

RESPONSE

to the European Commission's Green Paper on
Alternative Dispute Resolution in Civil and Commercial Law
(COM(2002) 196 Final)
dated 19 April, 2002.

1. Introduction

On behalf of the Endorsing Corporations identified in paragraph 1.2 below, CPR Institute for Dispute Resolution respectfully submits this Response to the European Commission's Green Paper on Alternative Dispute Resolution in Civil and Commercial Law (COM(2002) 196 Final) dated 19 April, 2002. The highly positive and creative approach taken by the Commission in the Green Paper is very much appreciated by CPR and the Endorsing Corporations. We applaud the initiative of the Commission to explore new ways to ensure widespread use of ADR.

1.1. CPR Institute for Dispute Resolution (www.cpradr.org) is a nonprofit educational and research organization founded in 1979. It is funded by a coalition of approximately 500 corporations and law firms. CPR's mission is to provide information and services to its membership, and to the public at large, regarding alternatives to litigation of complex private and public disputes. The CPR Corporate Pledge, pursuant to which signing companies agree to consider alternatives to litigation in disputes with other signatories, has been endorsed on behalf of over 4,000 companies around the world. CPR is not itself fundamentally a provider of neutral services, but does act as a referral body to enable disputants to identify appropriate neutrals, and provides tools to encourage and facilitate successful commercial dispute avoidance, management and resolution.

1.2. The following corporations (“Endorsing Corporations”) have expressly endorsed this Response:

Akzo Nobel N.V.
British American Tobacco (Holdings) Limited
Fiat S.p.A.
General Electric Company
Johnson & Johnson
Nestlé S.A.

These companies transact substantial business throughout the European Union, and represent combined revenues for FY 2001 of more than €15,000,000,000.

1.3 The Endorsing Corporations recognize the great value of the Green Paper. The Endorsing Corporations have an immediate and vital commercial interest in their relationships with customers, suppliers, trading partners, competitors, regulatory agencies, and other entities with whom occasional disputes are unavoidable, and consider the Green Paper to be a substantial contribution to the discourse of making dispute resolution more efficient, more fair and more conducive to the resumption of mutually beneficial commercial relationships. All of the Endorsing Corporations would like to see substantial growth in commercial ADR in the EU.

1.4 The Green Paper properly addresses a wide variety of issues of immediate concern to the field of ADR. The Endorsing Corporations will leave to other commentators, who may be better-versed, contributions to many of the concerns so ably raised in the Green Paper. This Response was prepared in the hope that the view of the Endorsing Corporations on one vital area in which they can speak authoritatively – mediation of business-to-business disputes – would be of value to the Commission and its constituents.

1.5 Summary of Response: In our view, the greatest obstacles to the growth of commercial ADR are an acute lack of awareness of the economic benefits of ADR, and an equally acute lack of a basic understanding of ADR processes by businesses and those who

consult them in the course of managing disputes. These deficiencies are most pronounced among small and medium-sized enterprises (SMEs), and are responsible for unnecessary costs, delays, disruptions of commercial activity, and uncertainties that bedevil business planning and growth.

So endemic is this problem, that the aggregate added costs and other consequences attributable to these deficiencies represent a tangible and measurable “brake” on economic growth throughout the European Union. Existing judicial and quasi-judicial public institutions are unable to address these promotional and educational aspects on an EU-wide scale because of social, economic, linguistic and cultural barriers and other distinctions among the various members of the EU. For similar reasons, the uncertain prospects of mainly under-funded private-sector ADR service provider bodies holds little hope that they can perform the educational and promotional tasks needed.

In order to gain for Europe the substantial benefits of more widespread adoption of commercial ADR practices that are enjoyed by companies in other regions, European businesses, in conjunction with and through the support of the European Commission, should create a neutral and nonprofit EU-wide facility whose mission would be to educate, promote, encourage, facilitate, train, articulate best practices, convene leadership, and otherwise encourage the greater use of ADR among businesses.

1.6 Conclusion

CPR Institute’s influence has grown beyond North America to ADR movements in South America, Europe and Asia. The Institute believes that its success in articulating the compelling argument for business-to-business ADR has been attributable almost entirely to the fact that the entire movement has been led and driven by the businesses themselves.

The Endorsing Corporations, all of which have multi-million euro operations in the EU, hope that similar progress can be experienced in Europe. They note that there are many differences to be addressed, and that the economic challenge confronting Europe may be more

complex than that in North America. Nevertheless, they believe that a partnership between business leaders and the EU Institutions is the ideal method of getting done the work that needs to be accomplished. CPR Institute is, of course, willing to contribute to this effort as requested.

2.0 Responses to Particular Questions

Question 1. Are there problems such as to warrant Community action on ADR? If so, what are they? What is your opinion on the general approach to ADR that should be followed by the institutions of the European Union, and what might be the scope of such initiatives?

Answer to Question 1: In the view of the Endorsing Corporations, the greatest challenge facing proponents of commercial mediation is lack of awareness of its economic benefits, among the community of those who would most directly derive those benefits: the business community. Numerous studies, well known in Europe, have quantified the many parameters in which diligent, systematic and skillful application of various ADR processes improve business relationships. Among these are lower transaction costs, faster cycle of dispute resolution, avoidance of belligerence, added value in relationships going forward, and maintenance of confidentiality with respect to non-public and strategic aspects of companies' operations. Yet many businesses continue to believe – and are encouraged to believe – that adjudication is the sole and best way to resolve all disputes, whether involving vital supply chain partners or involving critical intellectual property.

The next greatest obstacle is a lack of understanding among commercial end-users and, especially, their consultants, of how ADR processes work. Arbitration is not a mere forum change; it differs in many respects from the options available in a court of law, and differs yet more depending on the arbitration rules and procedures elected by the parties. Mediation is not arbitration – it is consensual, non-adjudicative, and results in an agreement (or not), rather than an enforceable award. Facilitated conciliation, summary proceedings, advisory arbitration, early neutral evaluation, shared neutral experts, neutral fact-finding – all of these techniques represent a veritable palette of ways that companies can seek a

resolution of commercial disputes in a commercially rational way. Yet few participants in the cross-border, multijurisdictional commerce that characterizes EU economic activity understand even the fundamental differences among these techniques, nor in many cases are their consultants advising their clients on the method best suited to the particular problem at hand.

The need is particularly felt in SMEs. Several of the Endorsing Corporations (such as General Electric Company, British American Tobacco and Fiat), have highly sophisticated policies and practices on a global scale, for early use of effective ADR analysis in handling commercial disputes. Yet they are in the forefront of advocating the promotion and rudimentary education called for in this Response – not because they feel that they need it, but because they feel that their critical business partners do.

The pervasive and wide-spread adoption of commercial ADR has public policy consequences and is particularly “fit” for Europe. As indicated above, the Endorsing Corporations believe that substantial resources are being wastefully spent – and yet more resources are being unrealized – because of inefficient and needlessly antagonistic methods of commercial dispute resolution. In the context of an enlarged EU comprising many separate commercial cultures, entrepreneurial expectations, business traditions, codes of commercial laws, and linguistic standards, the prospect of non-binding, extra-legal, commercially rational, business-driven methods of resolving private disputes in a confidential manner is particularly attractive.

This, then, is the core of the Endorsing Corporations’ Response: The most urgent need is neither improvement of the competence of providers of ADR-related services, nor the regulation of ADR practice, but rather better and broader communication, education, promotion and leadership. CPR Institute has provided these qualities to global businesses for over two decades, and it is the creation of an entity to provide these competencies in Europe that the Endorsing Corporations urge to be key to the cure for the problem.

The Endorsing Corporations believe that the EU has a vital and unique role in that cure. The Endorsing Corporations suggest the establishment of a nonprofit

entity in the EU, whose purpose would be, not the provision of ADR services in particular disputes, but rather the education, promotion, encouragement and facilitation of commercial ADR generally. Certain of the Endorsing Corporations are currently discussing the establishment of such a Centre in collaboration with the European Commission. A copy of the current outline Proposal appears as Appendix I to this submission.

Question 2. Should the initiatives to be taken be confined to defining the principles applicable to one single field (such as commercial law or family law) – field by field – and in this way discriminate between these different fields, or should they as far as possible extend to all the fields governed by civil and commercial law?

Answer to Question 2: The Endorsing Corporations' experience has been that the most effective policies for dispute resolution have emerged from specific fields. It is unlikely that any but the most general principles applicable to ADR in one field would be equally effective in another, and therefore initiatives should be developed within specific areas. This Response is purposely limited in its scope to the area of business disputes arising between sophisticated companies dealing with each other at arms' length and with access to competent legal advisors.

Question 3. Should the initiatives to be undertaken deal separately with the methods of online dispute resolution (ODR) (an emerging sector which stands out because of its high rate of innovation and the rapid pace of development of new technologies) and the traditional methods, or on the contrary should they cover these methods without making any differentiation?

Answer to Question 3: The initiatives that are recommended in this Response do not implicate any distinction among available methods of dispute resolution, whether traditional or otherwise.

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

Answer to Question 4: This Response is purposely limited in its scope to the area of business disputes arising between sophisticated companies dealing with each other at arms' length and with access to competent legal advisors. The Endorsing Corporations express no view as to Question 4.

Question 5. Should the legislation of the Member States be harmonised so that in each Member State ADR clauses have the same legal value?

Answer to Question 5: Companies who regularly engage in mediation or other ADR processes very frequently realize value in numerous ways, including but not limited to reduced transaction costs, quicker resolution, and improved commercial relationships. It is critical that companies who negotiate ADR clauses into their contracts rely upon the legal effect of those clauses. Therefore, at least as to commercial parties' intentions to engage in ADR processes as expressed in an otherwise valid commercial contract, such intentions should be uniformly enforceable throughout the Member States. The Endorsing Corporations believe that the current state of the law provides for this result, at least as to business parties with relatively even bargaining power.

Question 6. If so, should the validity of such clauses be generally accepted or should such validity be limited where these clauses appear in membership contracts in general or in contracts with consumers in particular?

Answer to Question 6: This Response is purposely limited in its scope to the area of business disputes arising between sophisticated companies dealing with each other at arms' length and with access to competent legal advisors. The Endorsing Corporations express no view as to Question 6.

Question 7. What in any case should be the scope of such clauses?

Answer to Question 7: Commercial parties should be free to devise whatever pre-dispute processes they feel advance their commercial interest, within the confines of the law. In a

business-to-business setting, and within the confines of public policy, the scope of ADR clauses should be as wide as the intent of the parties.

Question 8. Should we go as far as to consider that their violation would imply that the court has no jurisdiction to hear the dispute, for the time being at least?

Answer to Question 8: Yes, to the extent that question refers to postponement of further action after judicial determination of the existence of an obligation to engage in ADR. Courts should always have jurisdiction to determine the enforceability of commercial contracts, including the enforceability of ADR clauses in such contracts. Postponement of further judicial action, pending the ADR process that the court finds that parties intended, should be encouraged as being in the interests of both the parties and the court itself.

Question 9. Should the legislation of the Member States be harmonised so that in each Member State recourse to an ADR mechanism entails suspension of the limitation periods for the seising of courts?

Answer to Question 9: Yes, so long as notification of such recourse is made through the same channels as notification of a judicial claim (or as otherwise agreed by the parties). The suspension period should last as long as the ADR process continues actively and in good faith.

Question 10. What has been the experience of applying the Commission recommendations of 1998 and 2001?

Answer to Question 10: As the Green Paper notes at paragraph 73, the recommendations at issue “are applicable to the out-of-court bodies charged with the task of resolving consumer disputes.” This Response is purposely limited in its scope to the area of business disputes arising between sophisticated companies dealing with each other at arms’ length and with access to competent legal advisors. The Endorsing Corporations express no view as to Question 10.

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

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

Answer to Questions 11 & 12: The principles set forth in the recommendations are sound as general aspirational goals. They closely echo many of the principles that have been set forth by the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, which recently promulgated Principles for Provider Organizations (available at www.cpradr.org), which were substantively influenced by prominent attorneys, global ADR provider organizations, law professors and others. The Endorsing Corporations note, however, that concerns in a consumer or family law context have different weight in a business-to-business context, and offer no substantive opinion as to the principles' applicability outside the context in which they were initially promulgated.

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

Answer to Question 13: This Response is purposely limited in its scope to the area of business disputes arising between sophisticated companies dealing with each other at arms' length and with access to competent legal advisors. The Endorsing Corporations express no view as to Question 13.

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

Answer to Question 14: The creation of professional ethical standards is one of patient consensus-building within a community of differing interests. More information, more idea generation and more consultation among the various economic and political constituencies would be extremely useful in pursuing the utility and substance of such standards, as well as their scope and applicability. The Endorsing Corporations believe that the development of ethical standards that would influence the practice of third parties in the European Union might be an excellent task for the neutral “umbrella” Mediation Center to which reference is made in the Answer to Question 1.

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

Answer to Question 15: Yes. Commercial disputants should be able to exchange information in ADR proceedings with the assurance that the information will not be subsequently abused. This assurance should be created in two ways. First, as a matter of law and procedure, information revealed and statements made in the course of ADR proceedings should be inadmissible as evidence in any subsequent judicial proceedings. Second, the parties should be entitled to rely upon the enforceability of a promise not to reveal information that was imparted conditionally upon such a promise in the course of a mediation or other ADR proceeding. By operation both of law and of agreement, commercial parties should enjoy a presumption that information exchanged in an ADR proceeding will not be used by the recipient in other contexts.

Question 16. If so, how and to what extent should such confidentiality be guaranteed? To what extent should guarantees of confidentiality apply also to publication of the results of ADRs?

Answer to Question 16: The reliability of protections of confidentiality of information revealed in ADR proceedings is so critical to the trustworthiness – and thus the utility – of the process that such protections should be judicially enforced, subject to ethical and public policy constraints pertinent to contract law generally. The same considerations apply to the

enforceability of a promise not to reveal the results of an ADR proceeding. These strictures on confidentiality should not apply to information that cannot be used to identify parties to a particular dispute, or that is used merely to support general trends or studies. The Endorsing Companies again repeat that their opinion is restricted to a commercial setting in business-to-business disputes; they express no view on this matter in other settings such as consumer law, labor law or family law.

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

Answer to Question 17: No rule imposing a period of reflection or of withdrawal is appropriate in commercial ADR.

Question 18. Is there a need to make ADR agreements more effective in the Member States? What is the best solution to the question [of] recognition and enforcement of ADR agreements in other Member States of the European Union? Should specific rules be adopted to render ADR agreements enforceable? If so, subject to what guarantees?

Answer to Question 18: Agreements that are reached between businesses in the course of an ADR proceeding should have the legal significance of contracts and be judicially enforceable. The Responding Corporations do not suggest that, in the absence of consent by the particular disputants, such agreements should be entered as judicial Judgments. However, it would be helpful if settlements could, at the specific request of the parties, be endorsed by the courts and rendered into Consent Judgments.

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

Answer to Question 19: The Green Paper quite properly addresses the issue of formal training for mediators and arbitrators. Provision of excellent training opportunities throughout the Community has the dual effect of increasing the pool of competent practitioners, and also raising the standards of practice. The institutions in the European Union are quite right to encourage such training; the Endorsing Corporations encourage such training. Any opportunity to make such training available to aspiring mediators and arbitrators of various professional backgrounds can only be beneficial.

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

Answer to Question 20: In the commercial context, the qualifications for competent third parties varies according to the features of particular disputes – one dispute needing a mediator with property insurance background, for example, and another needing an accountant, a third an attorney. While sophisticated users of ADR processes clearly benefit from the availability of trained third parties, not every dispute is best resolved with a third party with formal training. Recognizing that minimum training criteria may have more utility in areas other than business-to-business dispute resolution (particularly where participation in ADR processes may be mandatory or where disputants do not have an effective voice in choosing the third party neutral), the Endorsing Corporations question their utility in the commercial arena.

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

Answer to Question 21: As a policy, disputants should indemnify third party neutrals for any acts in connection with the delivery of ADR services, except those involving gross negligence or wilful misconduct.

APPENDIX I

European Mediation Centre

Summary

The greatest impediment to the future growth of business dispute resolution in Europe is perceived to be the lack of awareness, understanding and acceptance of mediation by small and medium-sized businesses and those who counsel them. The need has therefore been identified by businesses for a unique European Mediation Centre, designed to promote business mediation and spread best practice effectively.

The EMC would not itself provide any conflict resolution services. Its role would be promotional, educational and facilitative, advising businesses of options to litigation, and enabling existing mediation bodies to collaborate more closely together to avoid the duplication of effort and cost. The EMC would also act to help stimulate national mediation bodies in European countries where none exists.

To be successful and sustainable the EMC must be inspired and largely funded by businesses, but also partly funded by service providers (such as law firms) and by governmental institutions (such as the EU). The EMC would require a budget of between 600k and 660k per annum over the initial first five years. To contain costs, much of the best practice work of the EMC would be disseminated via a multi-lingual web portal, and be managed by just two full time professionals – a pragmatic possibility having regard to the active involvement of existing mediation bodies.

The EMC would have a strategic goal of part-funding its activities through subscriptions from Year 2, and wholly funding itself from Year 6.

The Need for a European Mediation Centre

Mediation bodies are now beginning to emerge in Europe. The first was CEDR in the UK, established in 1991, largely inspired by CPR Institute for Dispute Resolution. In the past few years, several small and still emerging mediation bodies have been created in France, The Netherlands, Belgium, Italy and elsewhere. All suffer from limited financial resources. Additionally, arbitration institutions such as AAA, ICC, LCIA and WIPO have introduced mediation capability, though most remain primarily arbitration bodies. In the UK, civil justice reform has facilitated greater application of ADR. CEDR's mediator training programme is one of the best available in Europe.

Compared to the meteoric acceptance of mediation in the US during the first 10 years of CPR's existence, the growth of mediation in Europe has generally been modest, slow and uncoordinated and early dispute resolution processes remain grossly under-utilised in Europe. The main

obstacle is lack of awareness – not so much on the part of leading businesses as on their less sophisticated counterparts. Early dispute resolution is perceived as hard to grasp, and the bodies which do exist have few funds to apply to educational and awareness campaigns. Language is a strong barrier, as well as some cultural, judicial and social conditions.

Two key differences between development of mediation in the US and in Europe are:

- Although CPR was and still is designed to promote, but not to administer mediation in the US, no similar counterpart exists in Europe. Mediation bodies in Europe are all designed to deliver mediation and other conflict resolution services. Their resources are directed to this aim, not to promotion.
- Most bodies in Europe have been created more at the initiative of law firms than of business. An adverse consequence of this is that mediation has come to be misperceived in Europe more as a tool for lawyers than for businesses.

The EMC would be created to correct these two core impediments to growth before misperceptions become entrenched. It is proposed to engage CPR on a paid basis to assist actively in the development of the EMC as it has no possible conflict of interest.

The Characteristics of the European Mediation Centre

The EMC would be established with the following essential characteristics:

Non-profit body with no income other than subscriptions
No provision of mediation services
Registered in The Netherlands, a European country espousing neutrality
Web-portal-based
Founder Members are businesses; Associate members are service providers
Non-subscribing members – mediation bodies, academic institutions, NGOs
Board comprises reps from all classes of membership, but business driven.

Main Objects:

Promote mediation to businesses in dispute resolution
Proactive source of best practice throughout Europe
Publicly-available resource centre on conflict resolution
A key reference source for businesses, mediation bodies, mediators, etc
Foster collaboration among mediation bodies throughout Europe
Support the work of national mediation bodies
Act as referral body to most appropriate mediation bodies/mediators
Provide training opportunities at cost (delivered by existing bodies)
Encourage development of trans-cultural mediation
Inspire adoption of mediation in European emerging economies

The EMC would eliminate back-office costs by basing its operations through an Internet portal, confining its full time management to just two people, and relying heavily on involvement by national mediation bodies at European levels. The EMC would have contact offices in name only (and at no additional cost) via the national mediation bodies whose interests it exists to promote by serving the corporate needs.

The EMC would further encourage and support the development of mediation expertise in academic and professional institutions throughout Europe, and will offer non-subscribing membership support to such bodies.

Outline 5 Year Plan

of Funds (€000)	2003	2004	2005	2006	2007	Notes
site maintenance	80	32	34	36	38	1
el & Subsistence	70	70	70	60	50	2
lations	30	30	30	30	30	3
agement Fees	200	310	220	230	240	4
Consulting Fees	250	250	275	275	300	5
I	630	692	629	631	658	
orce of Funds (€000)						
on Bursaries	315	225	150	75	0	6
ider Bursaries (Governments)	315	225	150	75	0	
ibership Subscriptions	0	142	329	481	658	7
I	630	592	629	631	658	

Notes - Uses of Funds

1. Website maintenance

There will be an initial one-off cost to design and set up the EMC web portal, predicted to be in the region of 50k, and then 30k per annum to maintain it, indexed.

2. Travel & Subsistence

The management will apply special focus in recruiting new businesses to subscribe as members of the EMC and encourage use of national mediation foundations. There will also be an emphasis on presentations, interviews, etc. In total, approx 50 trips per annum by two people @ 1.4k per trip including economy class air and train fares, subsistence and out of pocket expenses.

3. Translations

A gradual increase in the number of languages used on the website is assumed, starting with English plus three languages (German, French, Italian), then adding three languages per annum. Assumes cost of 10k translation costs per language, including changes posted from time to time.

4. Management fees

Assumes one top business or professional person engaged full time to interface with senior corporations, main mediation bodies, etc, (cost 140k pa Year 1) plus one less senior but able Manager, also full time (60k pa Year 1), indexed.

5. CPR consulting fees

Much of the inspiration, experience and support for the EMC will be derived from CPR who will be paid consulting fees for use of materials, experience, access and involvement.

6. Patron bursaries

Assumes that 20 major international corporations operating in Europe will each make a 4 year funding pledge to contribute 40k over 4 years (beginning in Year 1 with 16k each and reducing annually to 4k in Year 4). This should be tax deductible in most countries. Assumes further EU funding to match the business contributions, tapering on the same scale.

7. Member subscriptions

Assumes that member subscriptions from businesses (large, small and medium-sized) as well as service providers from across Europe can be generated from Year 2. In Year 5, corporations contributing Patron Bursaries are expected to become subscribers. By Year 5, 100 subscribing businesses and 60 subscribing service providers (at half the business rate) are anticipated.