

# *Guide for Regulating Dispute Resolution (GRDR): Principles<sup>1</sup>*

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**T**HIS DOCUMENT RECOMMENDS structures and principles for the regulation of dispute resolution in civil and commercial matters. The recommendations are a first attempt to provide guidelines for a value-based and coherent regulation of dispute resolution. The principles refer to court proceedings as well as to alternative dispute resolution (ADR). Since this is a Herculean task, the principles suggested are only a first starting point to inspire further development. They are not comprehensive and, instead, aim to encourage further discussion. The structures and principles are recommendations for the regulation of dispute resolution, not for the practice of dispute resolution. As a consequence, issues that are important in practice, for example methods of dispute resolution, but that should not be regulated are not mentioned. This is both in the interest of clarity and the avoidance of over-regulation.

The recommendations are formulated against a comparative and international background. They have an open structure in order to allow for regional and local adjustments and to allow further developments of dispute resolution practice. They may serve to inform the formulation of model rules, regional directives or specific legislative acts. The recommendations start with more general issues and proceed to more specific topics.

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<sup>1</sup> For an explanation of the principles see chapter 2, which contains the principles and comments.

<sup>2</sup> The views expressed are only the author's own opinions and may not in any circumstances be regarded as stating an official position of the German Federal Ministry of Justice.

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#### I. DISPUTE RESOLUTION MECHANISMS

##### A. Choice of Procedure

*The regulation of dispute resolution should start with and focus on the parties. Generally, the parties and not the state should choose the dispute resolution mechanism (principle of self-determination or party choice of process). While consensual dispute resolution is preferable over resolution forced on (one of) the parties, there is no preference of one sort of dispute resolution mechanism over another. Regulation may*

*reflect, however, that certain dispute resolution mechanisms may be particularly well suited for specific types of disputes.*

## **B. Regulating Dispute Resolution**

*The regulation of dispute resolution mechanisms both within a single jurisdiction and internationally should follow principles that permit rational choices to be made by the parties and include clear criteria informing that choice.*

## **C. Functional and Modular Approach**

*A modular approach referring to the characteristics of dispute resolution procedures facilitates principled regulation. The following characteristics can be used to classify dispute resolution mechanisms; they generally refer to the control of or choice by the parties:*

- *Initiation control: whether the parties' consent is needed to initiate the procedure;*
- *Procedure control: whether the parties determine the procedure;*
- *Result-content control: whether the parties determine the content of the result (ie whether the procedure is non-evaluative);*
- *Result-effect control: whether the parties' consent is needed for the result to be binding;*
- *Neutral choice control: whether the parties choose the neutral;*
- *Information control: whether the procedure and the information obtained during the procedure is private;*
- *Interest-based: whether the procedure is interest- or rights-based;*
- *Intermediary: whether the procedure includes intermediation by a third person.*

## **D. Policy Choice**

*Regulation of dispute resolution should be based on the following fundamentals: normative individualism (as expressed in human and constitutional rights), party choice, just dispute resolution for the parties and efficiency. Individuals have a right to effective and fair dispute resolution.*

## **E. Principles**

*Currently, only general principles for the regulation of dispute resolution are desirable.*

## II. INFRASTRUCTURE AND FRAMEWORK

*Citizens have a right of access to effective and fair dispute resolution. The state is responsible for organising and financing an adequate court and enforcement system. Additionally, the state has to provide citizens with a reliable legal framework for alternative dispute resolution and should, within the means available, support such alternative forms of dispute resolution.*

## III. COSTS

### A. General

*Generally the parties should carry the costs of resolving their dispute by the use of ADR procedures, while the cost of court proceedings may be partially borne by the general public. In procedures where the parties do not have initiation control, the costs of the procedure and reasonable party expenses should be borne according to the procedures for cost assessment appropriate in the legal system. In procedures with initiation control the parties should by default share the costs of the procedures and pay their own expenses. Mandatory extrajudicial dispute resolution may not impose costs to a degree that hinders access to the courts.*

### B. Cost Subsidies

*Access to courts must not be impeded by prohibitive costs. Subsidies for alternative dispute resolution mechanisms may be justified if information and decision deficits exist, if certain procedures have intrinsic advantages or more generally on grounds of efficiency. Cost subsidies should avoid setting incentives favouring one kind of resolution mechanism merely for cost reasons.*

### C. Legal Aid

*Legal aid for court proceedings should be provided to parties in financial need if they can demonstrate a more likely than not probability of being successful. Alternatively, legal aid could be provided based on the sole criteria of demonstrated financial need. Legal aid should not set incentives for parties to opt for court proceedings instead of alternative dispute resolution for cost reasons only. A necessary reaction may be the introduction of legal aid for alternative dispute resolution mechanisms.*

## IV. DISPUTE RESOLUTION CLAUSES

## A. General

*Dispute resolution clauses should be binding and enforceable in the same manner as other contracts are binding and enforced. Interim or conservation measures should generally remain possible as a dispositive default rule.*

## B. Specifics

*The invalidation or later modification of dispute resolution clauses should follow general legal principles. The more control the parties have as regards (1) the procedure, (2) the choice of the neutral, (3) the content and (4) the effect of the result, the less there is a need for restricting and policing the validity of dispute resolution clauses.*

## V. CHOICE OF DISPUTE RESOLUTION PROCEDURE

## A. General

*Regulation should ensure an early, informed and undistorted choice of a dispute resolution procedure with the lowest possible transaction costs. Regulation should ensure that the parties are in a position to choose by matching their interests with the intrinsic characteristics of the resolution procedures. The state may provide options and alternatives for situations where the parties do not prefer the same dispute resolution mechanism.*

## B. Centralised or Decentralised Approach

*Centralised and decentralised approaches to facilitate an early, informed, undistorted and less expensive choice of a dispute resolution mechanism are both reasonable. Counsel and the neutral should be under a duty to monitor the adequacy of the choice and point out if the choice needs to be modified. In case of information and decision deficits as regards choice, primarily incentives and subsidiarily mandatory rules may be necessary.*

## C. Sanctions

*Cost, damage and procedural sanctions for parties who hinder or prolong dispute resolution without a good and proportionate reason can be justified. Before turning to cost sanctions, however, alternative and less intrusive means to correct decision deficits should be considered.*

#### **D. Transfer to Other Dispute Resolution Mechanisms**

*The above principles apply equally to a transfer between dispute resolution mechanisms.*

#### **E. Good Practice**

*Comparative analysis and empirical research reveal good practice models for regulating the choice of dispute resolution procedures. Research and assessment are essential for continued monitoring of what are the best ways to ensure early and good choices of dispute resolution procedures.*

### **VI. CONFIDENTIALITY**

#### **A. General**

*Dispute resolution procedures, where the parties have information control, should be facilitated by enabling confidentiality rules.*

#### **B. Regulatory Tools and Approaches**

*Confidentiality of dispute resolution procedures, where the parties have information control, needs to be ensured in both substantive and procedural law. Confidentiality rules should cover all relevant persons and different types of information carriers. The subject matter to which the rules on confidentiality apply should be delineated. However, limits to confidentiality may be necessary. In particular, abuse of the confidentiality rules needs to be addressed, as well as the protection of third parties and the prevention and detection of crime.*

### **VII. LIMITATION AND PRESCRIPTION PERIODS**

*Limitation and prescription periods should be suspended from the start until the end of any dispute resolution procedure. For all procedures the details of regulation should refer to the characteristics of initiation control and result effect control.*

### **VIII. NEUTRAL**

#### **A. General**

*The more control the parties have as regards initiation control, neutral choice control, result-content control and result-effect control, the less intensive the regulation of the intermediary's neutrality and qualification needs to be.*

## B. Neutrality

*The legislature has to ensure that the parties' choice of the neutral does not suffer from information asymmetry or decision deficits. If the parties have neutral choice control and result-effect control, the intensity of regulation may be lower.*

## C. Qualification

*The less the parties control the choice of the neutral, the initiation, the result-content and the result-effect of a dispute resolution mechanism, the more the state needs to ensure the qualification of the neutral. Generally, however, it is recommended to opt for as little intrusive regulation as necessary.*

*If the parties control the choice of the neutral and the initiation or the effect of the procedure, a market approach or an incentive approach may be advisable.*

*If the parties have neutral choice control, but do not have control over the initiation of the procedure, either the incentive approach or the authorisation approach is recommended.*

*If the parties neither control the choice of the neutral nor the initiation, an authorisation approach is recommended.*

*If the parties have no control over initiation, neutral choice and result-effect, the state needs to opt for an authorisation approach.*

## IX. PROCEDURE

*If the parties have neither initiation control nor both result-content and effect control, procedural safeguards are necessary. If the parties have initiation control but no result-content or effect control, a weaker form of state-ensured procedural safeguards is advisable.*

## X. COUNSEL

*Generally, parties should have the right to be accompanied and advised by counsel. Full representation in procedural acts should also generally be allowed. Where the procedure specifically depends on personal participation of the parties, regulation may require the parties to appear in person.*

## XI. STATE (JUDICIAL) REVIEW OF RESULTS

*If the parties have control over the result-content and effect of the procedure, a state (judicial) review of the result beyond that applying to contracts in general is not recommended. If the parties do not control the result-content and effect, there should be the possibility for a state review of the results. The degree of the state*

*review should distinguish whether the party bound to the result had control over the initiation of the procedure or not.*

## XII. ENFORCEABILITY

*Enforceability should require the participation of the state or a representative charged with state functions. Results controlled by the parties should not ex post be submitted to a court-like result review. The availability and the path to enforceability should generally not be designed in a way that it indirectly influences the choice of a dispute resolution mechanism.*

## XIII. TRANSPARENCY

*Transparency can be used to indirectly control the quality of procedures. Care needs to be taken not to infringe the justified confidentiality interests of the parties.*

## XIV. CONSUMERS

*Specific rules for consumer dispute resolution are required concerning, in particular, initiation control through dispute resolution clauses and the governance structures of industry-financed resolution systems.*

## XV. RULE-MAKER

*Further research as regards the identification and assessment of rule-makers is desirable. Dispute resolution mechanisms with procedure control by the parties should generally not be influenced unnecessarily by mandatory state law. Rules with an enabling and protection function should generally be made by actors with high-level regulatory authority and wide geographical reach.*

## XVI. TYPE OF RULES

### A. General

*As regards conduct rules, in cases of doubt, dispositive rules over mandatory rules or even no regulation should be preferred. As regards enabling rules, state regulation is always needed to create the necessary tools and rights. To remedy information and decision deficits, regulations setting incentives or even imposing mandatory rules may be (temporarily) advisable.*

## B. Good Practice

*Rules should be principled, clear and accessible. The development of dispute resolution practice should not be hampered by overly rigid regulation.*

## XVII. PROCEDURE DESIGN

*It is essential to incentivise lawyers, judges, accountants, notaries, tax advisers, insurance companies and other gatekeepers to act in the parties' dispute resolution interest. Further measures can be information campaigns, institutionalised information boards and mandatory dispute resolution training within the university and education sector. The characteristics and effects of dispute resolution mechanisms need to be understandable. Online dispute resolution requires particular thought and may require specific regulation.*

# Regulating Dispute Resolution

## ADR and Access to Justice at the Crossroads

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