

資訊安全及隱私工作小組

**企業對消費者之替代性爭端解決機制
在隱私及消費者保護部分之法律規定**

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Working Party on Information Security and Privacy

**LEGAL PROVISIONS RELATED TO BUSINESS-TO-
CONSUMER ALTERNATIVE DISPUTE
RESOLUTION IN RELATION TO PRIVACY AND
CONSUMER PROTECTION**

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前言

本文件就現有各國對相關電子商務之替代性爭端解決機制（簡稱ADR）之法律規定提出概括性的介紹。主要是以綜合式的方式陳述各會員國對於企業對個人ADR調查的回覆（調查表請見附件）。

本文件有提供了要點、計畫介紹、回覆的彙整及一些結論。此由秘書處依據消費政策委員會及資訊安全及隱私工作小組所提供的資料所整備，為線上環境的B2CADR計畫的一部份。

資訊、電腦及通訊政策委員匯集消費政策委員會已同意將本份文件經書面程序解密，並於2002年6月26日完成。

要點

雖然會員國提出的報告中，為數眾多有關替代性爭端解決機制並非針對線上環境^①，不過這些資料仍可以提供大多數OECD會員國中關於ADR現階段應用的概況及範圍，以及為將來簡化跨國ADR層次的工作提供一項基礎。

FOREWORD

This document addresses the extent to which existing national legal provisions may impact recourse to alternative dispute resolution (ADR) in relation to electronic commerce. It presents a synthesis of Member country responses to the Questionnaire on Legal Provisions related to Business-to-Consumer Alternative Dispute Resolution (ADR) in relation to Privacy and Consumer Protection (attached as an annex).

This document provides a summary of the main points, an introduction to the project, a synthesis of the responses received, and a few concluding remarks. It was prepared by the Secretariat with contributions from the Committee on Consumer Policy (CCP) and the Working Party on Information Security and Privacy (WPISP), as part of their joint work programme on business-to-consumer (B2C) ADR in the online environment.

The Committee for Information, Computer and Communications Policy and the Committee on Consumer Policy agreed to declassify this document under written procedure, completed on 26 June 2002.

MAIN POINTS

Although the numerous national instruments related to alternative dispute resolution (ADR) reported by Member countries are not specific to the online environment^①, their collation helps provide a general picture of the nature and scope of application of existing provisions related to ADR in most OECD Member countries,

●會員國承認ADR可能助益及鼓勵非正式ADR的建立

對於建立非正式ADR的議題在會員國已經引起廣泛的回應。在大多數國家，藉由政策提議方式中認同ADR帶來的可能助益也已經增加。而這些政策之所以提案的最主要目的在於增加有效率的、及時的及廉價的替代正式法院程序的爭端解決機制^②。

●離線式的ADR計畫在會員國中一般由政府建立，提供或運作

有些特別的離線ADR機制是因法律規定而建立，例如附屬於法院的ADR或處理租賃糾紛的ADR等普遍地存在會員國中。而此種類型的ADR迥異於消費者調查、仲裁及調解的形式，其範圍通常限在若非特殊形式爭端，否則即為特定領域。而這些機制通常具強制性或鼓勵性。

●會員國中少見ADR的基礎規範：其概況通常為拼湊的結果

會員國中並未有支配性的架構規範正式及非正式的ADR。雖然很多國家有仲裁規範，但非正式的ADR大部分仍在未規範狀態。儘管如此，有許多國家已著手擬定

and may serve as the basis for further work to facilitate online ADR at the cross-border level.

●Member countries recognise the potential benefits of, and encourage informal ADR.

A common theme echoed throughout the responses is the importance Member countries attach to informal ADR. In the majority of countries, policy initiatives recognising the potential benefits of ADR have been developed. These initiatives aim at increasing the availability of effective, timely and cheap mechanisms as an alternative to formal court-based dispute resolution.^②

●Offline ADR schemes that are established, funded or run by governments are common in Member countries.

Legal provisions that establish particular types of offline ADR schemes, such as court-annexed ADR or ADR for landlord-tenant disputes, are common in Member countries. They vary from consumer ombudsmen to arbitration boards to conciliation courts. The scope of their competence is usually limited to either a particular type of dispute or a specific sector. Recourse to these schemes may be mandatory or encouraged.

●There is little broad-based regulation addressing ADR in Member countries: the general picture is a patchwork.

Member countries have no overarching framework regulating formal and informal ADR. Although many countries regulate arbitration, informal types of ADR remain largely unregulated.

在特定領域的企業對消費者（B2C）爭端的規範。而因為這些規則，依不同爭端主體（如隱私）、基礎交易行為（如保險及電信）、規模、價值及爭端的複雜性，ADR也發展出許多不同的型態，甚至還含括仲裁或調解的形式等等。

● 在大部分會員國中，當事人一般同意採非拘束性ADR做為契約基礎

依賴非正式的B2CADR並不需要特殊的法律限制。在大多數國家，當事人多會任意以ADR作為契約基礎，如同契約通常在避免遭受詐欺、束縛或在公共政策考量（不公平行為、對個人不公平條款、平等互惠之考量）所為之限制。而這些條件通常會對利用ADR、ADR的執行或拘束ADR形成一般限制。

介紹

為了對ADR在提高使用者及電子商務消費者信心當中所扮演的角色能有更進一步的瞭解，OECD、國際商會及海牙國際私法研討會於2000年12月於海牙舉辦了一個與隱私及消費者保護議題相關的線上ADR研討會。這場研討會主要是探究線上ADR系統在解決線上企業與消費者間小額及低損害爭端的利用。會議首要的焦點在非正式、彈性的系統能否達成爭端的形式與正式處理程序之

However, many countries described provisions that apply to business-to-consumer (B2C) disputes in specific contexts. Rules have been developed for different types of ADR depending on the subject matter of the dispute (e.g. privacy); the underlying transaction (e.g. insurance, telecommunications); the size, value and complexity of the dispute; whether arbitration or mediation is involved, etc.

● In most Member countries, parties generally are free to agree to non-binding ADR on a contractual basis.

Recourse to informal B2C ADR is not subject to specific legal limitations. In most countries, parties are free to agree to ADR on a contractual basis, subject to the restrictions that apply generally to contracts such as fraud, duress or public policy concerns (e.g. unconscionability, non-waivable rights, clauses unfair to an individual, and concerns of equity and fairness). These considerations appear to be a general limit to recourse to, and implementation of mandatory or binding ADR.

INTRODUCTION

In order to gain a better understanding of the role ADR can play in enhancing user and consumer confidence in e-commerce, the OECD, the International Chamber of Commerce and The Hague Conference on Private International Law organised a joint conference on online ADR in relation to privacy and consumer protection, that was held in The Hague in December 2000. The conference explored the use of online ADR systems for disputes involving small values

間的必要平衡。

在2001年2月及3月份的會議中，「資訊安全及隱私工作小組」（WPISP）及「消費者政策委員會」（CCP）決議貫徹海牙會議，並以提升使用者及消費者對於線上ADR的認知，及鼓勵利用公平及有效率的B2C線上ADR為目標。貫徹的工作需包括三個基礎：更新的線上ADR目錄、對於線上ADR潛在使用者的教育工具及法律議題的調查表。

法律議題調查表（見附錄）由秘書處依WPISP及CCP代表經由電子討論會所提出的內容所制訂。2001年6月，最終版的調查表已經寄到會員國並要求其回覆。

秘書處接獲澳洲、奧地利、比利時、加拿大、捷克、丹麥、芬蘭、法國、德國、匈牙利、義大利、日本、韓國、墨西哥、荷蘭、紐西蘭、波蘭、斯洛伐克、西班牙、瑞典、瑞士、土耳其、英國及美國等24個會員國的調查回覆意見。除此之外，比利時Namur大學電腦及法律研究中心（CRID）、義大利零售業協會（Confcommercio）及兩個

and/or low levels of harm that arise between businesses and consumers online. The primary focus was on informal, flexible systems that allow for the necessary balancing between the type of dispute and the formality of the process for resolution.

At their February 2001 and March 2001 meetings, the Working Party on Information Security and Privacy (WPISP) and the Committee on Consumer Policy (CCP) decided to follow up on The Hague Conference with the aim of raising user and consumer awareness about online ADR and encouraging recourse to fair and effective B2C online ADR. This follow-up work included three elements: an updated inventory of online ADR mechanisms, an educational instrument for potential parties to online ADR, and a questionnaire on legal issues.

The questionnaire on legal issues (see Annex) was developed by the Secretariat with input from WPISP and CCP delegates participating via an electronic discussion group. In June 2001, the questionnaire was finalised and sent to Member countries and stakeholders for response.

The Secretariat received responses to the questionnaire from 24 Member countries, including Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Japan, Korea, Mexico, Netherlands, New Zealand, Poland, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States. Responses were also received from The Research

ADR業者TRUSTe與SquareTrade也提供回覆意見。

本調查表的目的是對會員國對於適用於B2CADR的國內法律制度能有一綜觀，並藉此瞭解是否現行法令規定對於ADR的利用造成影響，特別是在線上環境的部分。這些問題的目的在於找出針對國內及跨國情形下，適用ADR的法律規定內容（包含基本法與特別法）真正資訊。

在從回覆結果中所勾勒出的結論中可以見到一些局限性。首先，在一個完整定義方式下所提出的大範圍問題原本就難以回答。特別是在部分國家的法律體系中，將ADR的權限分配予中央與地方的情形下，不一定能擬定相關規範措施。類似的情形還有相關ADR的法律規定通常並不定在單一法令中，而使得難以答覆調查表中廣泛的問題。最後，由於各國對於ADR程序（例如調解及仲裁）的定義不同，而使得各國間的比較變得十分複雜。

儘管有上述限制，從會員國提供的資料中仍可以見到有一定數量的相關團體。

Centre for Computer and Law, University of Namur, Belgium (CRID), *Confcommercio* (The Italian Retail Association), and two online ADR providers, TRUSTe and SquareTrade.

The objective of the questionnaire was to generate an overview of the national legal regimes applicable to B2C ADR in Member countries, with a view to understanding if and how existing legal provisions impact recourse to ADR, particularly in relation the online environment. The questions aimed to elicit factual information on the content of legal provisions (both general and specific) applicable to ADR, both in national and cross-border situations.

There are limitations in the conclusions that can be drawn from the answers to the questionnaire. First, it was difficult to respond to the broad range of questions in a completely definitive way. In particular, for countries with legal systems in which competence over ADR is shared by national and regional or local authorities, it was not always possible to describe all relevant regulatory measures. Similarly, the fact that legal provisions related to ADR are not usually grouped together in a unique set of rules made it difficult to provide comprehensive responses. Finally, comparisons between countries were complicated by variations among national definitions of ADR processes (e.g. mediation or arbitration).

Despite these limitations, a number of commonalities emerged from the answers given by Member countries.

I.ADR的一般規定

部分會員國有一些要求或鼓勵當事人利用非正式ADR解決特定爭端的特殊規定。撇開法律規定不談，大多數國家的回應傾向以一般政策的方式鼓勵消費者利用非正式的ADR，特別是政府規劃已經進行的情形。其他國家則有特別規定禁止或限制ADR在特定事件的利用。

A. 鼓勵或要求利用ADR的規定

澳洲、加拿大、義大利、紐西蘭、英國及美國均有對於特定爭端利用ADR的鼓勵規定。在英國，有關誹謗、個人侵害、醫療糾紛、需專業判定的疏失、建築、機械有關案件會在前審階段鼓勵其利用ADR。在澳洲1998年的公平貿易法庭法也明文鼓勵在起訴前先利用ADR解決爭端。

奧地利、加拿大、法國、德國、義大利、日本、紐西蘭、英國及美國均有規定，在特定情形下，甚至明確要求當事人尋求司法救濟前應優先採用ADR。

要求起訴前利用ADR的規定

I. GENERAL PROVISIONS ON ADR

Some Member countries have specific provisions that require or encourage parties to have recourse to informal ADR for certain types of disputes. Aside from legal provisions, a majority of countries referred in responses to general policies of encouraging consumers to have recourse to informal ADR, particularly where government schemes have been made available. Other countries have specific provisions prohibiting or limiting recourse to ADR in certain circumstances.

A. Provisions encouraging or requiring ADR

Australia, Canada, Italy, Japan, New Zealand, the United Kingdom and the United States have provisions that encourage recourse to ADR for certain disputes. In the United Kingdom, pre-trial protocols for defamation, personal injury, clinical disputes, professional negligence and construction and engineering matters encourage recourse to ADR. In Australia, the Fair Trading Tribunal Act 1998 expressly encourages the use of ADR in resolving disputes brought before the tribunal.

Austria, Canada, France, Germany, Italy, Japan, New Zealand, United Kingdom and the United States have provisions that, in certain circumstances, explicitly require parties to exhaust ADR prior to seeking judicial remedies.

Provisions requiring ADR before a complaint is filed

部分國家要求當事人在特定情形下應在向法院起訴前優先尋求ADR的方式解決。舉例而言，德國有地方立法要求財產權糾紛的當事人先嘗試以協商方式解決爭端，這些也包括涉及小型的賠償或睦鄰法的訴訟、及有關個人名譽損害的訴訟。在奧地利及瑞士，租賃糾紛應由公法人提供的特別ADR處理。在法國，如果對於房屋租賃中關於房屋整修的協議無法達成時，雙方當事人在提起訴訟前必須向公寓調解委員會請求處理^③。

要求起訴後利用ADR的規定

一些國家有法律規定法院或法庭在相當情形下，且案件在管轄權範圍內，得要求當事人在尋求ADR處理之前，應先完成起訴程序。又此相關規定的國家有澳洲、加拿大、義大利、日本、紐西蘭及美國。例如在澳洲1994年的租賃法庭法中即明文要求調解為雙方當事人要求法院介入前的首要解決爭端的程序。更進一步的例子，如加拿大的州立法中甚至要求所有民事糾紛的當事人在辯護程序結束前參與調解。在英屬哥倫比亞、加拿大，由法官非正式引導的強制性的機制甚至做為當事人小額訴訟程序的一部份^④。

Some countries require parties to exhaust ADR in certain circumstances prior to filing a complaint in court. For instance, Germany has regional legislation requiring parties to attempt conciliation for disputes relating to property law, involving small claims for compensation, neighbourhood law and claims over damage to personal reputation. In Austria and Switzerland tenancy disputes should be taken to a specific ADR administrative body. In France if agreement cannot be reached on rent when a lease is being renewed, the parties must refer the matter to the *Commission Départementale de Conciliation* before applying to the courts.^③

Provisions requiring ADR after a complaint is filed (court-annexed programmes)

Some countries have legislation that allows courts or tribunals to require parties that have filed complaints before them to go to ADR in appropriate circumstances for matters within their jurisdiction. Countries that referred to such provisions include Australia, Canada, Italy, Japan, New Zealand and the United States. For example, in Australia, the 1994 Tenancy Tribunal Act requires mediation as a first method for dispute resolution between parties seeking the intervention of the tribunal. As a further example, in Canada, state-based legislation requires all parties to civil disputes to attend a mediation session at the close of pleadings before any further step can be taken in the case. In British Columbia, Canada, a mandatory settlement conference conducted informally by a judge is part of a small claims court initiative.

類似的發展在荷蘭則是最近在國內建置了5個附屬於法院的專業調解計畫。在這計畫中法官得要求在特殊的行政訴訟或民事訴訟當事人接受調解人的協助找出解決方式。更進一步的則有美國，其在最近推動一連串立法，促使部分的州及聯邦法院要求訴訟當事人利用ADR為起訴後，及程序進行前之必要步驟。例如在緬因州，大部分的民事案件在完成起訴程序後，雙方當事人必須先排定ADR的時程以處理爭端。

B. 禁止或限制利用ADR之規定

一些國家有禁止或限制ADR利用的規定。法國、德國與義大利明文規定，有關不得讓與或不得拋棄的爭端，一般而言當事人不能尋求ADR處理（例如離婚或家庭糾紛案件）。墨西哥也有類似的規定，墨國禁止特定案件如家庭糾紛或離婚案件藉由仲裁方式處理^⑤。美國則規定，如果特定的爭端案件涉及憲法上的權利時，雙方當事人不得向法院附屬的ADR請求處理，但可以自願性地尋求私人ADR解決^⑥。

丹麥、芬蘭、德國、韓國、荷蘭、波蘭、西班牙、瑞典及瑞士已建置國內的ADR機制，不過部分特定的案件（例如涉特殊金融價值）及特定當事人（如企業對政

In a similar development, the Netherlands noted that it has recently initiated court-annexed mediation projects on an experimental basis in five different courts throughout the country. As part of the programme, judges can request that parties try to reach a solution with the help of a mediator in specific administrative and civil (including family mediation) cases. Further, in the United States, pursuant to a range of legislation, some state and federal courts require litigants to exhaust ADR first as a matter of course, after a complaint is filed, before the trial can continue. For example, in Maine, in most civil cases, after filing a complaint in court, parties must schedule an ADR conference to try to resolve the dispute.^④

B. Provisions prohibiting or limiting recourse to ADR

Some countries have provisions prohibiting or limiting recourse to ADR. France, Germany and Italy noted that parties could not generally seek to resolve disputes involving inalienable or non-disposable rights through ADR (e.g. divorce, familial disputes, etc.). Similarly, Mexico referred to legal provisions that prohibit certain matters such as familial conflicts and divorce to be resolved by arbitration^⑤. In the United States, while the parties cannot be required to go through court-annexed ADR for certain disputes notably involving constitutional rights^⑥, they can voluntarily agree to try to resolve them through private ADR.

Denmark, Finland, Germany, Korea, Netherlands, Poland, Spain, Sweden and Switzerland have set up national ADR schemes to which recourse is not permitted for certain types of cases (e.g. below a

府的爭端則在排除之列），尋求ADR方式是不被允許的。在荷蘭，經過認證的申訴處理中心不得處理一定範圍的爭端，包括涉及死亡、身體傷害或醫療等爭端。在瑞士則有進一步規定，基於仲裁協議，如專屬管轄的案件，雙方當事人不能任意採取仲裁。

C. ADR的耗盡

少數會員國的報告中可以見到因適用ADR取代法院救濟程序的足以影響契約合意的特殊規定。

韓國、紐西蘭、美國及西班牙均明白指出在契約中制訂ADR耗盡條款在實務上似乎是可執行的。例如在美國，類似這樣的契約通常是被認同的，除非有涉及詐欺、脅迫、錯誤、不正當或違法行為時，當事人方得主張無效。澳洲、加拿大及日本的報告中則提及當事人可在契約中載明ADR耗盡條款。不過報告中也強調，這些條款更在被法院以「不公平條款」為由或因其他違反規範為由，例如產生不當的影響、違反公共政策或限制消費者尋求正式法律救濟，而宣告無效。

絕大部分的歐盟國家都援引歐盟指令的不公平契約條款規定，主張不能讓消費者放棄訴訟的權利。這些國

specified monetary value) and/or to certain parties [e.g. exclusion of business-to-government (B2G) disputes]. In the Netherlands certified complaints boards are not able to deal with a range of disputes including those relating to death, physical injury or illness. Further in Switzerland, under the *Concordat* (agreement on arbitration), the parties are not free to use arbitration if the case comes under the exclusive jurisdiction of a state authority.

C.Exhaustion of ADR

Few Member countries report having specific provisions that would affect the validity of a contractual agreement to exhaust recourse through ADR prior to seeking redress through the courts.

Korea, New Zealand, the United States and Spain indicated that contracts to exhaust ADR would, in practice, likely be enforceable. For example, in the United States, such a contract would generally be upheld unless the parties seeking to invalidate it can show that it was procured by fraud, duress, mistake, unconscionability or illegality. Australia, Canada and Japan reported that parties could enter contracts to exhaust ADR. However, they stressed that such contracts may be set aside or declared invalid by the court as an “unfair contract term” or because of some other irregularity such as procurement by undue influence, violation of public policy or restriction on consumer access to ordinary legal remedies.

The majority of European Union countries referenced the EU Directive on Unfair Contract Terms that, *per se*, does not allow

家也提到國內現行的法令中也規定，如契約中有限制進入正式法律救濟之條款，則該契約無效。舉例而言，奧地利在其消費者保護法中規定，如契約中有剝奪消費者起訴權利，該契約無效。類似的情形在義大利則參酌民法規定解釋B2C契約的任何條款涉及或限制司法機關權限者推定為濫用。參酌國內法的不公平契約條款或援引歐盟指令的國家有丹麥、芬蘭、法國、義大利、荷蘭、瑞典及英國。而與上述有類似規定的則有墨西哥，在該國消費者保護法中明文規定，有不利於消費者權利之條款一般為無效。

D. 拘束性的ADR

一般而言並沒有特別的規定在爭端發生後及ADR程序結束時，禁止契約當事人為受ADR拘束的契約合意。例如奧地利、法國及義大利則明文，若當事人在ADR處理的結果中為同意之簽名，依契約自由原則，應受承認及簽署之同意將依契約法拘束當事人。

然而，在一般實務上常出現的情形為：在契約條款中在爭端發生前以ADR拘束當事人的條款多被視為「不公平條款」或違反公序良俗，特別是如果有剝奪消費者

consumers to give up their right to go to court. They also mentioned national implementing legislation as further bases on which a contract could be invalidated if its effect were to restrict access to ordinary legal remedies. For instance, Austria noted provisions in its Consumer Protection Act which declare invalid a contract that deprives a consumer of his/her right to bring a matter before court. Similarly, Italy referred to its Civil Code which states that any clauses in B2C contracts that concern or entail exceptions to the competence of judicial authorities are presumed to be abusive. Other countries to reference national legislation on unfair contract terms or the EU Directive in this context included Denmark, Finland, France, Italy, Netherlands, Sweden and the United Kingdom. In a similar but broader approach, Mexico noted that its Federal Consumer Protection Law also invalidates clauses that are generally “against consumers’ rights”.

D. Binding ADR

In general there are no specific provisions that prohibit contractual agreements between parties to be bound by ADR after a dispute has arisen, and, *a fortiori*, at the end of the ADR process. For example, Austria, France and Italy noted that in the case of agreements signed at the conclusion of an ADR process, contractual autonomy is recognised and agreements signed by the parties will be binding according to contract law.

However, the general practice appears to be that contractual provisions binding parties to ADR prior to a dispute having arisen may be regarded as an “unfair” contract term or contrary to public

訴訟權利的情形時。採此觀點的國家有澳洲、奧地利、加拿大、丹麥、芬蘭、義大利、日本、荷蘭、西班牙及瑞典。例如瑞典及法國的法律規定，如消費契約中有仲裁條款者以違反公平為由自動無效。英國也有類似規定，如果契約中涉及小額請求時，仲裁合意條款對消費者而言是不公平而無效的。

紐西蘭與美國在實務上，消費者得任意決定是否受ADR拘束，但契約法中對於契約中有關受ADR拘束條款之效力最後仍應視契約法而定。例如在美國，即使契約條款中有剝奪消費者訴訟權利的情形，契約並不因此而無效，此時契約的效力應就個案視情況而定。除有違反契約法之一般原則，如詐欺、脅迫、或不正當行為，依通常規定仍視其為有效、不可撤回及具有可執行性。日本的法律則指出，如為將來發生之爭端事先為仲裁協議，只要其符合正當性且該爭端因此產生，即為有效。

E. ADR結果的履行與執行

許多ADR的處理結果是由雙方當事人之合意履行，也因此並不要求由第三人進一步介入。然而，當一方當事人拒絕履行ADR的協議時，許多國家認為應有機制執

policy, notably if it deprives the consumer to the right to go to court. Countries which adopted this approach included Australia, Austria, Canada, Denmark, Finland, Italy, Japan, Netherlands, Spain and Sweden. Legislation in Sweden and France for example mandates that consumer contracts entered prior to a dispute containing an arbitration clause are automatically invalid as unfair. Similarly, in the United Kingdom, an arbitration agreement is automatically void as unfair for consumers specifically if it relates to a claim for a small amount.

New Zealand and the United States noted that, in practice, a consumer is free to consent to be bound by ADR but that contract law will apply to ultimately determine the validity of a contract to engage in and be bound by ADR. For example, in the United States, a contract is not invalid simply because it deprives the consumer of the right to go to court-the validity of a contract in this situation is decided on a case-by-case basis. The general rule is that such contracts are valid, irrevocable, and enforceable, except where they violate general principles of contract law, such as fraud, duress or unconscionability. Legislation in Japan also indicates that an agreement to refer future disputes to arbitration is valid as long as it relates to determined relations of right and disputes arising therefrom.

E. Implementation and judicial enforcement of ADR outcomes

Many ADR outcomes are implemented by the consent of the parties and thus do not require further third-party intervention. However, when one party refuses to abide by an ADR agreement,

行ADR的協議。在B2C的跨國案件中，如何使牽涉數國的ADR處理結果能被執行的立場尚不明確。

日本、紐西蘭、英國及美國均明白指出ADR，如調解或協商結果得依契約基本原則而為法律強制執行。其他國家則有特殊的法律規定俾提供相關機制執行國內ADR的處理結果。舉例而言，在荷蘭，經由調解程序產生的協議通常得向法院請求法官確認。在法國，非司法機關所為之調解，如當事人同意，可以向法院請求給予協議法律拘束力⁷。

部分國家也指出，經由一定程序完成的ADR協議（例如法院附屬的ADR程序），在當事人同意下，多能向法院聲請確認而取得判決之地位。澳洲、法國、日本、美國及英國多傾向這項作法。在法國，法院中也提供協商之機制讓當事人在訴訟程序間得以利用，當事人在任何時間均可請求法院紀錄其協議或法院得準備調解協議讓雙方當事人簽署。加拿大也表示有類似情形，雙方當事人ADR協議有簽訂的書面形式或或藉由公證證明其合意，ADR的處理結果即可因當事人的合意而得以執行。

many countries indicated that they have mechanisms for enforcement of ADR agreements. It remains unclear, in the B2C cross-border context, how an ADR outcome involving nationals from different countries can be enforced.

Japan, New Zealand, the United Kingdom and the United States indicated that ADR outcomes such as mediation or conciliation can be judicially enforced under basic contract principles. Other countries have specific legislative provisions that provide mechanisms for the enforcement of domestic ADR outcomes. For instance, in the Netherlands, agreements reached after a mediation procedure can generally be brought to court to be confirmed by a judge. Further in France, in cases of non-judicial conciliation, if the parties agree, the court may be asked to give binding force to their agreement.⁷

Some countries also indicated that ADR agreements made during the course of proceedings (for example in the context of court-annexed ADR) can be given the status of judgements on application to the court if both parties consent. Australia, France, Japan, the United States, and the United Kingdom referred to this approach. For instance, in France, the courts have a general conciliatory role such that if the parties reach settlement during a procedure, they may at any time ask the court to record their agreement or the court can itself prepare a conciliation agreement to be signed by the parties. Canada also indicated similarly that an ADR outcome can be enforced with the consent of the parties in which case an ADR agreement forms the basis of a consent order issued with the same status as any other court

奧地利、德國、匈牙利、義大利、韓國、墨西哥、波蘭、西班牙、瑞士及土耳其表示ADR的決定若是國家設立之機制所為者，在特定情形下具有執行力。例如在墨西哥，基於消費者保護法，經簽署之處理結果或協議必須經消費者保護官辦公室PROFECO依其調解或仲裁程序所為而證明者，及具有終局判決之性質，當事人必須履行或由法院強制執行。奧地利也有同樣的規定，依房屋出租人與承租人法規定，由相關ADR機構寄出的處理結果尚未生效力，如該爭端在四週內未就ADR處理結果向法院起訴者，則該處理結果具有執行力。相反地，丹麥及芬蘭表示消費者申訴局所為之決定或建議並不具執行力與拘束力。

最後，一些國家提及ADR結果執行的一些特殊的法律限制。例如日本在仲裁程序及公開傳喚程序法中，爭端之任一方當事人若有出現所規定的特殊情形之一者，如要求一方為法律禁止行為，方能聲請裁定無效。依英國仲裁法，如法院有足夠理由認定仲裁協議有無意義、無效、無法補正或不符資格之情形時，仲裁協議得被廢棄。荷蘭也有進一步規定，當仲裁或拘束性建議程序處理結果顯然與公序良俗衝突時其執行將會受到影響⁹。在捷克共和國、法國、墨西哥、波蘭、瑞士、土耳其及美

order.

Austria, Germany, Hungary, Italy, Korea, Mexico, Poland, Spain, Switzerland and Turkey indicated that ADR decisions rendered by bodies operating under national schemes can be enforced in some circumstances. For example in Mexico, under the Federal Consumer Protection Law, outcomes issued or agreements approved by PROFECO (the Consumer Protection Attorney's Office) under its conciliation and arbitration procedures have the nature of final judgements and must be fulfilled by the parties or enforced by the courts. Also in Austria, an outcome delivered by the relevant ADR body concerning Landlord and Tenant Law constitutes an "executory title" and as such is therefore enforceable provided the dispute isn't pursued in court within four weeks of service of the ADR outcome. Conversely, Denmark and Finland indicated that the decisions or recommendations of Consumer Complaints Boards are not enforceable or binding.

Finally, a few countries mentioned specific legislative limits on implementation of ADR outcomes awarded by particular statutory ADR bodies or in the context of arbitration. For example, in Japan, under the Law of Public Summons Procedure and Arbitration Procedure, either disputant can apply for the annulment of an award if one of a number of circumstances exist, including for instance, if the award requires a party to undertake an act prohibited by law. Under UK arbitration legislation, an arbitration agreement can be "set aside" if the court is satisfied that the agreement is "null and void",

國還有其他特殊的法律規定。

II、ADR的程序保障

部份會員國針對內容多樣之ADR機制設有程序保障條款。其他國家則僅在特殊ADR類型或為特殊爭端所設置之ADR機制方設有程序保障。

A. 機密性

美國指出其為ADR程序及其結果機密性提供了特別的規範。在部分州立規則中針對保障機密性有明確性的規定。例如俄亥俄州的調解保密條款即要求調解之通訊須秘密為之，但其亦有不少例外^⑧。

機密性使政府運行ADR制度開始呈現多樣化。瑞典現有ADR案件係由官方受理，所有程序原則上係公開為之，除非有敏感之個人或企業資訊情形，其決定始為秘密。波蘭亦採類似作法，和解法院除「公開將違反公共政策」或「公開將揭露國家或企業機密」情形外，均以

inoperable or incapable of being performed. Further, in the Netherlands, when the outcome of an arbitration or binding advice procedure is manifestly in conflict with public morals or public policy, its implementation will be affected.^⑧ Other specific legislative provisions exist in Czech Republic, France, Mexico, Poland, Switzerland, Turkey and the United States.

II. PROCEDURAL SAFEGUARDS FOR ADR

In some Member countries there are legal provisions imposing certain procedural safeguards for a broad range of ADR programmes. Other countries have procedural safeguards only for a particular type of ADR or ADR for a particular type of dispute.

A. Confidentiality

The United States cited specific legislation providing for confidentiality of ADR proceedings or outcomes. The United States noted that there are some state-based regulations which ensure confidentiality. For example, Ohio's mediation confidentiality statute requires mediation communications to be confidential, subject to a number of exceptions.^⑨

Confidentiality rules for government-run ADR schemes appear to vary. In Sweden the existing ADR body is a public authority such that all processes are usually public but a decision can be made confidential if it contains delicate personal or business information. A similar approach is taken in Poland where Court of Conciliation cases

公開方式行之。其他如丹麥、芬蘭及南韓，法律為確保程序公開之目標，規定政府於運作ADR機制時得無視任何為機密性所為之協議。以丹麥為例，行政公開法允許涉及ADR案件處理或結果之相關資訊，必要時得提供予第三人。

相對而言，瑞士以公權力進行之仲裁程序通常秘密進行，但在當事人對仲裁決定有不服情形時，受理案件者能取得所有關於ADR程序之資訊。

澳洲、法國及日本則將ADR之程序保障與司法相連結（或採取附隨於法院之ADR）。例如法國將程序保障寓於由法院指定和解者或調解者所進行之司法程序中。其次，日本之和解依其民事調停法應秘密為之，但當事人及利害關係人得請求閱覽或複製本案紀錄，惟須以閱覽或複製行為無礙於法院保存該紀錄或其功能者為限。部份國家立法例確實認為因ADR程序之進行而生資訊並非等同於訴訟程序中的證據。例如澳洲聯邦法院法規定，在附隨於法院之ADR程序中，所有陳述或承認，均不得使用於任何法院或程序當中。

are public unless disclosure would be against public policy or would reveal state/business secrets. Similarly, in Denmark, Finland, and Korea, legislation aimed at ensuring public access to public processes applies to government run ADR bodies to override any agreement as to confidentiality. For example, in Denmark, the Open Administration Act would apply such that information regarding the proceeding of an ADR or an ADR outcome can be given to a third party on demand.

Conversely, in Switzerland, arbitration procedures in state-run bodies are usually confidential but if a party appeals against a decision, the appellate authority is entitled to all relevant information on the ADR process.

Australia, France and Japan referred to safeguards applicable to ADR in the judicial context (or court-annexed ADR). For example, in France there are safeguards imported in the procedures of conciliation undertaken by judicial conciliators and mediation proceedings conducted by court appointed mediators. These safeguards notably guarantee the confidentiality of the proceedings. Further, in Japan, conciliation cases, under the Law of Conciliation of Civil Affairs, are confidential but the parties and the persons interested in the case can request perusal or copying of the record of the case unless it would obstruct the keeping of the record or the functions of the court. Legislation in some countries actually deems information arising from an ADR process as inadmissible as evidence. For example, in Australia the Federal Court Act provides that evidence of anything said, or of any admission made at a court-annexed mediation session,

然而會員國之澳洲、加拿大、法國、義大利、墨西哥、荷蘭、紐西蘭¹⁰、瑞士與英國仍指出，不論當事人間是否合意維持程序機密性，實際上當事人仍可能被迫於特殊情狀下揭露關於ADR程序的相關資訊。例如墨西哥即指明，依據其聯邦消費者保護法，該管機關、ADR提供者與消費者須提供PROFECO，即消保代理人所有進行法定程序所需之資訊。澳洲與加拿大亦指明ADR之程序主導者（或調解者等等）為避免重大損害而有必要時，負有揭露特定資訊之倫理上義務。澳洲及加拿大更進一步指出，法院為公益理由雖須對機密性加以尊重，但出於相同理由，其亦須經慎重考量作成「公益」優先於「對機密性所為合意」之決定。

B. ADR提供者之定位與中立性

多數會員國均表示，對於附隨或提交於法院之ADR程序主導者之資格及中立性，在其本國法中有特別規範。提出此類規範者包括澳洲、加拿大、法國、日本、荷蘭及美國。以法國為例，民事程序法要求和解者或調解者必須擁有三年以上之實務經驗，但對於非司法領域所提供之服務則無一般性強制規範。此外，美國有部份州法院或議會，對州立或法院資助之調解機制中之調解

is inadmissible in any court or proceedings.

However, several Member countries indicated that, in practice, parties may be compelled under some circumstances to disclose information in relation to an ADR proceeding, regardless of whether the parties have agreed to keep the proceedings confidential. Australia, Canada, France, Italy, Mexico, Netherlands, New Zealand,¹⁰ Switzerland and the United Kingdom outlined this approach. For example, Mexico noted that, under the Federal Consumer Protection Law, authorities, ADR providers and consumers must provide PROFECO, the Consumer Protection Attorney, with any information needed for legal procedures. Also, Australia and Canada noted that ADR practitioners (mediators, etc.) are ethically obliged to disclose certain information if that were necessary to prevent serious harm. Australia and Canada noted further that courts appear to have a general discretion in this context: they may respect confidentiality on the grounds of public interest but, equally, may decide that public interest considerations override the confidentiality agreement.

B. Qualifications/neutrality of ADR provider

Most Member countries indicated that there are legal provisions that specifically regulate the qualifications and neutrality of ADR practitioners in court-annexed/court-referred ADR. Countries referring to such regulation include Australia, Canada, France, Japan, the Netherlands and the United States. For example, in France, the Code of Civil Procedure lays down requirements for judicial conciliators and mediators, including for example that conciliators

者提供訓練或經歷方面之標準。

奧地利、丹麥、芬蘭、德國、匈牙利、義大利、日本、南韓、墨西哥、波蘭、斯洛伐克、西班牙、瑞典、瑞士及英國均指出其本國法具備對於依法設立ADR團體之程序主導者資格及中立性之規範。如丹麥所設消費者申訴委員會，即對該委員會之組成有詳盡規範（其中即包括調停者之資格規定）。

部份會員國似對一般ADR機制中主導者之資格與中立性有所規定。澳洲指出，其州或自治區存有關於調解者任命程序之立法。日本則在報告中指出該管內閣閣員須給予欲辦理私領域或個人資訊爭議之機構證書後，機構始可遂行其業務。若為營利而從事ADR業務者，原則上須具備律師資格。美國對於ADR服務提供者多無此類規範。多數州之私人無須經過訓練課程、通過考試、擁有特定執照或證書，即可提供調解服務。但實際上多數獨立調解機制及會員制之調解團體，均自行推出對於調解者之訓練或經歷標準^①。最後，紐西蘭指出，執業律師經常提供ADR服務，且受倫理要求與紀律程序之管制。捷克與墨西哥亦指明其於仲裁程序中之相關規範。例如墨西哥聯邦消費者保護法即針對消費者爭議之獨立仲裁

must have at least three years' experience in law, but there are no mandatory general conditions for non-judicial services. Further, in the United States, some state courts or legislatures impose training or experience standards on mediators who practice in state or court-funded mediation programmes.

Austria, Denmark, Finland, Germany, Hungary, Italy, Japan, Korea, Mexico, Poland, Slovak Republic, Spain, Sweden, Switzerland and the United Kingdom cited provisions regulating the qualifications and neutrality of ADR practitioners in statutory ADR bodies. For instance, in Denmark, the legislation establishing the Consumer Complaints Board has provisions that detail how the board is to be composed (and therefore who can act as an intermediary).

There also appear to be some rules on qualifications and neutrality of general ADR services in some Member countries. Australia referred to state/territory legislation that deals with accreditation of mediators. Japan reported that competent ministers must certify organisations that intend to settle privacy/personal information disputes. Japan also reported that people who engage in ADR "for profit" must be qualified as lawyers in principle. In the United States, ADR providers are largely unregulated. In most states, a person can offer private mediation services without taking a class, passing a test or having a special license or certification. In practice, however, most independent mediation programmes and mediation membership organisations impose their own training or experience standards on mediators.^① Finally, New Zealand noted that practising

者的註冊加以規定。

C. 其他程序保障

加拿大、捷克（僅在企業對企業（B2B）場合）、日本、墨西哥（僅B2B場合）、荷蘭、紐西蘭、英國及美國均陳明其對仲裁程序所設之程序保障。例如紐西蘭「1996年仲裁法」所設眾多程序要求，並規定於當事人之申請未依仲裁人指示或仲裁程序規定而為適當通知，及申請未能呈現當事人之案情時，得撤銷仲裁協議。

澳洲、奧地利、丹麥、芬蘭、義大利、南韓、墨西哥、荷蘭、波蘭、西班牙、瑞典及瑞士均指出，辦理國立或州立ADR業務之政府機關或行使公權力之團體，須對程序保障事項須加以監督。以南韓為例，法令對於消費者爭議處理委員會進行之ADR程序，諸如委員會的組成、成員任期、作成決定之最低可決人數及期限，均有所規定。

lawyers usually provide ADR and are subject to ethical requirements and disciplinary procedures. Czech Republic and Mexico also cited provisions applying in the context of arbitration. For example, in Mexico, the Federal Consumer Protection Law contains regulations for registration of independent arbitrators in consumer disputes.

C. Other procedural safeguards

Canada, Czech Republic [only business-to-business (B2B)], Japan, Mexico (only B2B), Netherlands, New Zealand, the United Kingdom and the United States stated that certain procedural safeguards applied to arbitration. For example, in New Zealand, the *Arbitration Act* 1996 contains a number of procedural requirements and provides that agreements may be set aside if the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case.

Australia, Austria, Denmark, Finland, Italy, Korea, Mexico, Netherlands, Poland, Spain, Sweden and Switzerland indicated that public authorities and bodies conducting national or state ADR schemes must observe certain safeguards. For instance, in Korea, legal provisions outline some procedural safeguards that apply to the ADR processes conducted by the Consumer Dispute Settlement Committee, such as composition of the Committee, term of its members, quorum for decisions, and deadlines for reaching a decision.

至於ADR程序一般性規定方面，美國指出規範B2C爭議處理程序之部份條款已出現超越授權以提供當事人更多保護之現象。Magnuson Moss授權法要求美國聯邦貿易委員會建立爭議解決程序之最低標準。就此而論，此法之下的任何消費者爭議解決機制尤須排除涉案當事人的影響，獨立解決爭議；依循程序規定明文；並提供當事人表達意見、提出有利資料及反駁他方當事人之機會。惟部份州法更支持調解協議程序之陳述意見權。例如阿拉斯加與北達科塔州均有禁止調解者在程序進行中排除律師參與之規定。

除法令之外，部份將程序保障引進ADR機制的立法建議亦被提出。如本文曾提及之歐盟執委會「法院以外團體處理消費者爭議適用原則建議」與澳洲「企業爭議處理標準」（係一共同管制建議）。

紐西蘭與英國亦指出，部份程序保障經常得因要求調解者及其他中立第三人遵守專業行為規範，而在「事實上」被導入ADR程序。以紐西蘭為例，多數ADR案件係由須遵循倫理要求與紀律程序之律師從事，因而亦提供部份程序保障，在獨立性、公平性及透明性方面尤其

In terms of general regulation of ADR processes, the United States cited some specific provisions governing procedures for B2C disputes over warranties. The Magnuson Moss Warranty Act requires the US Federal Trade Commission to establish minimum requirements for disputes resolution procedures. As such, any consumer dispute resolution mechanism under the Act must, *inter alia*, be able to settle disputes independently, without influence from the parties involved; follow written procedures; and provide each party an opportunity to present its side, to submit supporting materials and to rebut points made by the other party. There are also some state-based regulations which uphold the right to representation in mediation negotiations. For example, Alaska and North Dakota statutes prohibit mediators from excluding an attorney from the mediation table.

Aside from legal provisions, some other regulatory initiatives that seek to import safeguards into ADR were noted. Both the EU Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes and Benchmarks for Industry-Based Dispute Resolution (a co-regulatory initiative) in Australia were cited in this context.

New Zealand and the United Kingdom also noted that some procedural safeguards may be introduced into ADR processes in a “*de facto*” sense, given that mediators, conciliators and other third party neutrals are often required to adhere to professional codes of conduct. For instance, in New Zealand most ADR is undertaken by lawyers

如此。

最後，美國亦提及其具備為處理B2C爭議之ADR提供者設計之自發性指導綱領¹²。

III. 現行ADR機制的替代方案

沒有會員國對一個整合性的B2C交易爭端處理機制管理立法架構的存在進行報告。然而，許多國家敘述了在特定情形下能適用於B2C爭端的條款。隨爭端涉及的主題（如隱私權）或暗中交易（如保險、電信），規模大小、價值和爭端的複雜度，仲裁或調解是否涉入等等，不同的規定發展出不同型態的ADR。

多數國家提供一些由政府建置、資助或經營的計劃，以解決特定B2C紛爭。這些計劃可以分為兩類：公私混和型的ADR，和政府建置、資助或經營的ADR。

A. 公私混和型ADR

有些國家ADR計劃的發展，起因於一種混和公部門和私部門的提議。例如，澳洲經由立法，對發展已趨成

who are subject to ethical requirements and disciplinary procedures which may serve to introduce some procedural safeguards, particularly around independence, impartiality and transparency.

Finally, the United States mentioned the existence of voluntary guidelines for ADR providers conducting B2C disputes.¹²

III. THE PATCHWORK OF EXISTING ADR MECHANISMS

No Member country reported the existence of an overarching regulatory framework for B2C ADR. However, many countries described provisions that apply to B2C disputes in specific contexts. Rules have been developed for different types of ADR depending on the subject matter of the dispute (*e.g.* privacy) or the underlying transaction (*e.g.* insurance, telecommunications); the size, value and complexity of the dispute; whether arbitration or mediation is involved, etc.

Most countries offer some sort of government-established, funded or run programme to resolve certain B2C disputes. These programmes can be split into two categories: mixed public-private ADR and government-established, funded or run ADR.

A. Mixed public-private ADR

Some countries have developed ADR schemes that result from a mix of public sector-private sector initiatives. For example, Australia

熟之行業的行為規範（經常結合ADR條款）以強制方式作成。例如，一個澳洲人經營權的行為規範，其立法目的就是為了將經營權的爭端指派給調解顧問辦公室。澳洲同時有在隱私權領域的公私部門混和提議，當消費者和企業不能自行解決隱私權紛爭時，消費者可以要求一位獨立人士對申訴案件進行調查。當企業受已通過的隱私權規定（包括申訴處理機制）拘束時，該獨立調查者將會是一個根據法律任命的評判員；當企業不受已通過的隱私權規定拘束時，聯邦隱私權委員會委員將處理此申訴案。在澳洲，尤其是電信領域，一個獨立的產業組織運作如同一個調解辦公室，而電信提供業者有參與程序運作的義務。

斯洛伐克共和國報告中指出，該國法律賦予非政府的消費者協會，調解消費者和企業間爭端的權力。有兩個傘狀的消費者協會和部份區域性組織一樣，在全國運作著。斯洛伐克有關遠距行銷和訪問買賣的法律，也授權消費者協會對此部分的爭端進行調解。

B. 政府建置、資助或經營的ADR

has legislation through which industry-developed codes of conduct (which often incorporate ADR provisions) can be made mandatory. For example, an Australian franchising code of conduct provides for the referral of franchising disputes to the Office of the Mediation Adviser.⁶ Australia also has a mix of public-private sector initiatives in the privacy area, which provide that if the consumer and business are unable to resolve privacy disputes between themselves, the consumer can request that an independent person investigate the complaint. Where the business concerned is subject to an approved privacy code that includes a mechanism for handling complaints, the independent investigator will be an adjudicator nominated under the code. Where the business is not subject to an approved privacy code, the Federal Privacy Commissioner will handle the complaint. In Austria, in the area of telecommunications, an independent industry body serves, *inter alia*, as a conciliation office, and telecommunication providers are obliged to participate in the procedure.

The Slovak Republic reported legislation that entitles non-governmental consumer associations to mediate disputes arising between consumers and business. There are two umbrella consumer associations operating in the whole of the country as well as several regional organisations. Slovak distance and doorstep selling legislation also entitles consumer associations to mediate disputes in that sector.

B. Government-established, funded or run ADR

一般消費者申訴組織

會員國應建置多樣的相費者申訴組織，以一般性地處理B2C的交易爭端。丹麥、芬蘭已經建立消費申訴機制，而澳洲、德國、匈牙利、日本、韓國、墨西哥、紐西蘭、西班牙、瑞典、瑞士、和土耳其已經建置多樣的其他相關機制。除此之外，波蘭介紹了一種ADR機制，和解法庭，它是一個非常正式、或類似法庭的ADR組織。此ADR組織係根據貿易檢驗法設立，並且有正式的程序；其著手，必須在法庭之前提出請求。雙方自發性地服從此法庭的程序，但是一旦和解法庭的授權和程序被認可，其決定具有拘束力，等同於一般法庭的判決，並且不能上訴。相對於（波蘭的）正式程序，美國的報告中介紹了許多州的總檢察長辦公室或消費者保護機構，提供自發性、非正式的爭端處理計劃去解決B2C爭議。

特定產業或特定型態爭端申訴機制

一些會員國同時建立了由政府運作的B2C交易爭端解決機制或組織，只處理從特定工業、產業而來的消費者申訴案件，或某類爭端。

澳洲、奧地利、加拿大、芬蘭、德國、義大利、韓國、墨西哥、荷蘭、西班牙、瑞典和瑞士報告了這類由

General consumer complaint bodies

Member countries have established a variety of consumer complaint bodies to deal generally with B2C ADR. Denmark and Finland have established consumer complaints boards, and Australia, Germany, Hungary, Japan, Korea, Mexico, New Zealand, Spain, Sweden, Switzerland and Turkey have established a variety of other related mechanisms. In addition, Poland described an ADR scheme which is a more formal or “court-like” ADR body, the Court of Conciliation. This ADR body was established by the Act on Trade Inspection and involves a formal process commenced by filing a motion before the court. The parties submit to the courts processes voluntarily, but once the authority and procedures of the court are accepted, its decisions are binding equally to the verdicts of common courts and there is no right of appeal. In contrast to this formal procedure, the United States reported that many state attorney generals offices or consumer protection agencies offer voluntary informal dispute resolution programmes to resolve B2C disputes.

Complaint mechanisms for specific industry sectors or specific types of disputes

A number of Member countries also have established government-run B2C ADR schemes or bodies that deal only with consumer complaints from a particular industry or sector or particular kinds of disputes.

Australia, Austria, Canada, Finland, Germany, Italy, Korea, Mexico, Netherlands, Spain, Sweden, and Switzerland reported such

政府運作的機制。例如，在墨西哥，國家醫療調解委員會為了處理與醫療服務規定有關的爭端而設立。墨西哥同時報告了，在金融服務領域索賠案件，在金融服務使用者被告國家委員會前¹⁵委任出席的規定。在加拿大，安大略金融服務委員會被授權成立，以和解或調解的方式解決機車保險的爭端。在義大利，法律¹⁶授權成立調解和和解委員會，以解決B2B和B2C關於旅遊服務條款的爭端。

加拿大、韓國和紐西蘭提到，在隱私權領域，由政府經營或資助的計畫。在韓國，只要當事人希望有關他的個人資料紛爭被調解，法律¹⁵允許任何人向爭端調解委員會¹⁵提出請求，在60天的期間內，對案件進行調查和提出調解方案。在加拿大，法條授權隱私權委員會委員，可以鼓勵申訴人，直接和組織嘗試就隱私權紛爭達成和解；或自行發起調查。委員會委員可以對一個組織提出建議，向公共發表任何有關該組織處理個人隱私的資訊，或將申訴案提送到加拿大的聯邦法院。在紐西蘭，法律¹⁷要求隱私委員會委員¹⁶盡力確保和解案的進行。ADR進行的方式無法事先敘述。實務上，當涉及審判偵察程序時，隱私權委員會委員的申訴處理多在協助談判；等到適當時，委員會委員才會進行調解。

government-run schemes. For example, in Mexico the National Commission for Medical Arbitration has been established to deal with the arbitration of disputes related to the provision of medical services. Mexico also reported legislation that mandates presentation of claims in the financial services area before the National Commission for the Defence of Financial Services Users.¹⁵ In Canada, the Financial Services Commission of Ontario has been established with a mandate to resolve motor vehicle insurance disputes through mediation and arbitration. In Italy, the law¹⁶ provides for arbitration and conciliation committees to be set up to resolve B2B as well as B2C disputes in respect of the provision of tourism services.

Canada, Korea and New Zealand mentioned government-run or funded schemes in the privacy area. In Korea, the law¹⁵ provides that any person who wants a dispute over his/her personal information mediated can file an application with the Dispute Mediation Committee¹⁵ that investigates the case and proposes a draft mediation to the parties within a 60-day period. In*Canada, legal provisions provide that the Privacy Commissioner may either encourage complainants to try to settle privacy complaints directly with the organisation, or initiate his/her own investigations. The Commissioner can make recommendations to an organisation, make public any information about the personal privacy practices of an organisation, or take a complaint to the federal court of Canada. In New Zealand, the law¹⁷ requires the Privacy Commissioner¹⁶ to use his best endeavours to secure a settlement. The method of ADR is not

此外，澳洲、奧地利、法國、荷蘭和瑞典敘述了對租賃爭端的特別要求。在荷蘭，在申訴案送到任一租賃申訴委員會前，公共租屋法給予承租人選擇權。如果任一方無人就同一案件在二個月內訴諸法院，雙方一定要遵照委員會的決定來達成協議。

法院附隨的ADR

有關法院附隨或法院參照的ADR，澳洲、加拿大、法國、德國、義大利、日本、英國和美國的報告中描述了這類設計，經過此設計，法院可以指派案件以ADR進行。例如，法國提到一個授權進行司法和解的計畫，在雙方同意的前提下，法官可以指定一位和解人去協助處理輕微的爭端案件。和解人必須聆聽雙方的意見，並且在程序結束前，通知法官程序處理的結果。如果和議達成，結論就會呈交給法官做正式的核准，否則案件將繼續送至法庭。

C. B2C以外的ADR規定

雖然不是本研究的重點，有些會員國仍簡短的討論

prescribed. In practice, the Privacy Commissioners complaints process mostly utilises assisted negotiation in conjunction with an inquisitorial process. Where appropriate, the Commissioner will use mediation.

In addition, Australia, Austria, France, Netherlands, and Sweden described special requirements for tenancy disputes. In the Netherlands, the Act on Rental of Public Housing gives tenants the option of bringing their complaint before one of the Tenants Complaints Boards. The parties are deemed to have reached an agreement, as laid down in the decision of the Board, if none of them resorts to the court in the same matter within two months.

Court-annexed ADR

As regards court-annexed or court-referred ADR, Australia, Canada, France, Germany, Italy, Japan, the United Kingdom and the United States described programmes through which courts could refer disputes to ADR. As an example, France mentioned a scheme that provides for judicial conciliation under which a judge may designate a conciliator to assist in amicable dispute resolution if the parties agree. The conciliator must hear the submissions of the parties and at the end of the procedure, inform the judge of the outcome of the process. If an agreement is reached, it is submitted to the judge for formal approval; otherwise, the case continues before the court.

C.Regulation of ADR outside the B2C realm

Although not a key focus of this research, some Member

了一些在B2C領域的規定，並且將該特定條款適用至B2B的ADR、消費者對消費者C2C、B2G、和消費者對政府C2G的爭端事件中。

特別是澳洲、法國、義大利、韓國、和瑞士，報告了政府經營ADR計劃以處理牽涉政府的糾紛。例如，澳洲的條款¹⁰指定以協商（和解）方式，利用共和國所為的有關行政決定進行調解，調解事項可能涉及企業或消費者，到政府事務（如稅務），或為了消費者對政府機關申訴案的和解（如殘障者使用權，種族歧視議題）。在瑞士，有些行政區（地區性行政單位）建立調查官系統，以解決C2G爭端、與政府雇員與雇主間的爭端。更進一步在韓國，環境爭端解決委員會和行政上訴委員會已設立，在環境領域，經營某區域，涉及B2G和C2G的爭端。

結論

調查的結果，突顯了對ADR的規範沒有單一的一套規定。不同的規定根據不同的背景發展。在一些地區，現行的法律立法架構提供指引，給可能的雙方一個國家層級的ADR程序。然而，有少數規範僅是一般性的管理

countries briefly discussed regulation outside the B2C realm and referred to specific provisions applying to the ADR of B2B, consumer-to-consumer (C2C), B2G, and consumer-to-government (C2G) disputes.

In particular, Australia, France, Italy, Korea, and Switzerland reported government-run ADR schemes for disputes involving government. For example, Australian provisions¹⁰ prescribe conferences (conciliation) and mediation with respect to administrative decisions by the Commonwealth that may involve business, or consumer, to government matters (for example, taxation), or for the conciliation of consumer complaints against government agencies (for example, disability access, racial discrimination). In Switzerland, some Cantons (regional administrations) have established ombudsman systems for resolution of C2G disputes and disputes between government employees and superiors. Further in Korea, the Environment Dispute Resolution Committee and the Administrative Appeals Committee have been established to manage a range of disputes involving B2G and C2G disputes in the environmental area.

CONCLUSION

The results of the questionnaire highlight that there is not a single set of rules governing ADR. Different rules have developed in different contexts. In a number of areas the existing legal framework provides guidance to potential parties to an ADR procedure at the

規定，欠缺正式型態的B2C ADR；該處有關ADR的規定，多是典型的由政府建立、資助和經營的機制。

OECD關注為線上環境所設計的、具有彈性和非正式的ADR機制。然而，沒有會員國報告此特殊法律規定的存在，雖然多數會員國對促進公平和有效的線上ADR以作為解決小規模B2C爭端、特別是跨國爭端的方式表示興趣。若特別細究跨國案件的來龍去脈，國家間的差異就會浮現，特別是在承認ADR協議的正當性、ADR過程中被使用的程序原則、程序的機密性和安全性、在ADR外解決協議的合法性，和執法機制的可能性等議題上。

OECD在電子商務消費者保護綱領中建議，ADR應提供方法以處理消費者在電子市集中關心的議題。國家間的差異在既有的ADR法律架構下可能影響ADR的跨國執行可能性。會員國、企業和消費者因此需要對何種的ADR機制在不同的國家被提供、和其運作的規定有所認識。本份文件對促進各界的了解，提供了一份重要資料。

national level. For example, many countries regulate the provision of arbitration services. However, there are fewer regulations that would generally govern the provision of less formal types of B2C ADR. What regulation there is typically addresses the provision of ADR through mechanisms established, funded or run by governments.

The OECD has focussed on flexible and informal ADR mechanisms designed for the online world. Here, no Member country reported the existence of specific legal provisions although most expressed an interest in promoting fair and effective online ADR as a way to resolve small value B2C disputes, particularly cross-border disputes. Looking more specifically at the cross-border context, there do appear to be national differences as to the validity of agreements to submit to ADR, the procedural principles for use during an ADR, confidentiality and security of proceedings, validity of settlement agreements arising out of an ADR, and the availability of enforcement mechanisms.

The OECD *Guidelines for Consumer Protection in the Context of Electronic Commerce* suggest that ADR may provide a means for addressing consumer concerns in the electronic marketplace. National differences in existing legal frameworks on ADR may affect the operability of ADR in the cross-border context. Member countries, businesses and consumers need to be aware of what kinds of ADR programmes are offered in different countries and what rules they operate under. This document provides an important tool to facilitate such awareness.

NOTE

- ①有關線上ADR的法律規範見於歐盟電子商務指令（EU Directive 2000/21/EC），規定中主要是鼓勵線上ADR，但指令中對其並未有法律上的要求。
- ②另外，OECD會員國也採納線上消費者保護指導原則中對公平、即時的ADR為有效利用。
- ③規定在1989年7月6日房屋出租居住法第17條。
- ④規定在緬因州民事訴訟法16B
- ⑤規定在聯邦民事訴訟法第615條
- ⑥替代性爭端解決機制法中提及如爭議涉及基本權利、平等權保護及投票等權利，或金錢損害賠償金額高達15萬美元案件，則不得於訴訟程序後再利用ADR處理。
- ⑦見1978年3月20日頒佈條例第9條。
- ⑧有關仲裁程序請見民事訴訟法第1065條，拘束建議程序請見民法典第七輯第902條
- ⑨此外，於美國之ADR專家係依「統一調停法」草案進行業務，該法提出調解機密性之一般要求並列舉數項特別例外。該等例外包括：棄權證書；進行中或未來之委任涉及犯罪之通訊；經簽署之協議紀錄；「依法律須公開之會議及紀錄」與「公共政策調解」；虐待或遺棄兒童之證據；調停者違反專業或怠忽職守之證據；違反專業之證據；或當事人或其代理人違背義務之行為。

註釋

- ①The main legal instrument targeting online ADR is the EU Directive (2000/31/EC) on electronic commerce. This instrument encourages online ADR but does not impose any legal requirements on it.
- ②In addition, OECD Member countries have adopted guidelines related to the protection of consumers online that call for meaningful access to fair and timely ADR without undue cost or burden.
- ③Article 17, Act of 6 July 1989 concerning leases of dwelling houses.
- ④Maine Rules of Civil Procedure, Rule 16B.
- ⑤Article 615 of the Federal Civil Procedures Code.
- ⑥The Alternative Dispute Resolution Act states that courts cannot refer parties to ADR after litigation has been filed if the dispute is based on constitutional rights, concerns equal rights protection and voting or the relief sought consists of money damages of an amount greater than USD 150 000.
- ⑦Article 9 of the Decree of 20 March 1978.
- ⑧See for arbitration procedures, Code of Civil Procedure art. 1065.1.e and for binding advice procedures, Civil Codebook 7 art. 902.
- ⑨In addition, ADR experts in the United States are working on a Draft Uniform Mediation Act, which sets forth a general requirement for confidentiality of mediations and enumerates several specific exceptions. These exceptions include: waiver; communications relating to the ongoing or future commission of a crime; record of a signed agreement; meeting and records open by law and public policy mediations; evidence of child abuse and neglect; evidence of professional misconduct or malpractice by the mediator; evidence of professional misconduct; or malpractice by a party or representative of a party.

- ⑩於紐西蘭，「1996年仲裁法」規定非經當事人同意，禁止將仲裁程序中呈現之資訊加以揭露。
- ⑪請與前述「統一調解法」草案相比較。
- ⑫參閱美國：www.adr.org; www.arb-forum.com; www.jamsadr.com/arbitration_guide.asp.
- ⑬見金融服務使用者保護和防禦法。
- ⑭580號法律，1993年12月29日。
- ⑮促進資訊通訊網路利用和資訊保護法，2001年1月16日修正。
- ⑯設立在資訊通訊部下。
- ⑰隱私法，1993年。
- ⑱此隱私權委員會委員由政府資助，但是在組織設計上是獨立的榮譽性組織。
- ⑲1975年共和國行政上訴裁決法，和人權立法。

- ⑩In New Zealand, the Arbitration Act 1996 prohibits the disclosure of information revealed during an arbitration unless the parties agree.
- ⑪cf. Draft Uniform Mediation Act mentioned above.
- ⑫See for the United States: www.adr.org; www.arb-forum.com; www.jamsadr.com/arbitration_guide.asp.
- ⑬See *Law for the Protection and Defence of the Financial Services User*.
- ⑭Act n°580 of the 29/12/1993.
- ⑮Act on the promotion of information and communications network utilisation and information protection (last amendment on 16 January 2001).
- ⑯Established under the Ministry of Information and Communication.
- ⑰Privacy Act, 1993.
- ⑱The Privacy Commissioner is government funded, but is structurally an independent Crown entity.
- ⑲The Commonwealth *Administrative Appeals Tribunal Act* 1975 and human rights legislation.

附件

企業對個人替代性爭端解決機制在關於隱私及消費者保護法律規定調查表

由政府回覆者，請回答問題中有關法律規定的部分-任何國內法律、規範，包括法院裁決或協議、公約或其他貴國政府參與之國際法律文書。

由非政府回覆者，請回答問題中有關法律規定的部分-任何國內法律、規範，包括法院裁決或協議、公約或其他你已知的國際法律文書。

問題

在回答下述問題時，請注意以下事項：

—針對B2C的替代性爭端解決機制（ADR），為使對B2C的環境有廣泛瞭解，B2B、C2C、B2G等其他ADR形式也可以在討論之列。

—針對法律規定，但主要以隱私保護及消費者保護為準。

ANNEX

QUESTIONNAIRE ON LEGAL PROVISIONS RELATED TO BUSINESS-TO-CONSUMER ALTERNATIVE DISPUTE RESOLUTION IN RELATION TO PRIVACY AND CONSUMER PROTECTION

For governments, please answer the questions with regard to any “legal provisions”—any domestic laws or regulations, including court decisions (case law), or conventions, treaties or other international legal instruments to which your country is party.

For non-government stakeholders, please answer with regard to any “legal provisions”—any domestic laws or regulations, including court decisions (case law), or conventions, treaties or other international legal instruments of which you are aware.

Questions

When answering the questions below, please:

—Focus on business-to-consumer (B2C) alternative dispute resolution (ADR). However, where informative for the B2C environment, answers may discuss other forms of ADR, such as business-to-business, consumer-to-consumer, business-to-government or consumer-to-government ADR.

—Focus on any legal provisions, but as they particularly apply to privacy and consumer protection.

- 針對非正式B2C ADR機制（例如有調停或調解等協助者）。不過，如有適宜的情形，討論B2C的仲裁亦可。
- 將一般適用於B2C ADR的法律規定、部分適用B2C ADR及不適用B2C ADR但不影響ADR的法律規定作一區分。
- 指出B2C ADR在國內及跨國糾紛利用上的差異。

另外，請注意我們所使用的法律規定是指一般涵括性定義。

A. 特殊的ADR規定

1. 是否有專為B2C ADR適用之法律規定？如有，請敘述規定內容。
2. 是否有專為ADR形式而設之特殊規定，包含企業對企業（B2B）、企業對政府或消費者對政府的ADR？若有，請敘述規定內容。

B. ADR的利用

3. 是否有法律規定規避ADR在特定型態爭端的利

- Focus on informal B2C ADR mechanisms (such as assisted negotiation and mediation). However, where appropriate, answers may discuss B2C arbitration.
- Distinguish, where appropriate, among: legal provisions addressing B2C ADR generally; legal provisions addressing B2C ADR on a sectoral basis; and legal provisions that may not mention ADR, but that could nonetheless impact ADR (for privacy and consumer protection disputes, in particular).
- Indicate any differences between use of B2C ADR for disputes arising in a domestic context as opposed to those with a cross-border element.

In addition, please recall that we use the term “legal provisions” in a generic, general and inclusive sense.

A. Specific ADR provisions

1. Are there legal provisions that specifically address B2C ADR (either addressing B2C ADR generally or addressing B2C ADR on a sectoral basis)? If yes, please describe the provisions.
2. Are there legal provisions that specifically address other forms of ADR (either generally or on a sectoral basis), such as business-to-business, consumer-to-consumer, business-to-government or consumer-to-government ADR? If yes, please describe the provisions.

B. Recourse to ADR

3. Are there legal provisions that would prevent or inhibit

用？如有，請解釋規定內容及適用情形。

4. 是否有法律規定要求或鼓勵ADR在特定型態爭端的利用？若有，請解釋規定內容及適用情形。

C 藉由ADR耗盡救濟途徑

5. 雙方當事人藉由契約合意於法律訴訟前利用ADR，是否有違反法律規定？若有，請告知該規定。

6. 是否有法律規定要求或鼓勵現提起訴訟前利用ADR？若有，請提供該規定。

D 藉由契約拘束ADR

7. 是否有法律規定規避雙方當事人以契約合意避免受ADR處理結果拘束？如契約有此合意，係於：

- a. 爭端產生前？
- b. 爭端產生後，ADR程序開始前？
- c. 在ADR程序結束時？

8. 是否有法律規定鼓勵或明文同意當事人得藉由契約合意受ADR處理結果拘束？如契約有此合意，係於：

- a. 爭端產生前？
- b. 爭端產生後，ADR程序開始前？

recourse to ADR for certain types or categories of disputes? If so, please explain the provisions and their application.

4. Are there provisions that would require or encourage recourse to ADR for certain types or categories of disputes? If so, please explain the provisions and their application.

C. Exhaustion of remedies through ADR

5. Would a contractual agreement by the parties (such as a business and a consumer) to exhaust recourse through ADR before they can seek redress through courts be against any legal provisions? If so, please reference the provisions.

6. Are there legal provisions that would require or encourage parties to exhaust recourse to ADR before seeking redress in courts? If so, please reference the provisions.

D. Contractually binding ADR

7. Are there legal provisions that would prevent or inhibit a contractual agreement by parties (such as by a business and a consumer) to be bound by the outcome of ADR, if agreement to the contract came:

- a. Prior to a dispute arising?
- b. After a dispute arose, but before an ADR process had begun?
- c. At the end of the ADR process (transaction)?

8. Are there legal provisions that would encourage or explicitly permit a contractual agreement by parties (such as by a business and a consumer) to be bound by the outcome of ADR, if agreement to the contract came:

c. 在ADR程序結束時？

9. 如當事人同意受拘束，是否有法律規避全部或部分ADR的處理結果？請陳述在可能產生的情形。

E. 法律執行

10. ADR的處理結果得否強制執行？需在何種情形下為之？

F. 程序

11. 是否有法律規定要求ADR在進行中需為特定程序上的防護裝置？

- a. 一般性的裝置？
- b. 任何對於消費者或使用者的特殊安全裝置？
- c. 任何對於企業的特殊裝置。

G. 保密

12. 如當事人及ADR業者同意對ADR的進程序及結果保密，是否有法律規定要求其揭露？應在何種情況下揭露？

H. ADR服務

13. 是否有法律規定B2C ADR提供者的資格？

a. Prior to a dispute arising?

b. After a dispute arose, but before an ADR process had begun?

c. At the end of the ADR process (transaction) ?

9. If the parties can agree to be bound, are there legal provisions that could prevent or inhibit, totally or partially, implementation of the ADR outcome? Please state under which circumstances this could be so.

E. Judicial enforcement

10. Can an ADR outcome be judicially enforced? Under which circumstances?

F. Procedure

Are there legal provisions that would require certain procedural safeguards to be in place during an ADR process?

- a. In general?
- b. Any special, or particular, rights for consumers or users?
- c. Any special, or particular, rights for businesses?

G. Confidentiality

12. If the parties and ADR provider agree to keep information on an ADR proceeding and/or outcome confidential, are there legal provisions that would require disclosure under any circumstances? If so, which circumstances?

H. ADR services

13. Are there any legal provisions that address who can offer

14. 是否有規定在ADR程序中立者的資格

15. 對ADR的運作、包括使用者或企業負擔的費用等相關事項，是否有任何法律規定之？

I. 其他

16. 對於上述ADR事項，是否有其他法律的要求或限制？

B2C ADR services?

14. Are there any legal provisions that address who can serve as a neutral in an ADR proceeding?

15. Are there any other legal provisions relating to the activity of ADR providers, including the cost of ADR for either users and consumers or businesses?

I. Other

16. Are there any other legal requirements or restrictions applicable to ADR that have not been addressed above?