – particularly in relation to the second-hand car market
- Flights
- Timeshare
- Second-hand cars

“Consumer problems are among the most common types of problems which people in Scotland are faced with on a daily basis. Consumer matters account for the second

¹³ This relates to credit agreements.

biggest category of new enquiries received by Citizens Advice Bureaux in Scotland, a total of 19% of all enquiries in 2001-2002."¹⁴

In its 2003 report *Knowledge of Consumer Rights in Scotland*, the Scottish Consumer Council identified the top causes for goods and services complaints as white and electrical goods (29%) and communications (24%).¹⁵ The report notes that these are the categories of goods bought by the greatest number of people.

Problems with a car purchase only accounted for 9%, although cars regularly are at the top of complaint tables produced by the Office of Fair Trading. The report suggests this rather surprising figure can probably be explained by the fact that only 20% of respondents had bought a car in the time period studied.

The report also describes the main *reason* (as opposed to *issue*) for the complaint. Most relate to poor performance of the product or service. These figures on the whole were similar to those in the rest of the UK.

Fewer complaints were made among Scottish consumers about work done to a home – the Scottish respondents were less likely to have had work done on their home.

Cross-border disputes

Figures are not available for the total number of cross-border disputes within the European Union. However, a recent Eurobarometer survey found a small majority of all EU consumers are as confident (46%) or even more confident (6%) buying from a shop or seller in another EU country as from one based in their country of residence. This compared to a small minority of consumers in the UK - 37% and 9% respectively. The survey also explored the reasons for consumers' lack of confidence in cross-border purchases. The top two reasons were:

- It is harder to resolve after-sales problems such as complaints, returns, refunds, guarantees etc – 59% very important reason, 29% fairly important
- It is harder to take legal action through the courts – 51% very important reason, 32% fairly important

¹⁴Scottish Consumer Council, *Knowledge of Consumer Rights in Scotland*, February 2003, p.12 (quoting Citizens' Advice Scotland Annual Report 2001/02).

¹⁵Scottish Consumer Council, *Knowledge of Consumer Rights in Scotland*, February 2003.

73% of the same respondents said that 'if you could apply to an independent body to resolve a cross-border dispute', this would be an important factor in making them more confident about cross-border purchases.

In addition, 46% of businesses perceived 'resolving cross-border complaints and conflicts' as an important factor causing difficulty in the development of sales and advertising in the EU. 59% of these respondents said that 'independent arbitration and conciliation services would be an efficient measure to make the development of sales and advertising in the EU easier'.¹⁶

The European Commission reports that the total number of complaints received by all the EEJ-Net clearing houses by March 2003 was 2182.¹⁷ Even without knowing the number of cross-border complaints, this figure seems low given the potential number of transactions. The most likely reason is probably low awareness of the clearing houses.

The EC reported that 50% of those complaints arose from transactions during trips abroad. In other words, fewer than half are arising as a result of distance selling methods – for example, e-commerce.¹⁸

Complaints to EEJ-Net clearing houses divide equally between goods and services (aside from timeshare). Timeshare problems represent a third of all complaints.¹⁹

A small number of complaints go to the UK clearing house of the EEJ-Net: 409 queries in 2002-03. Yet this represents a large proportion of those going to EEJ-Net clearing houses overall – almost 20%.

The biggest areas of complaints to the UK's clearing house in 2002-03 were:

| | |
|--------------------------------------|-----|
| Timeshare, holiday clubs | 191 |
| Electrical appliances | 81 |
| Flights, travel, hotels and holidays | 32 |

¹⁶ European Commission, Public Opinion in Europe: Views on Business-to-Consumer Cross-Border Trade. Standard Barometer 57.2, November 2002, p.20

¹⁷ "The EEJ-Net: An important tool to help consumers resolving cross-border disputes with traders", David Byrne, European Commissioner for Health and Consumer Protection, European Extra-Judicial Network Conference, Brussels, 10 June 2003.

¹⁸ Ibid.

¹⁹ Ibid.

A growing number of complaints to the UK EEJ-Net clearing house are about transactions on eBay, the online auction house.

Most of the UK's EEJ-Net clearing house queries are dealt with by EEJ-Net staff through informed negotiation. A very small percentage are referred to an ADR scheme. In April-October 2003, 54 out of 70 cases were resolved. Outcomes included: refunds (in the majority of cases), repair, replacement, delivery and other.

Of the 29 ADR schemes responding to our questionnaire, 14 said they are available to non-UK consumers.

Voluntariness is a problem for EEJ-Net where there is no trade association – or an ineffective one – to put pressure on members. Trade associations can be ineffective in particular because they have inadequate coverage of the industry – and those traders that are not members are likely to be less willing to comply with a Code and probably less likely to have good complaints-handling procedures. In fact this is a general problem with ADR. Except in those areas where traders are obliged by law to participate in a scheme, much depends on their willingness to play ball. Trade associations can help, by requiring their members to use their dispute resolution services, but trade associations cannot force businesses to join them. Traders have to see economic benefits in joining or have some other incentive.

A research study conducted by MORI for the DTI found that 12% of cross-border shoppers have purchased goods and services from non-EU countries, principally the United States.²⁰ The need to provide adequate redress for these non-EU transactions is a subject of debate in the policy field and the UK government recognises this is a problem. The OECD has a programme of work in this area, particularly in relation to on-line disputes.

In summary

Based on OFT complaint statistics, OFT consumer detriment statistics, advisers' views, and cross-border complaints to EEJ-Net, the thirteen sectors (out of 75 categories used by the OFT) below have been identified as problem areas, and will be used as a basis for measuring ADR provision. Note that these sectors are not listed in order of any perceived severity of the problem.

²⁰ DTI, *Cross Border Shopping*, October 2002.

1. Electrical goods (including large white goods, domestic appliances and computers)
2. Home maintenance, repairs and improvements
3. Internet shopping/e-commerce
4. Consumer credit (including non-status lending)
5. Second-hand motor vehicles
6. Upholstered furniture
7. Other personal goods and services
8. Food and drink
9. Telephone and mobile phone services (including internet service providers)
10. Personal clothing, shoes and jewellery
11. Gas, water and electricity
12. Timeshare, holiday clubs
13. Flights, travel, hotels and holidays

In addition, the two sectors below are particularly interesting from the point of view of ADR provision and so are also highlighted:

1. Funerals
2. Disability discrimination

4. Consumer redress options

Consumers faced with an unresolved dispute over goods or services have a range of routes they could choose to pursue, some more effective than others. Contacting the trader or business directly is the way many complaints are resolved before they become disputes. There are a number of sources of help and advice, most notably from trading standards departments and Citizens Advice Bureaux. Some sectors have effective complaints-handling systems handled by a regulator, who also has an enforcement role, or a sectoral consumer council with no enforcement role.

Sources of *help and information* include:

Trading Standards Departments

Trading Standards Departments have powers to investigate complaints about false or misleading descriptions or pricing, weights and measures, consumer credit and (except in Northern Ireland) safety of consumer goods. Many trading standards services also offer free consumer advice. Some go further and offer practical help with letter writing and preparing papers for ADR or court. As part of this research we also came across a scheme, run by Leicestershire County Council, that operates a free independent mediation service for disputes with local traders.

However, provision across the UK is patchy, with consumer advice not available in some local authority areas. From 2006-7 a DTI telephone consumer helpline, Consumer Direct, will operate throughout the UK. Consumer Direct will only offer first-line advice on consumer matters but will be able to refer on to appropriate trading standards services and other agencies for second stage help and advice.

Last year trading standards dealt with over 800,000 complaints relating to consumer goods and services.²¹

Citizens Advice

Consumer advice and information is available from Citizens Advice Bureaux from over 2,800 locations across England, Wales and Northern Ireland, as well as by telephone, via the internet at www.adviceguide.org.uk, by email and through the media. Advice provided by Citizens Advice Bureaux is free, confidential and

²¹ OFT Statistics, 2002-3.

impartial, and open to everybody. However, the service is largely run by volunteers, opening hours are limited and it can be difficult to get to speak to a consumer adviser. One survey found that 80% of calls to CABx go unanswered.²² However, individual bureaux assign different levels of priority to giving consumer advice. The level of judgement required to give consumer advice makes it a difficult area for generalists and volunteers, although Citizens Advice does provide guidance materials.

In 2002-03 Citizens Advice dealt with more than 1.4 million problems relating to consumer and debt issues. Of these, 15% (219,000) related to problems with goods and services, and a further 2.2% (31,000) related to other consumer problems.

Environmental Health Departments

The environmental health department of the local authority can deal with complaints about unfit food and drink and dirty restaurants. In Northern Ireland, they can deal with complaints about safety of consumer goods. Although the primary responsibility of local enforcement agencies is to prevent re-occurrence of the problem, they will sometimes also give advice to the complainant on how to pursue compensation through the civil courts.

Office of Fair Trading

The Office of Fair Trading (OFT) issues leaflets giving guidance on consumer rights when buying goods and services. For consumers it is a source of information on trading practices and consumer protection but it does not handle individual complaints. It is encouraging trade associations and professional bodies to establish Codes of Practice that meet its approval criteria, one of which requires an independent redress mechanism for consumers.

Regulators

Regulators oversee the way complaints are handled by the privatised utilities. Currently there are regulators covering water companies (Ofwat), gas and electricity suppliers (Ofgem) and telecommunications (Ofcom, and ICSTIS for premium-rate services), as well as financial services (FSA). They handle complaints to a varying extent depending on the powers to determine complaints that are given in the respective Acts, but their primary role is enforcement.

²² National Association of Citizens' Advice Bureaux Annual Report, 1997/98.

Sectoral Consumer Councils

Organisations such as energywatch (energy companies) and WaterVoice (water companies) investigate and resolve complaints on behalf of consumers. The General Consumer Council of Northern Ireland helps with complaints about natural gas, electricity and solid fuel/coal in Northern Ireland. Decisions on complaints are generally not binding on companies.

On-line advice

There has been a growth of websites offering information and advice to the consumer. These range from official sites such as the DTI's Consumer Gateway to independent sites that take an active role in helping the consumer to achieve redress, e.g. www.howtocomplain.com. A website developed by the DTI, local government, LACORS and the Trading Standards Institute, www.consumercomplaints.org.uk, allows the consumer to register a complaint with their local trading standards department. Other sources of on-line advice include www.adviceguide.org.uk (produced by Citizens Advice) and two sites that direct individuals to vetted advice websites: www.justask.org.uk (the Community Legal Service website) and www.advicenow.org.uk (managed by Advice Services Alliance).

Sources of *complaints-handling* include:

Internal complaints procedures

Many consumer problems are settled directly with the trader or organisation involved. Often consumers are required to use a trader's complaints procedure, where one exists, before proceeding to another form of dispute resolution.

Trade association conciliation

If the complaints procedure of the trader or organisation has not successfully resolved the matter, the consumer might be expected to use a complaints procedure of the relevant trade association – which might include conciliation as a stage of the procedure – before proceeding to arbitration.

Conciliation is a loosely defined term that is applied to a number of different dispute resolution options. In this context, it is generally a process in which the conciliator gives factual information about rights and responsibilities and tries to resolve the complaint over the telephone. Should this fail the conciliator examines case statements made by both parties and delivers an opinion as to the best or most likely outcome of the dispute.

In a similar vein some professional bodies also offer dispute resolution services. An interesting development in this respect is that the Royal Institution of Chartered Surveyors (RICS) is consulting on moving from in-house procedures to establishing an independent ombudsman scheme.

Court

For some, going to court will be the option of choice, especially where the trader or business is unlikely to cooperate in resolving the dispute. Small claims procedures are court procedures for resolving straightforward, lower-value claims, which may ultimately lead to a hearing and a binding ruling. They are designed to be relatively informal and user-friendly, allowing parties to use them without legal representation.

The small claims procedure involves a hearing, which has both advantages and disadvantages. Consumers' Association claim that a hearing is a plus for a layperson, who gets the chance to explain the problem in person, in their own words. But much of the research on litigants' experiences²³ suggests that many feel daunted by court procedures and are taken by surprise that district judges make decisions on points of law. What sounds like a common sense argument on the outside can become, in court, a legal irrelevance.

Small claims procedures are most suitable for money claims – i.e. money owed or damages. They are not suitable when the primary desired remedy is an apology or explanation or simply to prevent the same thing happening again. An issue for consumers in Scotland is that the small claims limit is low - £750. This means that for many consumer disputes (such as those involving a computer or a three-piece furniture suite), consumers either have to restrict their claim to £750 or use another, more complex court stream.

What constitutes a small claim – i.e. the maximum claim value – and the procedure used to handle it varies in each jurisdiction.

England and Wales

Claims worth £5,000 or less will normally be allocated to the small claims track. An exception is personal injury claims, for which the limit is generally £1,000. Typical cases include claims for:

²³ See Baldwin J, *Small Claims in the County Court in England and Wales*, 1997; and Scottish Consumer Council, *Civil Disputes in Scotland*, 1997.

- Compensation for faulty goods and services
- Recovery of personal debts
- Return of rent deposits
- Less serious housing disrepair
- Wages owed

Scotland

Small claims are heard in the sheriff court and form part of the summary cause procedure. The proceedings are presided over by a sheriff. The small claims procedure covers disputes up to a monetary value of £750 with limited rules concerning expenses.

Typical claims include:

- Compensation for faulty goods and services
- Landlord–tenant disputes (but not rent arrears and possessions)
- Wages owed

Northern Ireland

The small claims procedure in Northern Ireland covers claims up to £1,000. Cases suitable for the small claims procedure include:

- Compensation for faulty goods and poor service
- Personal debts
- Damage to property

ADR

Below are some of the ADR options available for particular types of disputes relating to goods and services.²⁴ The best-known provider of dispute resolution services is the Chartered Institute of Arbitrators (CI Arb). It uses a wide range of ADR processes for a wide variety of business and commercial sectors and runs 80 bespoke schemes for consumer and commercial markets. A range of ADR providers is profiled in Chapter 7.

Arbitration

Arbitration involves an impartial, independent third party hearing both sides and issuing a binding decision to resolve the dispute. It is used in a wide range of disputes. Most types of arbitration have the following elements in common:

- Parties jointly agree to use the process.
- The outcome is determined by a third party, not the disputing parties.
- The process is final and legally binding.
- There are limited grounds for appeal.

Hearings are often less formal than court hearings. Note, however, that some forms of arbitration do not involve hearings but are conducted on the basis of documents only.

In the consumer context arbitration is generally free or low-cost. It is the final stage (unless an appeal stage is offered) in a complaints process that can have as many as four stages: trader/manager directly, organisational internal complaints procedure, trade association conciliation, and then arbitration.

Some consumer arbitration schemes have introduced an appeal mechanism. However, for some of these there is a non-refundable fee.

Some contracts contain arbitration clauses, which bind the signatories to using arbitration for any dispute that arises. Under the terms of the Arbitration Act 1996, in consumer disputes below the small claims limit (£5,000 in England and Wales,

²⁴ Definitions based on those in Doyle M, *Advising on ADR: The essential guide to appropriate dispute resolution*, Advice Services Alliance, 2000.

£750 in Scotland, £1,000 in Northern Ireland), however, such clauses are not binding on the consumer. And above that limit they may be unfair under the Unfair Terms in Consumer Contracts Regulations.

A complainant must choose between arbitration and going to court; it is not usually possible to take a claim to court after it has been the subject of arbitration.

The arbitrator can:

- Award compensation to the complainant. This might include the complainant's registration fee, and might include an element for distress.
- Order a party to do or not do something.
- Order the parties to carry out a contract.
- Order that a document be changed or cancelled.

The arbitrator cannot order one party to apologise to another. Also, although they can award for loss of enjoyment, they will look at only the affected part of the claim. In a holiday claim, for example, the arbitrator might consider that because the complainant's flights were satisfactory, he or she did not suffer loss of enjoyment for that part of the holiday, and thus any compensation would not reflect the cost of the flights. The courts might take a different approach and consider the complaint as a whole.

Note also that awards can be reduced in other ways. If an earlier settlement offer had been made that was higher than the award made by the arbitrator, the award will be reduced by the cost of registration. In other words, a 'winning' complainant will have to pay the trader's registration fee as well as their own.

Most of the consumer dispute resolution schemes set up and sponsored by trade associations/companies use arbitration.

Early neutral evaluation and expert determination

In early neutral evaluation (ENE) an independent third party evaluates the claims made by each side and issues an opinion – either on the likely outcome or on a particular point of law. The opinion is non-binding; the parties can use it if they wish in considering how they want to proceed with the case, and it can be the basis for settlement.

In a similar process, expert determination, the parties choose an expert to evaluate the case and issue a decision that is binding on both parties.

In our research we found no independent ADR schemes using this process.

Mediation

Mediation involves an impartial, independent third party helping disputing parties to reach a voluntary, mutually agreed resolution. All mediation services have the following in common:

- The disputants, not the mediator, decide the terms of the agreement.
- It is voluntary, and the proceedings (but not always the outcome) are confidential.

In most cases, mediation involves some direct, face-to-face contact between the parties, but it can be done by conference call or by 'shuttle' mediation, in which the parties are kept separate and the mediator moves between them, exchanging information and settlement offers or potential points of agreement.

Because mediated outcomes are usually not determined by reference to the law, mediation can be useful where consumers have fewer rights, such as buying goods from auction or second-hand dealers or buying from a private seller.

Using a 'commercial' mediation provider, which tend to handle higher-value claims and charge accordingly, is an option, although the fees might be prohibitive in relation to the amount in dispute. Some 'commercial' providers might be willing to provide low-cost mediations to consumers on a case-by-case basis. Currently, however, there is a gap in the provision of affordable mediation for low-value claims.

Although most local community mediation services are limited to handling neighbour disputes, many have a more flexible remit and will take on some small claims with a local basis – such as disputes with a local builder or trader.

The difficulty with mediating consumer disputes is the absence of pressure on, or incentives for, the trader or organisation to co-operate. Ignoring court action might result in a default judgment, and refusing to arbitrate under a code of practice might mean an organisation losing its membership of its trade association. A court might also react unfavourably if a trader refused to participate in ADR. But there are no

sanctions for not agreeing to participate in mediation, so it can be difficult to persuade a recalcitrant trader to agree. The offer to mediate does not need to come from the client however; usually the mediator, or the mediation provider, will send out the offer and attempt to persuade the other side to take part. We note that in the United States, the Better Business Bureau (see Chapter 7) acts as an incentive to persuade a business to agree to mediation – failure to agree to mediation affects the rating given to it by the Bureau.

A major stumbling block for mediation in this context is lack of trust. If a company or trader has not resolved the problem after a direct approach from the consumer, the consumer is likely to lose faith in the company's willingness to comply in any mediated agreement.

Med-arb/Med-rec

Med-arb is a combination of mediation and arbitration, though not a blend; i.e. each process is kept separate. Mediation is attempted first, and if no agreement is reached by the parties, the dispute will go to an arbitrator for a binding decision. In some cases the same person acts as mediator and arbitrator; in others a different neutral is brought in to arbitrate.

Med-rec is a similar hybrid although it involves the mediator making a recommendation instead of a binding arbitration award. The OFT has suggested that if mediation with a recommendation (med-rec) is made binding on the trader only, and not the consumer, it would make it possible for med-rec to be approved as an independent redress scheme.²⁵

Ombudsmen

Ombudsmen are impartial 'referees' who adjudicate on complaints about public and private organisations. All ombudsmen services have the following in common:

- They are free to complainants.
- They will not normally consider a complaint unless the organisation complained of has first been given a reasonable opportunity to deal with it through its own internal complaints procedure.

²⁵ Discussion between researchers and OFT, 24/9/03.

- Their decisions are not binding on the consumer, so consumers are free to go to court or use another dispute resolution process.
- They are not consumer champions – they don't take sides but act impartially.

Members of the British and Irish Ombudsman Association (BIOA) must meet criteria for membership that include independence of the bodies complained about and transparency. They are also expected to be user-friendly and to assist complainants in making their complaint – although they do not give advice; they have facilities to enable access to the scheme by disabled consumers and those whose first language is not English. The inquisitorial method of dispute resolution used by ombudsmen – rather than the adversarial mode that is part of arbitration and litigation – means that consumers do not bear the burden of having to compile a great deal of evidence in order to prove their case. One of the advantages of using an ombudsman is that often the evidence required (e.g. technical evidence and other documents on file) is in the hands of the body complained of, and the consumer has no access to it. An ombudsman can require a company within its membership to hand over a file.

Consumers' Association recommends using an ombudsman as the first port of call in consumer disputes (after going through the internal complaints procedure of the organisation complained of). Ombudsman schemes are free, and in most cases the ombudsman's decision is not binding on the consumer – he or she can still go to court.

Choosing a dispute resolution route

Some advisers we spoke to suggested that a 'route map' would be helpful in making a decision about which route to follow – court or ADR, or even which ADR process to use if the consumer has a choice of more than one. The Advice Services Alliance is developing a website on ADR for advisers, which will be a useful starting point.

Among the factors for consumers to consider are how much they want to participate in the decision-making. On a continuum ranging from the most directive – in which the outcome is determined by a third party – and the least directive – in which the parties retain full control over the resolution (or non-resolution) of their dispute, negotiation and mediation would be at the least directive end, and arbitration and litigation would be at the most directive.

LEAST DIRECTIVE ←————→ **MOST DIRECTIVE**

negotiation mediation conciliation ombudsmen regulators arbitration
litigation

An obvious choice missing in the continuum above is that of 'no action' – a particularly relevant choice in the consumer arena as it reflects what many consumers, faced with no choice or poor choice, decide to do.

5. Mapping ADR provision

In this section of the report we examine in more detail the fifteen areas of detriment identified in Chapter 3. We highlight levels of detriment, concerns related to redress and the extent of ADR provision. Where available we give details of the coverage of schemes (i.e. the proportion of businesses in a sector that are within its jurisdiction) and value of sales, but this information was for the most part not provided in the questionnaire responses. Tables summarising the responses to our questionnaire are provided in Appendix 5.

The information that follows in the narrative is summarised in the table below.

| <i>Sector</i> | <i>Complaint levels</i> | <i>Difficult to resolve (%)</i> | <i>ADR schemes</i> |
|--|-------------------------|---------------------------------|---|
| Electrical goods | 102,409 | 13.3 | AMDEA, ADR Group/DGS, RETRA |
| Home maintenance, repairs & improvements | 79,464 | 11.2 | Qualitas, Institute of Plumbing, DTI Quality Mark, GGF |
| Internet shopping/ e-commerce | n/a | n/a | EEJ-Net, SquareTrade, Word & Bond, DMA |
| Consumer credit (including non-status lending) | 10,381 | 7.8 | FLA arbitration (CIArb), CCTA arbitration (CIArb) |
| Second-hand cars | 62,807 | 9.6 | RMIF, VBRA |
| Upholstered furniture | 35,195 | 13.0 | Qualitas |
| Other personal goods and services | 47,439 | 5.6 | None |
| Food and drink | 29,110 | 0.1 | None |
| Telephone and mobile services | 29,152 | 13.3 | Otelo, Various CIArb schemes |
| Personal clothing, shoes and jewellery | 51,936 | 9.3 | None |
| Gas, water and electricity | 14,438 | 7.2 | (Regulators) |
| Time share, holiday clubs | 4408 | 3.3 | None |
| Flights, travel, hotels and holidays | 24,016 | 5.3 | ABTA, Various CIArb schemes |
| Funerals | n/a | n/a | NAFD (CIArb), NSAIFD (CIArb), Funeral Standards Council (CIArb) |
| Disability discrimination | n/a | n/a | DCS |

Notes on table

1. Complaint numbers have been amalgamated where appropriate. For example: for Personal clothing, shoes and jewellery - 30,418 (Clothing & clothing fabrics) + 11,726 (Footwear & footwear repair) + 9792 (Jewellery, silverware clocks & watches) = 51,936

2. Difficult to resolve refers to the percentage of difficult to resolve complaints within a sector. As above, figures are amalgamated where appropriate.

3. CI Arb refers to the Chartered Institute of Arbitrators.

Electrical goods

This appears to be one of the largest problem areas and a major gap in consumer redress.

Complaint levels

In 2002-3 there were 34,971 complaints about radio, TV and audiovisual equipment, which accounted for around 4% of all complaints. Of these, 4628 were in the 'difficult to resolve' category (13.2%). This amounts to 6.1% of 'difficult to resolve' complaints across all sectors.

In 2002-3 there were 33,834 complaints about large white goods and major fixed appliances, which accounted for around 4% of all complaints. Of these, 4654 were in the 'difficult to resolve' category (13.8%). This amounts to 6.1% of 'difficult to resolve' complaints across all sectors.

In 2002-3 there were 33,604 complaints about personal computers and related hardware, which accounted for around 4% of all complaints. Of these, 4331 were in the 'difficult to resolve' category (12.9%). Again, this amounts to 5.7% of 'difficult to resolve' complaints across all sectors.

Problems

Problems highlighted by advisers in relation to consumer electrical goods included:

- The high cost of testing – which often falls outside the limits allowable by the county court.
- The unwillingness of some high street retailers to agree to arbitration, particularly in cross-border disputes where going to court would be problematic for the consumer. One of these was cited by EEJ-Net as a particular problem because it is the source of many complaints received by EEJ-Net but it has refused to use arbitration when offered.
- Management structures inside large high street stores – where problems are diverted to the Service Manager who may then be 'over-ruled' by the Store Manager. However, the store manager is not willing to deal with the complainant.

- One adviser suggested that high street chains would go to great lengths to avoid admitting their goods were faulty – customers returning computers would be asked to pay for a diagnostic test – the fault would be put right but as it was returned to them they would be told that it was a customer error. This had happened so often that they now routinely advised consumers to take the computer for an independent diagnostic test before returning it to the shop.²⁶
- Another bugbear was the high cost of consumer helplines when problems arose with computers – one consumer spent £60 in £1/minute helplines before she was able to get an engineer to come out.²⁷
- Cross-border purchases, in which consumers can be affected by different consumer rights in different jurisdictions (e.g. relating to warranty periods).

ADR provision

There is an arbitration scheme run for the Association of Manufacturers of Domestic Electrical Appliances (AMDEA) by the Chartered Institute of Arbitrators. It covers only servicing of appliances. Claims up to £500 cost £25 plus VAT per party. It had no cases in 2002. AMDEA says that it deals with the approximately 100 servicing complaints it receives each year by, where appropriate, contacting the manufacturer. The outcome usually involves the manufacturer making a 'gesture' of a small sum to the consumer for aggravation.²⁸

The ADR Group, an independent mediation provider, offers a free mediation service for consumers with disputes relating to a warranty service plan on white goods and electronics where the warranty plan is provided by Domestic and General Services (DGS). This is an area of DGS's services not covered by the Financial Ombudsman Service. The model is an innovative one. The mediation process takes place by telephone; if a settlement is not reached between the parties, the ADR Group mediator can make a decision that is binding on DGS but not on the consumer. The scheme was introduced this year and no case information is available yet.

It is possible that a consumer with an unresolved servicing complaint about an item covered by a DGS plan would have a choice between the ADR Group mediation scheme and AMDEA.

²⁶ Consumer adviser, 26/9/03.

²⁷ Consumer adviser, 26/9/03.

²⁸ Interview with researcher, 18/9/03.

The Radio, Electrical and Television Retailers Association (RETRA) offers to help in conciliation with its own members but as this scheme is not independent it was not examined in detail as part of this project.

Home maintenance, repairs and improvements

Complaint levels

In 2002-3 there were 79,464 complaints about home maintenance, repairs and improvements, which accounted for around 10% of all complaints. Of these, 8885 were in the 'difficult to resolve' category (11.2%). This amounts to 11.7% of 'difficult to resolve' complaints across all sectors.

Problems

Problems highlighted by advisers in relation to home improvements included:

- The market has a large number of small businesses that do not feel the need to join any quality schemes.
- Itinerant traders who are difficult to locate or keep track of.
- Personal issues involved, creating difficulty in quantifying loss.

ADR provision

The Chartered Institute of Arbitrators also runs ADR schemes for the British Wood-Preserving and Damp-Proofing Association, the Heating and Ventilating Contractors Association, and the Kitchen Specialists Association. Aside from information from the Institute that it handled no cases for these schemes in 2002 or 2003, no other details were available for this research.

The Institute of Plumbing is a professional body of 11,000 members, not all of which are practising plumbers. It considers its aim to look after the public interest, and to this end it has a Code of Professional Standards and handles consumer complaints related to workmanship and regulations. It cannot get involved in contractual issues – e.g. to do with pricing, agreements made, etc. It is free to the consumer, and about 30-60 complaints go to its Professional Standards Committee each year.²⁹

²⁹ Interview with researcher, 10/9/03.

Qualitas, although better known in relation to its work on furniture complaints, also covers fitted kitchen installation – this represented 20% of its caseload in 2002. More on Qualitas appears later under ‘Upholstered furniture’.

The DTI Quality Mark Scheme (QMS) for builders, which is currently being rolled out nationwide, refers all complaints to the independent certification body that approved the trader onto the Scheme. The certification body investigates the dispute and tries to reach a resolution.³⁰ Note, however, that at the time of writing only 500 traders are approved members of the QMS. So, while the scheme is consistent with the OFT criteria, very few consumers currently have access to an independent ADR scheme that covers these trades.

This sector is an area that perhaps lends itself to local provision, particularly of mediation. This is an idea the National Consumer Council raised in its 1996 report, *Controlling the Cowboys*.³¹ We described a Voluntary Surveyors Scheme, operating through citizens advice bureaux, which provided technical advice where clients had a complaint against a builder but could not afford to pay for professional advice. An example uncovered by this current research is the free, independent mediation service run by Leicestershire County Council Trading Standards (described in more detail in Chapter 7).

Other mediation providers said they would take on cases such as the ones in Leicestershire, but usually for a fee. Community mediation services might be willing to take on these cases at a low fee, but the cost of expert reports can prove a major obstacle. In Australia, however, the Building Advice Conciliation Victoria scheme is a joint venture between the Consumer Affairs department in Victoria and the industry-run Building Commission. Specialist consumer advisors handle complaints in the first instance, and 80% of complaints are resolved at this stage. However, unresolved complaints are referred to the Building Commission, which carries out an inspection and produces a technical report free of charge³².

Internet shopping / e-commerce

³⁰ Phone discussion with NCC, 10 October 2003.

³¹ National Consumer Council, *Controlling the Cowboys. A consumer review of the home improvements and repairs market*, 1996.

³² Interview between David Cousin, Director of Consumer Affairs, Victoria and NCC, 22/10/03.

Complaint levels

Complaint levels about internet shopping are not available as they do not form a discrete category under the Office of Fair Trading recording system.

Problems

Problems highlighted by advisers in relation to internet shopping included:

- Difficulty in contacting the 'trader' if goods do not turn up – difficult to enforce your rights if all you have is an e-mail address (although this would be a breach of the distance selling legislation, so an enforcement authority would act).

ADR provision

Online provision appears to be well-suited to resolving disputes that arise online. There is no dedicated scheme for this sector, however. SquareTrade runs a dedicated scheme for eBay, an online auction house, and also says it runs a generic scheme that offers mediation for all types of e-commerce disputes. Its process is all online; the 'self-negotiation' process is free, and mediation fees vary according to the dispute type. In SquareTrade's eBay scheme, for disputes between eBay sellers and buyers, the complainant pays a fee of US\$20.

Until recently a Which? WebTrader scheme offered quality assurance and some help in resolving disputes but the scheme had to close due to lack of funding.

Word & Bond offers an online 'i-arbitration' process for a fee of 15 euros; it was originally set up to handle disputes that arise online. It now primarily offers a business-to-business dispute resolution service, although it is available to consumers also. Its consumer provision depends on high-volume caseloads, which Word & Bond says has not been achieved because of poor promotion of online dispute resolution.³³

EEJ-Net acts as a clearing house for many e-commerce disputes that arise from cross-border transactions within the EC. It can work with the parties to resolve these or refer the parties to an ADR body in its database.

The Direct Marketing Authority's (DMA) code of practice now includes all new media and marketing channels. The DMA adjudicates complaints and decides what,

³³ Interview with researcher, 23/9/03.

if any, further action is required. Sanctions include private and public admonishment, suspension or expulsion.

Consumer credit (including non-status lending)

Complaint levels

In 2002-3 there were 10,381 complaints about hire and unsecured credit, which accounted for around 1% of all complaints. Of these, 807 were in the 'difficult to resolve' category (7.8%). This amounts to 1.1% of 'difficult to resolve' complaints across all sectors.

Problems

Although the numbers of complaint in this area are relatively small, advisers felt that where they did occur they posed particular problems for complainants. Problems highlighted by advisers in relation to non-status lending in particular included:

- High interest rates being charged.
- Sale of credit on basis of the monthly repayment – consumer not aware of rate of interest being charged.
- Credit providers unwilling to recognise their responsibilities under Section 75 of the Consumer Credit Act.

ADR provision

Two of the trade associations covering the consumer credit sector have arbitration schemes operated by the Chartered Institute of Arbitrators: the Finance and Leasing Association (FLA) and the Consumer Credit Trade Association (CCTA). The FLA had only nine cases go to arbitration in 2002; the CCTA had none. Both use conciliation to try to resolve complaints themselves. The Financial Ombudsman Service (FOS) may consider complaints about unsecured loans and credit cards for the organisations within its jurisdiction. In 2002-3 it referred to its adjudicators 695 complaints about unsecured loans and 864 complaints about credit cards.

The FLA, which represents around 100 consumer credit and asset finance companies, publishes case studies of arbitration outcomes in its annual report, which also includes a great deal of information on the complaints it handles and how they are dealt with. In 2002 it dealt with 517 complaints. The FLA has a Memorandum of Understanding with the FOS so that complaints that are relevant for one scheme or the other are

referred across. A few complaint categories could fall under both the FLA or FOS schemes; these are explained in the Code of Practice.

The FLA was one of several trade associations expressing disappointment to the researchers that this research excluded trade association conciliation. The organisation believes it is not possible to consider the usefulness of its arbitration scheme without considering its conciliation process. It also points out that it can conciliate in complaints that are not eligible to go to arbitration (the exclusions are listed in the Code of Practice). In this way it can provide help to consumers beyond the reach of its arbitration scheme. Furthermore, the FLA argues that ‘...overlooking the conciliation aspect of the process leads to a skewed analysis of the outcome of arbitration.’³⁴ Where there is strong evidence of consumer detriment, the FLA says, it strives to resolve them at the conciliation stage. Those few that proceed to arbitration are likely to be unrepresentative and are not a reflection of how consumers fare using FLA’s processes.

The CCTA, which represents nearly 500 members in the consumer credit sector, receives only 40-50 complaints a year. They believe that the number is so small because they have a large proportion of small members, who are likely to be close to the customer and more likely to resolve matters locally – probably because they are concerned about their reputation. The CCTA’s process of complaints handling involves either telling the consumer they don’t appear to have a valid complaint, or contacting the member to ask them to reconsider the matter. Some of these are resolved by the CCTA informing the member of the consumer’s rights.³⁵

Another trade body formerly operating in this sector – and which had an arbitration scheme run by the Chartered Institute of Arbitrators – is the National Consumer Credit Federation. It began winding up from 31 July 2003 and is no longer offering services to members.³⁶

Currently the Financial Ombudsman Service is consulting on extending its coverage to include offering voluntary membership to consumer credit firms.

Second-hand cars

³⁴ Letter from FLA’s compliance manager to the researcher, 16/9/03; interview 1/10/03.

³⁵ Interview with researcher, 23 September 2003.

³⁶ Email to researcher, 25 September 2003.

Complaints

In 2002-3 there were 62,807 complaints about second-hand motor vehicles, which accounted for around 8% of all complaints. Of these, 6056 were in the 'difficult to resolve' category (9.6%). This amounts to 8.0% of 'difficult to resolve' complaints across all sectors.

Problems

Problems highlighted by advisers in relation to second-hand cars included:

- Lack of confidence in existing trade association dispute resolution schemes.
- High cost of testing.

ADR provision

The Retail Motor Industry Federation (RMIF) has in place a National Conciliation Service as a consumer redress facility with the opportunity for subsidised independent arbitration. However, the vast majority of the disputes it deals with are about repairs rather than purchase of cars. Fees for arbitration range from £45 to £90 and any value of claim can be considered. It covers 25-49% of the traders in the sector, approximately 10,000. The arbitration is a 'documents only' process, and it makes only monetary awards. In 2002 it handled 38 arbitrations. Decisions are binding on both parties and enforced through the courts. The RMIF reports 100% compliance with its awards.

The RMIF reports that: *'The vast majority of complaints against RMIF members are dealt with through our National Conciliation Service (approximately 1400 cases per year). The 40 or so cases which go to arbitration are therefore a tiny percentage ... but nevertheless offers an important backstop for consumers.'*⁶⁷

The Vehicle Builders and Repairers Association (VBRA) also operates a redress scheme but details were not able to be obtained in time for this study. The VBRA's Code of Practice has stage-1 approval from the OFT. However, the VBRA covers repairs activity rather than purchase of cars.

In Scotland, the Scottish Motor Trade Association offers its own conciliation and arbitration service. Approximately 80 cases per year are considered by its conciliation committee, which includes a representative from the local trading standards service.

³⁷ RMIF questionnaire response.

Around 10% of these cases proceed to arbitration, administered by the Chartered Institute of Arbitrators.³⁸

Upholstered furniture

Complaint levels

In 2002-3 there were 35,195 complaints about upholstered furniture, which accounted for around 4% of all complaints. Of these, 4587 were in the 'difficult to resolve' category (13.0%). This amounts to 6.1% of 'difficult to resolve' complaints across all sectors. According to national statistics the combined value of sales for furniture and furnishings; carpets and other floor coverings; and repair of furniture, furnishings and floor coverings in 2002 was £14.8 billion.

Problems

No particular problems were noted about this sector, although comments were made about the Qualitas scheme (see below).

ADR provision

There is one ADR scheme for this sector – Qualitas, which operates a free conciliation service for disputes related to 'the furniture, floor covering, kitchen and bathroom industry'. It represents 50-74% of the traders in the sector, and 50% of the sales. There are no claim value limits but they do not cover claims for personal injury. Disputes that are not resolved through conciliation can go on to adjudication, for which a fee of £45 is charged; this fee can be refunded if the consumer's complaint is upheld.

Qualitas dealt with 1935 cases in 2002, and of these 421 were in favour of the consumer. The decisions are not binding on the consumer, but they are binding on the trader in the sense that non-compliance can mean termination of their membership. Decisions are overseen by an Advisory Panel made up of representatives from trading standards, Citizens Advice and Which? Legal Services; the panel reviews each adjudication report and advises on compensation guidelines. Qualitas believes its work has reduced consumer detriment because retailers are more aware of their obligations and liability: *'We feedback common areas of complaint so members can proactively address shortfalls either in their customer service, product or sales techniques.'*³⁹

³⁸ Interview with NCC, 11/11/03.

³⁹ Qualitas questionnaire response.

Qualitas also offers expert inspection and testing as part of the adjudication process, and awards are made in a report setting out the reasons for the decision. Qualitas points out that if a consumer were to go to county court, he or she would have to pay for an expert report, and might not recover this cost if the claim is unsuccessful.

Advisers spoke well of this scheme, although some thought its testing facilities were expensive (compared to local testing facilities, if they could be sourced), and another mentioned that she felt a failing of the scheme was that some major players were not members. One adviser was critical of a commercial arrangement between Qualitas and a leading furniture supplier, which he felt compromised their ability to be independent in these cases.

Qualitas also covers fitted kitchen installations, bathrooms, laminate floors and conservatories. One of the advantages cited by Qualitas in its promotional material is that parties have access to free technical advice. Most disputes referred to Qualitas (80%) are resolved at the conciliation stage.

Other personal goods and services

Complaints

In 2002-3 there were 47,439 complaints about other personal goods and services, which accounted for around 6% of all complaints. Of these, 2672 were in the 'difficult to resolve' category (5.6%). This amounts to 3.5% of 'difficult to resolve' complaints across all sectors.

Problems

No particular problems were highlighted by advisers in relation to consumers' complaints about other personal goods and services. This category excludes clothing, pharmaceuticals and toiletries, hairdressing, jewellery and watches, tobacco, shoes, nursery items and homeworking schemes, all of which are listed separately in the 'Personal goods and services' category.

ADR provision

No specific ADR provision was identified for this sector.

Food and drink

Complaints

In 2002-3 there were 29,110 complaints about food and drink, which accounted for around 3.5% of all complaints. Of these, only 269 were in the 'difficult to resolve' category (0.1%). This amounts to 0.4% of 'difficult to resolve' complaints across all sectors. According to national statistics the value of sales for food and non-alcoholic beverages in 2002 was £61.7 billion.

Problems

No particular problems were highlighted by advisers with complaints about food and drink; this sector does not appear to be causing a great deal of consumer detriment. Only 0.1% of overall complaints about food and drink are considered 'difficult to resolve'. One reason suggested for this by advisers is that consumers are able to resolve these complaints successfully direct with the trader or business. Another idea is that people do not pursue complaints about restaurant meals, particularly if they do not live in the area. And many food and drink purchases are of low value, so complaints about them may be considered unworthy of pursuit by the consumer.

Another suggestion put forward is that supermarkets are relatively good at satisfying the complaining customer by giving refunds and making goodwill gestures. The idea is that they exert pressure on their suppliers and competitors, rather than the customer, to get the competitive edge.

ADR provision

No ADR provision was identified for this sector.

Note, however, that cases involving alleged discrimination against disabled customers in restaurants, pubs, and clubs can go to the Disability Conciliation Service. This is free to consumers and service providers. (See below.)

Telephone and mobile phone services

Complaints

In 2002-3 there were 24,824 complaints about **mobile phones and services**, which accounted for around 3% of all complaints. Of these, 2815 were in the 'difficult to resolve' category (11.3%). This amounts to 3.7% of 'difficult to resolve' complaints across all sectors.

In 2002-3 there were 3064 complaints about **telecommunications** (excluding mobile phones), which accounted for around 1% of all complaints. Of these, 813 were in the 'difficult to resolve' category (2.7%). This amounts to 1.1% of 'difficult to resolve' complaints across all sectors.

In addition, there were 1264 complaints about **internet service providers**, which accounted for less than 0.5% of all complaints. Of these, 242 were in the 'difficult to resolve' category (19.1%). This amounts to 0.3% of 'difficult to resolve' complaints across all sectors.

Problems

Problems highlighted by advisers in relation to mobile phones included:

- Unwillingness of traders to treat the sale of a mobile phone and a contract for air time as a linked contract – consumers finding themselves paying expensive monthly fees for air time they are unable to use whilst their phone is being repaired.

No other particular problems about this sector were highlighted.

ADR provision

The telecoms sector is covered by both an ombudsman and a range of arbitration schemes. Otelco, the Office of the Telecommunications Ombudsman, covers 95% of the fixed-line market and 50% of the mobile market. It also now has internet service providers within its remit and covers 30% of these.

We do not have responses from the other telecoms ADR schemes. These are run for the individual companies by the Chartered Institute of Arbitrators, which has provided data on the number of arbitrations held for each in 2002. Only five of the eight schemes had cases in 2002:

| | | |
|----------------------------|----|---|
| British Telecommunications | 46 | |
| Mercury (now Telewest) | 5 | |
| NTL | 1 | |
| Orange | | 3 |
| Vodafone | 3 | |

We understand that a new scheme will be proposed by the Chartered Institute of Arbitrators to meet the requirements of the Communications Act, although information about it is not yet available.

Under section 54 of the Communications Act, public communications providers are required to offer an alternative dispute resolution procedure to their customers, other than their own internal complaints system. These procedures must be approved by Oftel/Ofcom (in consultation with the Department of Trade and Industry). At the time of writing only the Otelo scheme had been approved.

This sector also has two regulators: Oftel, which has had a role in handling individual consumer complaints through its Consumer Representation Section, and ICSTIS, which deals with complaints about premium-rate phone services. Oftel will wind up at the end of 2003, and in 2004 a new regulator, Ofcom, will take over many of Oftel's responsibilities.

Personal clothing, shoes and jewellery

Complaints

In 2002-3 there were 30,418 complaints about clothing and clothing fabrics, which accounted for around 4% of all complaints. Of these, 2742 were in the 'difficult to resolve' category (9.0%). This amounts to 3.6% of 'difficult to resolve' complaints across all sectors. According to national statistics the value of sales for clothing in 2002 was £34.8 billion.

In 2002-3 there were 11,726 complaints about footwear and footwear repair, which accounted for around 1% of all complaints. Of these, 1244 were in the 'difficult to resolve' category (10.6%). This amounts to 1.6% of 'difficult to resolve' complaints across all sectors. According to national statistics the value of sales for footwear in 2002 was £4.9 billion.

In 2002-3 there were 9792 complaints about jewellery, silverware, clocks and watches, which accounted for around 1% of all complaints. Of these, 849 were in the 'difficult to resolve' category (8.7%). This amounts to 1.1% of 'difficult to resolve' complaints across all sectors. According to national statistics the value of sales for jewellery, clocks and watches in 2002 was £3.5 billion.

Problems

No particular problems were reported in relation to ADR in this area by consumer advisers.

ADR provision

The Footwear Examination Centre offers a testing and complaint resolution facility for those members who subscribe to its code of practice. SATRA also provide a testing and impartial reporting scheme but only where complaints are referred by retailers or manufacturers. Evaluation of this scheme falls outside the scope of this project as it does not have an independent element.

Gas, water and electricity

Complaints

In 2002-3 there were 8476 complaints about gas, which accounted for around 1% of all complaints. Of these, 693 were in the 'difficult to resolve' category (8.2%). This amounts to 0.9% of 'difficult to resolve' complaints across all sectors. According to national statistics the value of sales for gas in 2002 was £6.1 billion.

In 2002-3 there were 1567 complaints about water, which accounted for 0.2% of all complaints. Of these, 90 were in the 'difficult to resolve' category (5.7%). This amounts to 0.1% of 'difficult to resolve' complaints across all sectors. According to national statistics the value of sales water supply and miscellaneous dwelling services in 2002 was £5.2 billion.

In 2002-3 there were 5962 complaints about electricity, which accounted for around 1% of all complaints. Of these, 348 were in the 'difficult to resolve' category (5.4%). This amounts to 0.5% of 'difficult to resolve' complaints across all sectors. According to national statistics the value of sales for electricity in 2002 was £7.4 billion.

Problems

No particular problems were reported in this area by consumer advisers. However, it was noted as part of this study that the number of 'difficult to resolve' complaints for gas is around twice that for electricity.

ADR provision

Generally it is regulators and sectoral consumer councils who are most active at dealing with consumer complaints in this sector. Energywatch handles complaints from consumers about gas and electricity suppliers. In its Annual Report for 2002-3 energywatch announced it received 110,000 complaints from consumers. Most of these relate to billing and transfer complaints:

11% were direct selling

33% were transfer complaints

50% were account and billing complaints

WaterVoice aims to provide an independent voice for customers of water and sewerage companies, including dealing with complaints. A memorandum of understanding sets out the respective roles and responsibilities between it and the regulator, Ofwat. In 2001-02 it received 10,564 complaints; the top two categories of complaints were billing and water supply. It can deal with any complaint about any water company and uses negotiation to resolve most complaints. Some will be appropriate to refer to Ofwat, which has power to make a statutory determination, but only in certain areas of dispute – e.g. connections. Three water companies have arrangements with WaterVoice for an arbitration scheme run by the Chartered Institute of Arbitrators. WaterVoice committees sit as arbitration panels for these. No cases went to arbitration for any of the three schemes in 2002 or 2003.

The Chartered Institute of Arbitrators runs an arbitration scheme for disputes about domestic coal, but details were not made available for this research.

Also, the General Consumer Council of Northern Ireland (GCCNI) helps with complaints about natural gas, electricity, and solid fuel/coal in Northern Ireland. In all its complaint roles the GCCNI will normally only handle a complaint if the consumer has first given the company/supplier an opportunity to investigate their complaint and made amends, if necessary. There is currently no method of resolving consumer complaints about water services in Northern Ireland.

Timeshare, holiday clubs

Complaints

In 2002-3 there were 4408 complaints about time sharing, which accounted for around 0.5% of all complaints. Of these, 145 were in the 'difficult to resolve' category (3.3%). This amounts to 0.2% of 'difficult to resolve' complaints across all sectors.

Problems

Problems highlighted by advisers in relation to timeshare included:

- There is not an effective trade association covering the sector
- Tracing the trader where the complainant has been approached on holiday
- Holiday clubs
- Misleading information about rights in cross-border (e.g. cooling-off periods)
- Fraud
- 'Locked-in' owners

A recent Citizens Advice study reports that problems with timeshare and holiday clubs are one of the largest sources of complaints for European Consumers Centres. It highlights a range of problems – high pressure selling, false or misleading information, using prizes to get people to attend sales presentations, absence of cooling off periods – that the Timeshare Act 1992 fails to protect consumers from.⁴⁰

ADR provision

There is no ADR provision in this sector. According to the Timeshare Consumers' Association (TCA), which receives more than 6000 complaints a year from consumers:

'It is common practice for operators to try to force all disputes into the courts knowing that the great majority of consumers have neither the desire nor the resources to fight a court action. With a large percentage of complaints being cross-

⁴⁰ Citizens Advice, *Paradise Lost: CAB clients' experience of timeshare and timeshare-like products*, 2003

*border, consumers are intimidated by the potential difficulty and cost of taking or defending such a court action.*⁴¹

A trade association, the Organisation for Timeshare in Europe (OTE), represents only 10% of the firms operating in the industry. Only five countries are covered – Belgium, Spain, France, Italy and Portugal. According to the TCA, the OTE does include ADR within its Code of Ethics and is promising a Europe-wide ADR scheme. The TCA believes that:

‘If ADR is to work in the timeshare industry in Europe then it needs to be “imposed” as it will never happen voluntarily. The essential ingredients of an effective arbitration scheme in the timeshare [industry] are:

- *The scheme must operate throughout EU*
- *Consumers must have direct access to the arbiter/ombudsman*
- *Access to the scheme must not cost more than taking out a county court writ*
- *Consumers should not be obliged to accept the arbitration, but traders must*
- *An authority must have adequate sanctions to ensure that arbitration decisions are carried out by traders.’*

The OFT says that it cannot get involved with disputes about timeshares because the OTE’s membership is Europe-wide.

Flights, travel, hotels and holidays

Complaints

In 2002-3 there were 17,880 complaints about holidays, which accounted for around 2% of all complaints. Of these, 871 were in the ‘difficult to resolve’ category (4.9%). This amounts to 1.2% of ‘difficult to resolve’ complaints across all sectors.

In addition in 2002-3 there were 2850 complaints about travel agents, which accounted for a further 0.3% of all complaints. Of these, 186 were in the ‘difficult to resolve’ category (6.5%). This amounts to 0.3% of ‘difficult to resolve’ complaints across all sectors.

⁴¹ Email communication from TCA to the researchers, 29/9/03.

It is difficult to isolate complaint figures about flights, but in 2002-3 there were 3286 complaints about road, rail, air and sea travel, which accounted for around 0.4% of all complaints. Of these, 213 were in the 'difficult to resolve' category (6.5%). This amounts to 0.3% of 'difficult to resolve' complaints across all sectors.

Problems

Problems highlighted by advisers in relation to flights included:

- Budget airlines responding slowly to complaints, or not responding at all in some cases.
- Independent Association of Travel Agents (IATA) not interested in pursuing when guidelines not being followed.

ADR provision

Although its role is not primarily to deal with individual's disputes, the Air Transport Users Council can deal with written complaints about air travel. They handled 5332 complaints and enquiries in 2002-3. Its biggest category of complaint is mishandled baggage, and an area of increasing concern is that of flights booked on the internet – discrepancies between what the customer believes to have booked and the flight details shown in confirmation e-mails.⁴²

The ABTA scheme, run by the Chartered Institute of Arbitrators, covers tour operators, travel agents, and holidays – its members represent a majority of firms in the sector: 75-99%, and 90% of market sales. It deals with disputes about the quality of the services provided by its members: accommodation quality, flight delays, building works, food. Personal injury or illness claims are limited to £1,000. ABTA reports it is the largest consumer arbitration scheme in the UK. It receives 17,500 complaints each year, and about 12,000 of these are settled without going to court or arbitration – 'largely due to the desire by companies to avoid formal action through compulsory arbitration.' Of the rest, 1400 went to arbitration, and 1000 of these were in favour of the consumer, with an average award of compensation of £750.

The scheme was re-launched in April 2003 and an appeal procedure was introduced. There is a fee of £300 for the appeal, which is not refunded even if the appeal is upheld.

⁴² Air Transport Users Council, Annual Report 2002-2003.

Other improvements include allowing video evidence. This is important because the ABTA scheme is documents only – i.e. in most cases no hearing is held. ABTA has also recently started publishing anonymised case studies in its annual report.

This year ABTA also introduced a cost-controlled mediation procedure for personal injury and illness disputes in the travel industry. This is also run by the Chartered Institute of Arbitrators. Because this is outside the scope of the study we have not looked at this in detail.

Most advisers spoke well of the ABTA scheme. One said it offered ‘*Good, cheap arbitration, and it works.*’⁴³ However, one adviser said that she would always advise complainants to go to court because ABTA’s insistence on a ‘documents only’ approach led, she felt, to a lower level of compensation than could be obtained in the courts. This feeling of a lower level of compensation being available through the ABTA scheme was widespread amongst advisers and is supported by the recent *Holiday Which?* report comparing ABTA arbitration awards with small claims awards.⁴⁴

The *Holiday Which?* report also mentions ABTA’s pre-arbitration role as gatekeeper and views it as a barrier that consumers have to go through ABTA and get a reference number before they can proceed to arbitration. ABTA sees its involvement as a plus, however, because 70% of complaints get resolved at that stage, and also it allows ABTA to know what is happening among its members in terms of complaints handling, allowing ABTA to pick up on any disciplinary issues (such as violations of the code) that might get lost otherwise.⁴⁵

The importance of a face-to-face hearing was mentioned by others. In an interview with the researchers, a Which? legal adviser pointed out that holidays are one of the few areas where the consumer is entitled to compensation for loss of enjoyment; often the only way to convey the loss effectively is through a face-to-face meeting with the judge or arbitrator.

There was also a feeling that awards were inconsistent. Anecdotal reports were made of one case a few years ago concerning a wide range of awards – from a voucher for money off to a cash payment of around £1000 – depending on how willing the consumer had been to settle. At a forum of consumer advice specialists, however, it was agreed that arbitration awards are generally more consistent than those of district

⁴³ Consumer adviser, 26/9/03.

⁴⁴ *Holiday Which?, Small Claims v Arbitration*, Autumn 2003.

⁴⁵ Phone discussion with researcher, 4/9/03.

judges. And one arbitrator who was interviewed explained that an arbitrator can consider the individual circumstances of a complainant – one who, for example, had special needs and had informed the tour operator of this, yet they had not been catered for and as a result the holiday was worse for that consumer than it would have been for another.

Another adviser said that the awards may be lower but in his view ‘at least you got something’, whereas in the courts it was ‘all or nothing’. His view was that arbitration was much more hard headed and less adversarial – *‘they might say, well, yes your holiday was awful but you got there, so you can’t have any compensation for the flight... and the hotel may have been grim but you stayed there for three nights, so you can’t have any compensation for that...’*⁴⁶

An additional point is that the ease of the ABTA scheme is attractive to many consumers who just want to get the problem sorted out. We spoke to an arbitrator who has handled ABTA cases. She said that her cases are generally *‘about a demand for money – which makes consumer disputes ideal for arbitration.’* She pointed out that explanations can come out of arbitration, but it’s hard to include things that can be enforced. A cash award to be paid in a certain time – this can be enforced. *‘People sometimes just want a fast and accessible way to get the matter resolved, rather than living with it for a length of time.’*⁴⁷

In a study of alternatives to litigation, Goriely and Williams point out that ‘the best advice would be to use ABTA for uncertain claims, because it was cheap and easy to use and would probably produce some compensation. However, for clear-cut legal cases (where, for example, the brochure’s promises had not been honoured) it would be quicker and more profitable to bring a small claim before the county court’.⁴⁸

Several other travel-related ADR schemes are run by the Chartered Institute of Arbitrators for specific companies or bodies in the travel industry. These include: Direct Holidays, Holiday Caravan, Passenger Shipping Association, Saga Holidays, Seychelles Travel, Special Pilgrimages, Travel Trust Association and British Railways Board. Only two of these had any cases in 2002 or 2003: Passenger Shipping Association (2002 - 2 cases, 2003 - 1) and Direct Holidays (2002 - 12).

⁴⁶ Consumer Adviser, 26/9/03.

⁴⁷ Interview with researcher, 21/9/03.

⁴⁸ Goriely T and Williams T, *Resolving Civil Disputes: Choosing Between Out-of-Court Schemes and Litigation: A Review of the Literature*, Lord Chancellor’s Department Research Series No. 3/97, December 1997, p.100.

Funerals

Complaints

Complaint statistics are not gathered on this subject by the OFT.

Problems

Problems highlighted by advisers in relation to the funeral arbitration included anecdotal evidence (not directly experienced) that the system was highly bureaucratic and difficult for consumers to use.⁴⁹

The funerals sector was the subject of an OFT report in 2001. In 2002 Which? published a report on the industry. It states:

'We'd like to see all funeral directors in the UK signed up to a code of practice. Codes should be standardised throughout the industry and should set out the minimum levels of service that consumers should expect when arranging a funeral. Codes should also make it compulsory for all funeral directors to receive training in dealing with the bereaved.

Trade organisations are currently responsible for monitoring their own members' compliance with codes of practice. We would like to see random and objective monitoring of all funeral directors by one independent body which strictly enforces compliance with the code.⁵⁰

ADR provision

The Funerals Ombudsman closed in 2002. The sector is now partially covered by the three trade association arbitration schemes, all run by the Chartered Institute of Arbitrators: Funeral Standards Council, National Association of Funeral Directors and National Society of Allied and Independent Funeral Directors. The numbers of complaints going to the trade associations is small overall. Only the NAFD had any arbitration cases in 2002. This is the trade arbitration that did not sign up to the ombudsman; the others were members of the Funerals Ombudsman during 2002.

⁴⁹ Consumer adviser, 26/9/03.

⁵⁰ Which?, *Funeral Directors Investigated*, March 2002, pp.8-11.

Although we did not receive a response from one of these, two responded with details of their scheme. The NSAIFD covers 25-49% of the sector, and 23% of sales. It has had no cases go to arbitration. The arbitration is free to consumers, and there is a review process. The organisation says that having arbitration has not had any effect on reducing consumer detriment because there are very few complaints in the sector: of 140,000 funerals handled by its members, it receives only 20 complaints a year. The low number of complaints in the sector might not be representative of the level of detriment. An inquiry by the OFT into the funerals industry found a high overall satisfaction with the services offered by funeral directors. However, it concluded that the level of dissatisfaction is likely to be understated by the level of complaints because people 'to complain may simply prolong the grief.'⁵¹

The NAFD represents 40% of the sector and 50% of funerals sold. It has an interesting model for consumer redress. Its scheme, introduced in 2002, allows for the NAFD to refer a complaint back to the funeral director to urge them to resolve it directly. If unresolved, the dispute goes to the Chartered Institute of Arbitrators for a conciliation process; NAFD is not involved in this stage. If the dispute remains unresolved, it goes to arbitration, and a different person is appointed arbitrator from the one who conciliated. The decision is binding, but there is a review option for a fee of £300. According to the NAFD it referred one case to arbitration and four to conciliation in 2002.

It is interesting that arbitration appears to be the standard form of ADR for funerals disputes, as opposed to methods such as mediation and ombudsmen that can allow for explanations and apologies. Funeral disputes appear to be about poor service and professional conduct; according to the NAFD the complaints they see are not about billing for the most part. The arbitrator we interviewed believes that disputes related to funerals – although it would seem they would be impossible to quantify and very emotive – can be very simple, related to poor standard of service, which indicates suitability for arbitration.

Disability discrimination

Complaints

Complaint statistics are not gathered on this subject by the OFT.

⁵¹ Office of Fair Trading, *Funerals*, July 2001, p35.

Problems

No particular problems were reported in this area by consumer advisers. However, it was noted that the OFT does not gather complaint statistics on discrimination in particular. It is one 'type of problem' under the complaint category 'Ethics' used by the EEJ-Net. It is also one category for consumer enquiries used by Citizens Advice Scotland.

ADR provision

There is a dedicated service for disabled consumers, the Disability Conciliation Service (DCS), which is funded by the Disability Rights Commission and operated by Mediation UK. It handles disputes relating to allegations of discrimination under Part III (access to goods and services) of the Disability Discrimination Act (DDA) 1995. It also covers access to education (Part IV), although that is outside the scope of this study. The service is free and is accessed via the Disability Rights Commission. The procedure is very similar to mediation but the mediator/conciliator has an obligation to ensure that any agreements reached are in keeping with disabled consumers' rights under the DDA. It usually involves a face-to-face meeting with an impartial conciliator.

A total of 58 cases were dealt with in 2002. A measure of the growth of the service is that in the first half of 2003 more than double that number were dealt with: 120. Compensation was one outcome in 40% of cases, with an average amount of £500. Other remedies included:

- Apology
- Explanation
- Policy change by service provider
- Disability equality training of staff

Participation in the scheme by traders is voluntary. The agreements are also voluntary and, as with most mediation schemes, compliance appears to be high. Customer satisfaction is 90%. The DCS says it is the first and only non-litigation based service for disabled people. The scheme appears to be not well known among advisers, however.

6. Analysis of ADR provision and usage

Adequacy of ADR provision for consumer disputes

In this chapter we analyse the information provided in the previous chapter and draw conclusions as to the adequacy of ADR provision for the specific sectors and more generally.

Our research identified two types of ADR services for consumer disputes:

1. 'Generic' services, available to consumers with a dispute involving any goods or services. These are usually funded by the parties themselves or, in some cases such as the court-based mediation schemes, subsidised by government and by the mediators themselves. One or two are government funded but the funding is generally short term. These are for the most part consensual (non-directive) processes. Mediation services and one arbitration service fall into this category. Examples include: Central London County Court Mediation and LawWorks.
2. Sector-specific ones, usually financed by the industry. These use for the most part decision-making (directive) processes. The majority of arbitration and ombudsmen services fall into this category. Examples include: ABTA, Otelo and Qualitas.

Examples of the different types of ADR provision are given in Chapter 7.

1. 'Generic' services

In all, seven generic ADR schemes responded to our questionnaire, most of which are primarily mediation-based. Again, levels of usage are generally low. One is a new scheme offering arbitration for EEJ-Net disputes, and it has not yet been used. It is difficult to know the extent of use of the court-based mediation schemes by consumers because it is not possible to extract figures from court statistics showing the numbers of consumer claims (except Edinburgh Sheriff Court where 46% referrals were consumer in 2001-2).

Lack of awareness is one problem. Advisers do not know about most of the 'generic' services, although some advisers appear to be aware of the court-based mediation schemes. Without actual experience of these schemes - or of clients who have used

them - advisers find it difficult to discuss them, and their advantages and disadvantages, with clients. Another possible reason for low usage is that trader participation in the services is voluntary. Traders often need an incentive to participate in dispute resolution beyond the complaints stage. This incentive can be either carrot or stick - a stick if not participating can lead to sanctions such as loss of trade association membership, and a carrot if participation can be successfully viewed as a marketing advantage to obtain and keep customers. Geographic coverage is also patchy - only a few generic schemes are available nationwide - although coverage is adequate within the areas the schemes cover. Another problem is variation in practice - for example, while some are free to use, in others costs might run into thousands. It will often be the case that the cost of proceedings for commercial mediation is more than the value of the dispute. In addition, unlike arbitration and ombudsmen schemes, mediation does not always result in a resolution of the dispute, because it is up to the parties to reach a decision. For this reason it can add to the costs of proceedings if it is unsuccessful and the consumer must pursue another route to resolution.

However, aside from issues related to funding, there are many good points about the schemes and there appears to be potential for development. Mediation can be particularly useful where the rights or wrongs of dispute are not clear, where parties are likely to have ongoing contact or future dealings, and where each side would benefit from a greater understanding of the needs and views of the other. We were particularly interested in the Leicestershire County Council scheme in which a mediation service is linked to local provision of advice (see Chapter 7). The mediation is provided as a separate, independent service, but parties can be referred to trading standards to access impartial legal advice. This link with a source of advice and authority might help in persuading parties to try mediation. The fact that it is free can make it attractive to consumers with low-value disputes and those who cannot afford mediation or court fees. There might also be opportunities to develop consumer dispute resolution by community mediation services (which are free to the users and operate as independent voluntary organisations), who have the mediation expertise and could join forces with trading standards or CABx, for example via the local Consumer Support Network.

2. Sector-specific ADR services

The sector-specific schemes we identified are for the most part either arbitration or ombudsmen services. One is a mediation provider. In all, 22 sector-specific schemes responded to our questionnaire.

A small number of the sector-specific schemes are well known to advisers. These include ABTA, Qualitas and (although outside the remit of this study) the Financial Ombudsman Service.

Adequate coverage

The sectors or part of sectors well served by ADR – well served in the sense that there is an existing independent ADR service with adequate coverage⁵² – include:

- Travel agents/holidays
- Upholstered furniture
- Glass and glazing
- Carpets
- Telecommunications

ABTA's scheme for disputes over travel agents and holidays is well known and relatively well used. ABTA also covers 90% of holidays sold in the UK, and its arbitration provision is run by the independent body the Chartered Institute of Arbitrators. The Qualitas scheme for disputes over furniture and floor coverings is also well known and well used, although it covers only about 50% of the sales in that sector. The Glass and Glazing Federation claims to cover 60% of the market. The British Carpet Technical Centre says it covers 100%. The telecommunications sector is covered by a recently established ombudsman service and a number of arbitration schemes run by the Chartered Institute of Arbitrators. The ombudsman service, Otelo, covers 95% of the fixed-line market and 50% of the mobile market.

Limited coverage

Estate Agents

Other consumer sectors have some sector-specific ADR. An example is The Ombudsman for Estate Agents, which appears to be well used and is set up and

⁵² The OFT's Guidance on its Core Criteria for Codes of Practice (2002) says in relation to coverage: "In practice membership would normally be a majority of firms in the sector but this would not preclude support for a smaller code sponsor containing some of the more progressive elements in the industry. ... It is not a market share test."

operated according to sound principles. Like Otelo, it meets the requirements for membership of the British and Irish Ombudsman Association, which include independence and accountability. It has a Code of Practice approved at stage 1 by the OFT. It covers less than 50% of the sector, however. The schemes run by the National Association of Estate Agents (NAEA) and Royal Institution of Chartered Surveyors (RICS) do not fall within our definition of independent ADR schemes. However, RICS is consulting on setting up an independent ombudsman.

Funerals

Some sectors, like that of funerals, are covered by a number of different trade bodies. Until it closed in 2002 the sector had both a Funerals Ombudsman and a separate independent arbitration scheme. In funerals, the questionnaire responses we received describe schemes that are based on the Chartered Institute of Arbitrators arbitration model. Although we have not studied each trade association's internal procedures in this research, in terms of independent ADR provision the bodies appear to offer roughly the same choice to consumers.

Consumer Credit

Yet in another sector, consumer credit, a larger number of trade bodies are involved in handling complaints about their member companies. We only received details of two, the Consumer Credit Trade Association and Finance and Leasing Association, but they are each very different and offer a completely different choice to the consumer.

Internet issues

Looking at more specific areas of consumer dispute, two sector-specific schemes cover specific internet issues. Disputes arising from transactions via online auction house eBay, for example, are well-served by ADR. SquareTrade is an online mediation service available to all eBay buyers and sellers for a fixed fee of US\$20. Another area of dispute that appears to be well covered by ADR is that of domain name disputes. This is not a traditional consumer sector and statistics of overall complaint levels are not known. It is also an area of dispute that involves businesses as well as individuals as complainants – only 10% of its service users are individuals. Nevertheless it is worth including, especially as it is likely that as internet usage grows among individuals, so will domain name use among individual internet users. Nominet UK claims to cover 100% of the sector of .uk domain names and had a caseload of 572 in 2002. It is not known how many of these are UK consumers. Nominet offers a process

of mediation followed by, if requested, a decision stage for disputes involving .uk domain names. The mediation element is free; to obtain an expert decision is £750.

Direct Selling

In some sectors dispute resolution rests solely with a trade association. Direct selling appears to be one such sector. The Direct Selling Association (DSA), for example, represents 50-74% of direct-selling traders in the UK and 76% of sales. It handles all complaints it receives itself; yet with £1.8 billion in sales, covering 60 million retail transactions, only 'a handful a year' result in unresolved complaints, according to the DSA.⁵³ One reason is the low value of transactions. DSA's members sell small consumer goods – cosmetics, kitchenware, etc – face to face, away from business premises; average transaction values are about £35. Note that Citizens Advice has submitted a 'supercomplaint' about doorstep selling to the Office of Fair Trading. Presumably the traders Citizens Advice refers to in their report are not DSA members. However, it is clear that significant detriment occurs in the sector, especially with older and disabled consumers who may lack choice and are put under considerable pressure to buy expensive goods such as beds.

Little or no provision

Our research found that some of the sectors with the highest levels of detriment had the least independent ADR provision. The home maintenance and repairs sector has little provision except for trade association schemes for parts of the sector and the DTI Quality Mark.⁵⁴ For electrical appliances, only servicing is covered. For second-hand cars the RMIF and VBRA schemes are mostly for disputes about repairs rather than purchase of vehicles, although some coverage is provided in Scotland by the SMTA. These three sectors feature highly in both advisers views on areas most in need of effective ADR provision and OFT figures on 'difficulty in putting faults put right or offers of inadequate redress' (see pages 11 and 12).

A lottery of provision

It is clear that provision of ADR for consumer problems is patchy and presents a lottery for the consumer. The nature of the lottery depends either on the type of problem faced or where the problem arises, and sometimes on the ability of the consumer to afford the fees. This multi-level lottery also means there is a major gap

⁵³ Interview with researcher, 23/9/03.

⁵⁴ The DTI Quality Mark scheme, which is being rolled out nationwide, refers complainants to an independent certification body but currently has limited coverage.

between government policy of promoting ADR and the on-the-ground reality of access to effective, affordable ADR for consumers.

A problem lottery

A few consumer sectors have specific arbitration schemes but most of these are rarely or never used. These include funerals, consumer credit, and direct selling. A few have ombudsman schemes but sector coverage is limited – so access to them depends on the company the consumer is complaining about. These include telecommunications providers, the removals industry, and estate agents. Some very problematic sectors have little or no provision at all, such as home maintenance and repairs, electrical appliances (apart from servicing), and second-hand cars.

A postcode lottery

In relation to mediation, access is ad hoc geographically. This is particularly true of the few court-based mediation schemes around the country. If the consumer lives (or the problem arises) within the catchment areas of the Edinburgh Sheriff Court or the County Courts of Central London, Birmingham, Leeds, Guildford, Exeter, or Manchester, he or she might be able to use one of the court schemes.

If the consumer lives in an area that has a community mediation service, he or she might be able to use it to resolve a consumer dispute. But the umbrella body Mediation UK has only 300 services in local areas across the UK, some of them very small indeed, so not everyone has access to one. Most are involved primarily in neighbour disputes, and it is unknown how many of Mediation UK's member services would be willing to take on a consumer dispute.

A means lottery

The fees to use some ADR schemes put off consumers. Even a relatively small fee can be an obstacle to someone on low income. And they are not without costs risks: some ADR schemes allow the arbitrator to make a consumer pay twice the registration fee (their own fee and an equivalent sum to the trader) if they lose or if they were offered a settlement – pre-arbitration – that was higher than the arbitration award.

It is important to keep in mind that if ADR is seen as an alternative to the courts, many of the costs implications are as serious with litigation of consumer disputes. Even using the small claims procedure, with its costs-limited regime, can put a consumer at risk of losing more than the value of the claim, particularly if expert

reports are needed and the consumer loses and is ordered to pay the costs of the other side's report.⁵⁵

Promoting ADR use with limited provision

There are implications for government policy in this lottery of provision. Encouraging consumers to use ADR methods rather than go to court – and to consider court as a last resort – will only work if there is good-quality, accessible provision available to all. In other dispute areas judges are penalising parties for not using ADR. If this takes hold in the consumer sector, with its patchy provision of ADR, issuing sanctions for not using an ADR scheme would be a serious threat to access to justice principles. However, a judge might take into account a situation in which the consumer is willing to go to ADR but the trader is not, especially if the trader subscribes to a trade association scheme.

Barriers to access

Low usage

Use of formal ADR schemes (there may be quite a lot of informal ADR going on, for example inside trade associations) by consumers is very low. Our research found that only two consumer arbitration schemes (ABTA and Qualitas) receive a large number of complaints; most have none or very few cases. Further, usage cannot be high if availability is low - although ombudsmen are cited as one of the preferred ADR processes by consumer advisers, only three consumer goods and services sectors have ombudsmen schemes. Very limited use is made of *independent* mediation for goods and services disputes, and this is for the most part restricted to a particular geographical locale. However, many more people are likely to use in-house dispute resolution services even if only a small proportion get to formal arbitration, which suggests that some trade association schemes are reasonably well known.

The most well-used ADR schemes – and those most often cited by consumer advisers – are ABTA arbitration (handled by the Chartered Institute of Arbitrators) and

⁵⁵ Parties are encouraged to use a single expert, but not required to do so. So, where a single expert has been agreed on, the most the 'losing' side could be asked to pay towards the cost would be £200. Where each side has obtained their own expert report, the losing side may have to pay both their own costs of their expert report plus a maximum of £200 towards the other side's expert report costs. A winning side in such circumstances faces their own costs of the report minus any amount up to £200 awarded against the opponent.

Qualitas conciliation and adjudication (handled by Qualitas). These are the only ADR schemes whose caseload reached four figures:

| | |
|----------|------|
| ABTA | 1400 |
| Qualitas | 1935 |

The other ADR service that has a relatively high caseload is that of the Ombudsman for Estate Agents. Its annual caseload was 572 in 2002, but it covers only 25-49% of the sector.

The two other ombudsman services – Office of the Telecommunications Ombudsman and the Removals Industry Ombudsman – are both too new to judge the relationship between caseload levels and complaints levels overall. They are a case of ‘watch this space’.

Overall, use of ADR schemes is very low, in the double digits only for most services, and lower for many others.

Gatekeepers to ADR

We suggest that one reason formal ADR usage is low is that in order to access many of the schemes, consumers face a gatekeeper – usually the trade association – which for good or bad holds the key. Trade associations and the companies themselves handle the majority of complaints they get using internal procedures, and it is only when these are exhausted that a consumer will be allowed to proceed to arbitration or an ombudsman.

This gatekeeper role can be helpful or harmful, depending on how sound the association’s internal procedures are. Trade associations might be achieving good outcomes for consumers, and because many can also provide advice and technical expertise, they can be a useful source of help. Also, by dealing with complaints themselves in the first instance, trade associations learn of any problems or areas of bad practice, allowing them to police the relevant code of practice covering their members. It can also be quicker and cheaper for the consumer.

On the other hand, most of these procedures – complaints handling, conciliation, assisted negotiation – are not publicised or described. Some may be very good and meet many of the recognised quality-assurance criteria for formal ADR schemes and others may meet quality criteria such as British/ISO standards. Some may have poor procedures. The procedures are rarely independent and lack of transparency is likely

to make it difficult for consumers to know what they are getting and to weigh the advantages and possible disadvantages. See Chapter 8 for quality criteria.

Cost

Cost may be another issue – this is more relevant for mediation than other ADR services. Where a consumer has to pay a fee to access the service, even if that fee might be refunded, they might choose instead not to pursue the complaint.

Awareness

Another likely reason for low usage is lack of awareness of ADR schemes by consumers and consumer advisers. Beyond a few relatively well-known schemes such as ABTA and Qualitas, few of the ADR options are known to advisers. Comments from advisers also suggest that their views of ADR schemes – particularly those sponsored or handled by trade associations – are for the most part negative. It is reasonable to assume that if they hold such negative views they are less likely to refer consumers to ADR.

Several ADR providers and trade associations mentioned that they believe ADR usage could be improved if more information were available to consumers and advisers about ADR. Some also cited lack of funding and government support as the main obstacles to improved provision.

7. Models of provision

Models of provision

Our research shows that a variety of models for delivery of ADR exist, presenting an ideal opportunity to evaluate different approaches and assess which works best for which consumers or disputes. To recap, our research identified two types of ADR services for consumer disputes:

1. 'Generic' services, available to consumers with a dispute involving any goods or services. These are for the most part consensual (non-directive) processes. Examples include:
 - Court-based mediation schemes in County Courts in Central London, Exeter, Guildford, Leeds, Birmingham, Manchester, and Yorkshire and Humberside; these are generally for claims where proceedings have been issued above the small claims limit of £5,000, and the parties pay a fixed fee. Although Exeter has a scheme specifically for small claims.
 - A free mediation service linked with the in-court advice service at Edinburgh Sheriff Court.
 - A free mediation service run alongside a county council's trading standards department (Leicestershire County Council).
 - A free mediation service in a limited geographical region available to eligible clients for cases over £1000 (LawWorks Mediation Service).
 - 'Commercial' mediation services that could be used by consumers with higher-value disputes (because otherwise the fees charged would be disproportionate).

There is also a 'generic' arbitration scheme run by the Chartered Institute of Arbitrators for EEJ-Net-referred cross-border disputes.

2. Sector-specific ones, usually financed by the industry. These use for the most part decision-making (directive) processes. The majority of arbitration and

ombudsmen services fall into this category. Examples include: ABTA, Otelo and Qualitas.

Some generic schemes and sector-specific are profiled below, listed in alphabetical order. These examples are illustrative of the different types of scheme based on the questionnaire responses and interviews.

1. GENERIC SCHEMES

A low-cost arbitration scheme for cross-border disputes

Chartered Institute of Arbitrators EEJ-Net Scheme

One 'generic' scheme is an arbitration scheme run by the Chartered Institute of Arbitrators (CIArb) for EEJ-Net, specifically set up for EEJ-Net to be able to refer cross-border complaints where there is no sector-specific scheme available. The scheme has not yet had a case but it is set up along the lines of the other documents-only CIArb arbitration schemes. It is open to any consumer in the European Union, and it is designed to deal with claims for general compensation arising from alleged breaches of contract and/or negligence. Fees range from £23.50 for claims up to £1,000 to £293.75 for claims above £50,000. Awards are enforceable in 130 countries (signatories of the New York Convention). Interestingly, the award is not binding on the consumer; the consumer can reject the award and pursue the claim in their local court.

Court schemes

Several courts offer the opportunity to mediate in cases where legal proceedings have been issued. For consumers the most likely ones to be used are those based in several county courts, or in Scotland, the Edinburgh Sheriff Court.

Central London County Court Mediation

Although we did not receive a questionnaire response from this scheme, we include it here with information drawn from another source.⁵⁶ Established as a pilot project in 1996, the Central London County Court (CLCC) mediation scheme has since become a permanent

⁵⁶ From Doyle, M., *Advising on ADR*, 2000.

part of that court. It offers low-cost mediation in cases with a claim value above £5,000 (the small claims limit). The CLCC scheme is voluntary (parties can choose to use mediation), and the court administers the mediations, using trained mediators provided by recognised ADR providers. Also, the mediation sessions take place in the court building – but in small conference rooms, not a courtroom. If agreement is reached on one or more issues, the mediator can set these out in writing. Parties can choose whether they want a verbal agreement, a written agreement that can be enforced as a binding contract, or an agreement that is to be made into a court order.

Other court mediation schemes

Similar court schemes – each with its own guidelines but operated on much the same principle – exist in county courts in Exeter, Guildford, Birmingham, Leeds, Manchester, and Yorkshire and Humberside. The Association of Northern Mediators runs the Leeds, Manchester and Yorkshire and Humberside schemes, with some government assistance. In these, the parties pay a fee of £125, which covers a mediation session of up to four hours (£75 per hour thereafter). This covers claims up to £15,000; the fees increase for claims above that amount. Approximately 100 cases were dealt with by the Association of Northern Mediators in 2002. No information is available about outcomes.

Edinburgh Sheriff Court Mediation

Although we did not receive a questionnaire response from this scheme, we include it here with information drawn from another source.⁵⁷ Edinburgh Central CAB runs a free mediation service linked with the in-court adviser at Edinburgh Sheriff Court. It is funded by the Justice Department of the Scottish Executive and is aimed at a wide range of civil matters which would otherwise go to the Sheriff Court. Although the service identifies that there is scope for consumer disputes to be mediated, most large companies will not agree to go to mediation. Mediation between consumers and small and medium-sized firms, however, is more likely to proceed. Cases are referred by the in-court adviser, the sheriff, or the CAB. The service accepts cases within the small claims limit (up to £750) and summary cause jurisdictions (up to £1,500) but can also accept some higher-value claims. More information on outcomes is described in Appendix 3, Literature Review.

Comment: I think Susan Feloni was part of this scheme – although she advised on court procedures she did have access to a mediator where she judged that would be more appropriate and both parties would agree to it – at that stage she would hand the case over.

Note that most of the court schemes rely on mediators working either pro bono or at a reduced fee.

A pro bono mediation scheme using lawyer-mediators

⁵⁷ From Doyle, M., *Advising on ADR*, 2000.

LawWorks

The LawWorks Mediation Scheme was launched as a pilot in London and the West Midlands in March 2002. It provides a lawyer-mediator free of charge to mediate in disputes of over £1000 where at least one party cannot afford the cost of mediation and there is no other funding available. The scheme can also appoint a free legal representative if necessary. Although it was not set up as a consumer dispute resolution service, it is an option for consumers who live within its geographical scope (London and the West Midlands only) and whose cases are deemed worthy of taking on. Usually this will mean if the consumer cannot afford a court scheme or commercial mediation provider. The scheme has had eight mediations since its launch.

A county-wide scheme offering mediation of disputes alongside impartial advice to traders and consumers by Trading Standards officers

Leicestershire County Council Trading Standards – Alternative Dispute Resolution Service

This scheme, funded by a three-year Partnership Innovation Budget grant from the Legal Services Commission, started operating in October 2002. It offers free, independent mediation to local small/medium-sized traders and consumers within Leicestershire (but outside the city of Leicester). It was set up to deal with disputes over certain identified problem areas – e.g. vehicle repairs – and to target vulnerable and hard-to-reach groups, who appeared to be not accessing the trading standards consumer advice service. The service considers that as long as the resolution of the dispute would benefit Leicestershire consumers, other types of dispute may be brought into the scheme.

Consumers or traders can access the mediation service via trading standards or an external advice agency such as a CAB. The mediation service will contact the other side, and if both parties are willing to proceed a mediation is arranged – either by telephone or as a face-to-face meeting. At the meeting if an agreement is reached it will be drawn up and signed by both parties.

‘The ADR officer ensures that parties have been previously advised of their legal rights before commencing the mediation process and reinforces, at all appropriate times, the presumption that the service acts impartially. No one party is given specific advice on their legal entitlement. If an issue arises and the mediator is called upon to clarify the legal position then this is done on a general level. If further advice is required the Officer suggests further legal advice be sought.’⁵⁸

⁵⁸ Questionnaire response.

The scheme had 40 cases in the first half of 2003. The average claim value is about £4400, and the highest-value claim involved an original contract of £42,000. In 12 out of 58 cases compensation was part of the mediated agreement; the average amount was £664. Other outcomes achieved included:

- Original works completed
- Deadline agreed
- Repairs made
- Apologies for bad customer service given
- Alternative goods offered in place of original goods
- Cancellation of agreements
- Explanations of actions provided where required.

Agreements are binding once signed, and can be enforced through the courts. However, the service notes that it has a high compliance rate: 92%. This is in line with what other mediation providers say – that because the parties make their own decisions about how to resolve the matter, they are more likely to comply with any actions agreed.

Customer surveys are sent to all parties involved in mediation. The returns indicate that 95% are satisfied with the way the case was dealt with and would use the service again; 5% were not satisfied. The service says that consumers and traders are advised on methods used to resolve disputes, 'so that in future they may try to put these principles to use rather than resort to court action.' As evidence that consumers appear to be benefiting by not being forced into taking court action, the service notes that three traders have referred three cases for mediation after having been involved in mediation.

Along similar lines, **Wirral Trading Standards** has established a dispute resolution scheme for consumer disputes. It is called a 'conciliation process' and is restricted to consumers contracting with traders in the scheme. This is an issue of lack of resources, and Trading Standards is trying to get funding to extend it more widely. The conciliation process differs from the Leicestershire County Council Trading Standards mediation scheme in that it allows a Trading Standards representative to guide consumers and traders on the legal issues and if a settlement cannot be reached then give directions. If a consumer is not happy then they are free to pursue the matter to court. If the trader is unhappy, they would first have to make an appeal to an independent appeals panel consisting of a JP, a Councillor and a barrister who volunteers his services free of charge.⁵⁹

⁵⁹ Details via email, 22 September 2003.

2. SECTOR-SPECIFIC SCHEMES

Trade association conciliation and arbitration

Association of British Travel Agents

ABTA's is one of the most well-known consumer ADR schemes. It uses the model of trade association conciliation followed by CIArb arbitration. ABTA represents 75-99% of traders and 90% of sales in the holidays sector. In 2002 it handled 17,500 complaints. Of these, about 12,000 were settled using ABTA's conciliation, and 1400 went to CIArb arbitration. (A similar number, about 1400, go to court.) Of those that went to arbitration, 1000 were found in favour of the consumer, with an average compensation amount of £750.

Each complaint that goes to ABTA is looked at for evidence of a breach of the ABTA Code, which has stage 1 approval from the OFT. Breaches of the Code are passed to the Legal Department for investigation and possible disciplinary action. There is a fee for the arbitration stage, depending on the size of the claim – it ranges from just over £72 to £164.50. The arbitrator can award a refund of the fee if the complaint is upheld. The scheme is also accessible online – the process is the same but all documents can be submitted to the arbitrator electronically.

Typical Chartered Institute of Arbitrators trade association-sponsored ADR provision

STAGE 1

The complaint must have gone through the trader/company internal complaints procedure.



STAGE 2

The consumer takes the complaint to the trade association for complaints handling/conciliation.



STAGE 3

If dissatisfied, the consumer can take the complaint to arbitration administered by the CIArb. The CIArb appoints an independent arbitrator from its panel. Documents are submitted and considered by the arbitrator. A decision is issued which is binding on both consumer and trader.

The outcome can be that the complaint is upheld, partially upheld, or not upheld. The arbitrator can order that the registration fee, if any, be refunded to a winning consumer.



STAGE 4

If an appeal mechanism exists, the consumer can appeal the arbitration award for a non-refundable fee.

* Note that the National Association of Funeral Directors uses a slightly different model in that the conciliation stage - Stage 2 is handled by the CI Arb.

Trade association complaints handling

Direct Selling Association

The average value of claims received by the DSA is £100. Complaints must be submitted to the DSA in writing; the DSA then writes to the company, asking them to sort it out within 21 days. If it hasn't been resolved in 21 days, the complaint is passed to the code Administrator, an independent consumer lawyer commissioned by the DSA, who investigates the complaint and makes a judgement. Fewer than 10 cases a year go this far. The judgement is binding on the trader but not on the consumer. Those in favour of the consumer (about three-quarters of the outcomes) usually involve a refund or replacement.

DSA is listed on the EEJ-Net database and has OFT approval at stage 1 for its Code of Practice.

Trade association conciliation and arbitration

Finance and Leasing Association

The Finance and Leasing Association (FLA) covers approximately 30% of firms operating in the consumer credit sector. In 2002 it handled 889 complaints and enquiries; 409 of these were complaints by consumers. Most are dealt with by the FLA conciliation process, which involves helping the parties to reach an agreement. Those that are not resolved by conciliation can go to arbitration administered by the Chartered Institute of Arbitrators. In 2002 only nine cases went to this stage; in two out of the nine arbitrations compensation was awarded; the average amount was £200. Both conciliation and arbitration are free to the consumer. Arbitration awards are binding on both consumers and traders. All arbitration cases are published in anonymised format in the FLA's annual report. Outcomes on conciliation are not made public.

Trade association arbitration

Glass and Glazing Federation

In 2002-3 there were 27,613 complaints about double glazing products and installation, which accounted for around 3% of all complaints. Of these, 4500 were in the 'difficult to resolve' category (16.3%). This amounts to 5.9% of 'difficult to resolve' complaints across all sectors.

The Glass and Glazing Federation runs an arbitration scheme operated by the Chartered Institute of Arbitrators. It covers only service undertaken by member companies and represents 60% of sales in the sector. It had only 5 cases in 2002. There is a charge - the maximum arbitration fee is £48.

The GGF does not handle complaints about condensation and it does not award compensation. Outcomes are either that the customer is told that the installation is acceptable, or the member is told to bring it up to the required standard. Decisions are binding on both parties.

Professional body complaints handling

Institute of Plumbing

The Institute of Plumbing covers about 10% of the plumbing industry. It receives approximately 400 enquiries a year from consumers, and about one-fifth of these turn into complaints. The Institute can consider complaints about workmanship and compliance with regulations but not about contractual matters, such as pricing; for the most part these have to go to court. The Institute has tried to put in place as independent a complaints procedure as possible. About 30-60 complaints a year go to the Professional Standards Committee, which includes members of the plumbing industry and a representative of Trading Standards. They can appoint an inspector to make a site visit and issue a report, but the report is only for the Committee to see. Remedies can include a Committee recommendation that the plumber return and do remedial work. Disciplinary action is also possible; last year 29 members were removed. Consumers can still go to court if disciplinary action is taken.

Ombudsman

Ombudsman for Estate Agents

The Ombudsman for Estate Agents (OEA) represents 25-49% of estate agents in the UK. It handles claims up to £25,000 relating to buying or selling residential property. The consumer must first use the internal complaints procedure of the estate agent. If a settlement cannot be reached, the agent is required to refer the consumer to the ombudsman. Once all the documentation has been received from both sides, the complaint is reviewed by a case officer, who makes recommendations as to whether the issues are supported or not and what level of financial compensation should be made. The ombudsman then makes a decision based on the case review. The decision is binding on the estate agent but not on the consumer.

In 2002 the OEA closed 583 cases. Of these, 340 resulted in compensation, with average awards of £100 to £499. Other remedies included criticism of the estate agent, an apology and referral to the OEA Council where a flagrant breach of Code is found. The Code has stage 1 approval from the OFT and is policed by the OEA's Council.

Ombudsman

Otelo – the Telecommunications Ombudsman Service

Otelo handles complaints from consumers about its member companies, which provide fixed-line and mobile telephone services and internet service provision – representing 95%, 50%, and 30% respectively. It began operating at the start of 2003 and had 101 cases in the first half of the year. Of the 28 that were completed at the time of submission, 16 included compensation, with an average amount of £77.50. The consumer must first have used the company's internal complaints procedure. If they haven't heard within 12 weeks or if they remain dissatisfied with the company's response, they can approach the ombudsman. The service is free and help is available for completing the complaint form. Complaints are investigated and are resolved either through 'assisted negotiation' or an impartial decision by Otelo. Decisions are binding on the company but not on the consumer.

Otelo's independence is maintained by its governing Council, which consists of a majority of members with no connection to the telecoms industry. Otelo has been approved by Oftel as an independent dispute resolution provider meeting its quality assurance criteria. It is also a member of the British and Irish Ombudsman Association and meets its membership criteria. Both sets of criteria include independence as a core requirement.

Membership organisation conciliation

Qualitas Conciliation Service

Qualitas is a membership organisation made up of traders and companies across a number of sectors: furniture, floor coverings, kitchens, bathrooms, and conservatories. Its members represent about 50% of the sales in those sectors. It offers free conciliation and low-cost adjudication for disputes, and in 2002 it handled 1935 cases. Most of these (about 80%) were resolved by conciliation, which involves a review of the documents submitted by both sides. Advice and suggestions are given where necessary, and the aim is to reach a conclusion that is acceptable to both parties. If the complaint is not resolved, the consumer can choose adjudication for a fee of £45, which is refundable if the complaint is upheld. Adjudication can involve an on-site inspection; a final report is prepared with the adjudication decision, which is binding on the trader but not on the consumer. Remedies include: rectification; rejection; complete refund; replacement; and compensation awards, which range from £100 to £2000. Independence is maintained by an Advisory Panel, including representatives of Trading Standards, Which? Legal Services, Citizens Advice, and retailers. This panel reviews all adjudication decisions.

Other processes

Looking at other processes could be useful in exploring models of provision. **Neutral evaluation** can be a way to give both parties a sense of the likely outcome in court and can result in a recommendation that serves as a basis for consensual settlement. The hybrid process of **med-arb** might also present itself as a very suitable model for consumer disputes. It addresses the needs of the parties to understand each other's position and adjust their own if necessary, it allows for clarification of information, but it also addresses the desire that most consumers express to actually put an end to the dispute and resolve it. For both consumers and traders the finality of med-arb could be attractive.

Outside the UK

We considered and to a limited extent explored the usefulness of ADR models found outside the UK. This is an area that needs further attention so that the development of ADR here can draw from experience – both good and bad – found elsewhere.

Finland – Consumer Ombudsman

One adviser suggested a model like that of the Consumer Ombudsman in Finland. This is part of the Consumer Agency in Finland, which has wide-ranging responsibilities for protecting consumer rights, promoting consumer education, and issuing guidance to business. The Director General of the Consumer Agency serves as the Consumer Ombudsman and as such supervises marketing aimed at consumers and the reasonableness of contract terms used by businesses and monitors compliance with legislation concerning the protection of consumers' rights. The Consumer Agency can also support consumers by assisting in individual legal proceedings if the matter has significance for consumers in general or reinforces a decision by the Consumer Complaint Board. The Consumer Ombudsman does not appear to handle individual complaints from consumers but passes most of these to the Consumer Complaint Board, which describes itself as a neutral and independent expert body whose members represent consumers and businesses in a balanced way. The Board makes recommendations on individual consumer disputes; they are not binding but businesses comply in about 70% of cases. The Board's dispute-resolution services are free and are funded by the state budget. Parties are responsible for their own costs, including telephone and photocopying, and cases take from 6 to 14 months to resolve.

United States – Better Business Bureau

In the US, the Better Business Bureau offers ADR and uses a rating system, which is an inducement for traders to participate. Its ADR Unit uses trained volunteer mediators from all walks of life; it conducts most of the mediations by conference call, and claims to resolve most consumer-to-business disputes in six weeks. Its mediation service is free. Other services offered as part of its ADR Unit are arbitration and a procedure called 'informal dispute settlement', or IDS - similar to early neutral evaluation and resulting in a non-binding recommendation. There are two types of arbitration used: conditionally binding arbitration, which is binding on the business but not the consumer, and binding arbitration, which is binding on both parties. With all processes except binding arbitration, the consumer is free to go to court if dissatisfied with the ADR outcome. In addition to this 'generic' service for any consumer dispute, the BBB also runs specialised dispute resolution programmes for certain industries, including automobile warranties, moving and storage, and manufactured housing. In 2002 the BBB network handled over 620,000 written consumer complaints.

8. Developing ADR in the UK

This was primarily a fact-finding survey mapping what is and isn't available in ADR provision in the UK. However, several issues arose in the course of the research, raised by advisers or ADR providers. Although we were not able to explore any of these issues in depth, we do believe it is important to flag them up as areas that need addressing if ADR is to develop in a way that will benefit consumers and increase their choice rather than limit it.

ADR is a good thing

It is clear that ADR provides the consumer with a valuable means of redress and may offer wider benefits as well. Some of the advantages cited by interviewees include:

- ADR can be time saving and less hassle.
- It can save costs.
- It might be more attractive with small-value claims – e.g. CD purchases – where the hassle factor is off-putting and encourages people not to pursue a complaint.
- ADR can take an approach based on fairness rather than strict interpretation of the law.
- It can (in some schemes) provide independent expertise.
- There can be industry-wide benefits – for both companies and consumers – if standards of practice are improved through feedback loops.

Barriers to overcome

Our report reveals patchy provision of ADR and a multi-level lottery for the consumer, so the future development of ADR has some hurdles to clear if it is to fulfil its potential.

Need for advice

Deciding whether to use ADR or not can be difficult, especially when the decision involves (as with arbitration) waiving your right to take the dispute to court. Consumer advisers felt strongly that consumers need advice from someone with knowledge of their rights and of the various ADR options.

*'ADRs appear to be too formal and unapproachable to most members of the public unless they have a few words to encourage them to go forward. It does not take much but it does take a real person ... to humanise the schemes and make them seem less daunting.'*⁶⁰

At least one adviser told us that she believes that in light of the implementation of Consumer Direct to deal with bulk calls, it is crucial to protect the existing advice services to deal with the more involved cases that need assistance.

Several of the schemes we looked at include an element of impartial advice to the parties. This appears to be particularly true where the ADR provision is linked to a source of expert consumer advice, such as trading standards.

Note that the ADR Officer in the Leicestershire Mediation Service points out that both consumer and trader are able to get impartial advice. This makes the scheme particularly attractive to small-business traders, who often *perceive* they have nowhere to go to get advice on the dispute. All trading standards services will give *civil* advice to businesses, but this service may not be promoted other than for compliance with criminal law.

Need to raise awareness

We were not able to survey consumers' knowledge of ADR schemes but we did find that awareness among advisers is relatively low. Awareness of advisers must be increased if consumers are to become more aware of the alternative redress options available to them. The Advice Services Alliance, the national umbrella body for the networks of independent advice providers such as CABx and Law Centres, has had an ADR awareness project since 1998. Its ADR policy officer gives training to advisers and issues a regular ADR Update giving details of new schemes. ASA has received funding for a website on ADR provision, which is now in progress and will be launched next year. This is likely to be a welcome source of help. One trading standards officer felt that having 'a single point of access for consumer advisers/CABx

⁶⁰ Consumer adviser, by email, 16/9/03.

where information can be found about many forms of ADR (possibly a website) would be helpful.⁶¹

Several ADR providers also identified low awareness as a problem:

'Consumer advisers need to make consumers aware of the existence of our scheme.'

'Information and education about arbitration, what can be offered, what is offered.'

One adviser suggested:

*'Encouragement and more discussions about the ADR offered by trading standards need to be defined and developed to support the intention behind Consumer Direct and evolve a standard level throughout the UK for alternative dispute resolution.'*⁶²

Greater publicity by traders as a requirement of code membership was also suggested.

Status of decisions / enforceability

Concerns were expressed about the arbitration award being binding on the consumer and about the cost of appeals in some of the schemes, where the fee to appeal is not refundable even to a winning party. Some arbitration schemes are including a review stage as a form of appeal of the arbitrator's award. But the cost is often prohibitive – as much as £300, which is not refundable even if the consumer wins the appeal.

In addition, the legal status of ADR outcomes and their enforceability were issues raised by several consumer advisers we spoke with. Arbitration awards are legally binding and can be registered as a judgment on application to the court and enforced in this way. One advantage of these arbitration schemes is that it can be easier to enforce arbitration awards than county court judgments because the company is likely to have the resources to pay the award and has already agreed to participate in the process.

For court orders, as well, there are additional fees to pay for enforcing an award, and a party's other expenses – lost wages, legal representation if used at the hearing – are not recoverable. ABTA is one trade association that can help with enforcement of

⁶¹ Consumer adviser, by email, 16/9/03.

⁶² Consumer adviser, by email, 16/9/03.

awards, at no cost, if an operator or agent refuses to comply, and because there are no hearings, the party's expenses are likely to be lower.

Although traders can be forced out of a trade association for not complying with an arbitration award, advisers gave examples of traders who left a trade association because they did not want to comply with an award. In such cases, a consumer will have to go to court to do so – but it was acknowledged that in that sense they are no worse off than with a court order that has to be enforced. They might even have obtained the arbitration award faster and at less cost. An 'unofficial' (i.e. not conducted under the Arbitration Act 1996) arbitration process, however, can result in an unenforceable award.

Very few schemes are non-binding on the consumer but legally binding on the trade – although this is one of the criteria of the OFT Codes of Practice. With ombudsmen in the private sector, the decisions are binding in the trade in the sense that they can be expelled from membership for non-compliance – but they are usually not legally binding.

In addition to the three ombudsmen operating in the consumer sector, the schemes that are binding on the trader but not on the consumer are:

Qualitas adjudication
CIArb – EEJ-Net arbitration
ADR Group DGS mediation (with decision)
Direct Selling Association

Publication of decisions

Because arbitration awards are private there is no public record of these decisions. A court judgment against a company, however, becomes a public record and, if publicised, consumers could use this information to inform their purchasing decisions. Advisers suggested making arbitration awards public would be a way to empower consumers in this context.

Attitude towards complaints handling

A culture change in attitudes is needed – traders need to know that giving information about complaints doesn't reflect badly on traders. Many small companies and sole traders see complaints as a pain and don't tell customers about their complaints procedure, even if they have one. As a generalisation, larger companies

tend to see good handling of complaints as good public relations, and complaints data as customer feedback is used to improve services.

Quality criteria

At the moment there is no single quality assurance mechanism for ADR provision. Consumers have no way to identify if the ADR scheme they have approached, or to which they have been referred, offers an effective and fair consideration of their dispute and adequate means of redress. The European Commission, British and Irish Ombudsman Association and Office of Fair Trading all set down their own criteria. These are as follows:

The following sets of principles/criteria are currently used to measure ADR services.

European Commission/EEJ-Net

European Commission Recommendation 98/257/EC set out seven principles:

Independence
Transparency
Adversarial principle
Effectiveness
Legality
Liberty
Representation

There is a second set of EC principles covering mediation. In relation to the EEJ-Net criteria, BEUC, the European Consumers' Organisation, in its response to the European Commission's Green Paper on ADR, cited lack of quality control and consistency across Member states:

"Some of our member organisations have been very concerned about the fact that in their respective countries the ADR body or bodies notified to the Commission were not meeting all of the principles of the 1998 recommendation and therefore should not be on the list of notified bodies. Apparently the funding of the clearing houses is also not guaranteed in all Member States and it has been reported from one of our member organisations that although the clearing house seems to function well, it might not be [able] to continue its work in the absence of funding by the Commission. It was also seen as a problem by some of our member organisations

*that in some cases the clearing house was not able to name appropriate ADR-bodies.*⁶³

British and Irish Ombudsman Association

The primary quality standard for ombudsmen schemes is recognition by the British and Irish Ombudsman Association (BIOA). To achieve recognition, ombudsman services must meet four key criteria:

- Independence from the organisations they investigate
- Effectiveness
- Fairness
- Public accountability

Office of Fair Trading

The OFT's criteria for Codes of Practice require the provision of an independent redress scheme with the following necessary provisions:

- Low cost, and ideally no cost, to consumers
- Direct access by the consumer
- Binding on business but not the consumer
- Transparency of decisions and reasons
- Independent scrutiny
- Independence from the code sponsor

Community Legal Service

In addition, the Legal Services Commission has a Community Legal Service Quality Mark for Mediation in the community and family sectors. For some providers – such as community-based ones linked with local trading standards – this might be an appropriate quality assurance mechanism. It is too new, however, to measure the impact on consumer decision-making or the effectiveness of Quality Marked ADR provision.

⁶³ BEUC, the European Consumers' Organisation, in its Response to the EC Green Paper on ADR, November 2002, p2/13.

Funding

Each of the models of provision listed above has a different funding mechanism. This is an issue that needs to be explored when considering what models of provision might work best. For example, it is not easy to see how ADR for relatively low-value consumer disputes could be self-financing. For consumers eligible for legal aid (now known as Community Legal Service Fund funding), financial support is available from the Legal Services Commission, which supports the use of ADR. Mediator or arbitrator fees can be paid as a disbursement under Legal Help, and this can also be used to pay for support in making a complaint to an ombudsman. Neither Legal Help nor Legal Representation can cover the cost of a legal adviser attending arbitration. In consumer disputes that is less of an issue because most arbitrations are conducted on the basis of documents only.

One adviser told us:

“The courts are not providing the solution to the problem. It’s back to the lack of funding again. At consumer level most real problems involve very small amounts and victims (complainants) are usually disadvantaged. They need proactive help at local level to get them redress at no or very little cost to themselves.”⁶⁴

Unsurprisingly, usage is highest in those schemes that are free to consumers. But these have problems, particularly if provision is dependent on short-term grants and on professionals giving their time for free. Cost may also act as a disincentive to small businesses and sole traders participating in ADR. Unsustainable funding can be a risk to consumers – especially if an ADR scheme is vulnerable to closure or undue influence by the industry because of its lack of funding. This is a concern highlighted by the Office of Fair Trading in its Code of Practice criteria:

“Code sponsors shall have adequate resources and be funded in such a way that the objectives of the code are not compromised.”⁶⁵

Even if its independence and impartiality are not at risk, threat of closure of a service can leave consumers exposed. Mediation, which is not funded by the industry for any sector of consumer disputes, is least well provided for and is most of a ‘means lottery’ for the consumer. If funding for mediation provision is dependent on unsustainable sources, consumers are likely to be left high and dry when the funding runs out.

⁶⁴ Consumer adviser, by email, 19/9/03.

⁶⁵ Office of Fair Trading *Core criteria for consumer codes of practice: Guidance for those drawing up codes of practice*, May 2002.

The most effective model appears to be industry-funded but non-industry operated. This is most likely to be true of ombudsman schemes. It is also true of many of the arbitration schemes operated by the Chartered Institute of Arbitrators, but the lack of use of these suggests that the sponsoring trade bodies may be keeping disputes from proceeding to arbitration. The reason for this is probably not solely due to case fees – the way the trade body perceives its role, its view of its importance in policing its Code of Practice, is also relevant – but the funding model is likely to be an additional obstacle.

Ideas and suggestions

This research project was primarily fact-finding in nature, but the DTI did invite views about how ADR might be developed in future. A small number of suggestions did emerge from our discussions with advisers and providers, which are outlined briefly below. However, on the whole the research raised more questions than it did answers. With this in mind, the last chapter describes areas of research that we believe merit further examination.

One suggestion from a **consumer expert in Scotland** was that EEJ-Net needs to have more access points if it is to be useful. There are currently none in Scotland, and he felt that at least two would be useful.

The model used by Leicestershire County Council - local provision, linked with trading standards or a chamber of commerce for disputes with local businesses - has sparked a lot of interest among **trading standards departments**. Although it is important that it be run as an independent service – i.e. separate from enforcement or business interests – the link with a local authority was cited as a useful way to give weight to the invitation to participate in voluntary ADR and thus to reduce the likelihood of the trader declining.

A number of **Consumer Support Networks** are planning to set up their own ADR schemes. We understand, although we were not able to obtain details for this study, that a community mediation service in Milton Keynes is working with the Consumer Support Network to establish consumer mediation.

The **OFT** has said that local schemes could go for Code of Practice approval. This might include a mediation service within a particular geographical location, or it might involve a major shopping centre.

The programme manager of Consumer Support Networks told us:

‘Trading Standards could be well placed to provide such a service as it would be an extension of fair trader schemes and more importantly would address the concerns of the consumer who come to advice agencies expecting they will intervene in the dispute.

However to succeed it would need the support of the Government and the Local Government Association(s) otherwise individual local authorities would argue that there is no remit to become involved. Also resources would be needed to ensure a professional service. Other matters that spring to mind are the definition of the scope of ADR for consumer matters and who would pay any fee and the testing costs.’⁶⁶

⁶⁶ Email from LACORS CSN Programme Manager, 9/9/03.

9. Areas for future research

Recommendations for future research

Our study identified several areas where more information is needed. This was necessarily a limited survey of current ADR provision, and the timescale did not allow for us to delve into these additional areas. In all the areas listed below, we believe that future research would be helpful.

Consumer surveys

Different dispute resolution routes offer different remedies. In court, remedies are generally limited to financial ones. ADR methods like mediation and ombudsman offer the opportunity for a wider range of remedies. For this reason, more information is needed on what consumers want to achieve by pursuing a complaint. We believe that in order to consider how best to encourage the development and use of ADR for consumer disputes, the DTI will want to have – at some point in the future – more information on which types of consumers use ADR, what their experience of ADR is and how the outcomes achieved compare to each other and to those of more traditional fora such as the courts.

Evaluation of ADR schemes

There are several aspects of evaluation to be explored: consumers' views of the ADR process; comparison of outcomes; and evaluation of the effectiveness of the schemes.

Different dispute resolution routes offer different remedies. In court, remedies are generally limited to financial ones. ADR methods like mediation and ombudsman offer the opportunity for a wider range of remedies. For this reason, more information is needed on what consumers want to achieve by pursuing a complaint and on whether or not they are satisfied with the process of dispute resolution. Few ADR schemes in this research appear to undertake customer satisfaction surveys. We believe that in order to consider how best to encourage the development and use of ADR for consumer disputes, the DTI will want to carry out consumer surveys to obtain more information on how consumers experience ADR.

More information is also needed on ADR outcomes. Many ADR providers are reluctant to give even anonymised information on outcomes, generally because they are concerned to protect the confidentiality that is promised to parties. Future

research should evaluate the effectiveness and fairness of ADR outcomes and compare these with other dispute resolution options, including the courts.

Effectiveness is also manifested in the way the scheme operates and is managed. ADR schemes should be audited against a recognised set of principles of quality assurance criteria, such as the EC principles or the OFT criteria for codes of practice, as well as public accountability and sustainable funding.

Linking advice provision to ADR provision

Consumer Direct has the potential to be a watershed development in the provision of advice to consumers. The initial pilot phase suggests that Consumer Direct will handle approximately 80% of enquiries and refer the remaining 20% to other agencies. Of this 20%, however, given the current extent of ADR provision only a tiny number can be referred to existing ADR mechanisms – but what happens to the rest? What is the scope for providing local ADR services along the lines of the Leicestershire model? Could Consumer Support Networks in future provide conciliation, mediation and arbitration services? In the long-term could Consumer Direct itself provide independent ADR services?

Access to ADR for disadvantaged consumers

It is often the case that the most vulnerable consumers in society – for example, the elderly, disabled, those on low-incomes – suffer the greatest detriment but are least able to fend for themselves. It follows that it is precisely these groups of consumers who most require access to redress mechanisms, including ADR. Research is required to identify how much assistance and support such groups need in order to participate in ADR, and the relationship between information, advice and advocacy prior to and during the ADR process. Work is also needed to evaluate what models of provision are most suitable for vulnerable consumers – for example, low-cost telephone mediation or the investigative approach of ombudsmen - and how they should be promoted.

Research into conciliation and complaints handling

Companies, professional bodies and trade associations often take on the role of gatekeeper impeding consumers' access to ADR. In many cases they are providing a good service at conciliation/assisted settlement of complaints, but in general we do not know if the complaints they are dealing with are resolved or simply concluded – in some cases it might be that the consumer goes away still dissatisfied but unwilling to pursue the complaint further, and in others the complaint-handler might be obtaining

good results for consumers. It is hard to form a view because there is no information available on the process, the types of complaints, and the outcomes. Research on what these conciliation and complaints-handling procedures are delivering for consumers is essential.

Similarly, the role of advisers (CABx advisers, lawyers, trading standards officers) in handling consumer complaints should be explored. They are often the first port of call for consumers with a problem, and many complaints will be resolved at an early stage through their intervention. It would be useful to know more about how these are resolved and how such outcomes compare with other dispute resolution options that appear later in the process. Advisers themselves can also be gatekeepers if lack of knowledge or understanding about ADR provision keeps them from referring clients to suitable ADR provision.

There is also a need to assess whether there is a bias in the way the conciliator handles a case when it is part of a trade association scheme compared with more independent case handling at trading standards or citizens advice bureaux.

International study of ADR regimes

Time constraints prevented us from considering in any detail the usefulness of ADR models found outside the UK. In particular, the Better Business Bureau model in the US is worthy of further examination. The DTI's recent benchmarking study⁶⁷ identified a number of different approaches to consumer redress internationally, and it would be interesting to draw good and bad practice from these experiences to inform the development of ADR and other redress routes in this country. Areas to explore could include:

- Raising awareness of ADR among different audiences.
- Improving access to ADR services among disadvantaged consumers.
- The impact of ADR on the market and standards in business.
- Innovative ways of providing and funding ADR services.

⁶⁷ DTI, *Comparative Report on Consumer Policy Regimes*, 2003.

Research on ADR usage for related consumer issues: debt and personal injury

We did not explore the problems consumers face as respondents to court or other action. Debt actions are a major problem area and make up the vast majority of county court claims in England and Wales. Many of these involve consumers, some of whom are likely to have used not paying a bill as a way to register their dissatisfaction with a consumer good or service. Others face actions because of difficulties with consumer credit. Many debt claims are resolved through assisted negotiation with the help of specialised advisers. Debt is not an area that most would be comfortable sending to an ADR scheme. If liability for the debt is not an issue and the only dispute is the debtor's ability to pay, there is not likely to be any appropriate ADR provision anyway. Where consumer dissatisfaction is involved, however, there may be scope for mediation.

Another area that has important overlaps with consumer disputes is personal injury (PI). Some of the PI cases making their way to court might involve injuries or illness as a result of a consumer purchase. PI claims related to holidays, for instance, can only go to the ABTA arbitration scheme if the consumer is claiming less than £1,000. ABTA has recently launched a Mediation Scheme for Personal Injury and Illness that has no cap on claims. Mediation is increasingly being used to resolve PI claims; the process appears to lend itself well to this type of claim, where remedies sought by claimants often go beyond monetary ones.

In order to facilitate future research, we recommend the following.

OFT statistics

The OFT should consider including a category of discrimination in its statistics of complaints by trading practice and gather statistics on this as a type of consumer problem. It is a category used by Citizens Advice Bureaux in Scotland and it falls within the category of 'ethics' used by EEJ-Net in its categorisation of complaints.

It should also include the categories of selling practices (eg direct door-to-door selling and mail order) and online shopping.

It would also be helpful if the OFT goods and services categories were amended in order to mirror more closely the categories in 'Consumer Trends'. This would enable us to have a better idea of the economic impact of complaint figures in various areas of consumer spending.

Court statistics

Court statistics are not available on consumer claims. This makes it difficult to understand if ADR mechanisms are being presented or used as an alternative to court. They might instead be an alternative to trade association complaints handling, or indeed to taking no action. The Mintel Report in 1997 also recommended that 'Statistics should be collected on cases where consumers seek redress, noting sectors, amounts of claims and outcomes.'⁶⁸ This improvement has not happened.

⁶⁸ The Mintel Report, p.33.

