

Openness, consistency and predictability

Session 4B

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Introduction/scope

Is ADR private, confidential dispute resolution or a publicly open function?

Issues discussed

- Confidentiality
- Is guidance about the ombudsman's approach back door regulation?
- Maintenance of consistency
- Publication of precedents or decisions
- Statistics and league tables

Confidentiality

- In an age of openness, transparency and freedom of information, should schemes keep matters confidential?
- If a scheme does not act as a public open function, consumers are not informed about badly performing businesses. Decisions can be 'leaked' and 'spun' by the parties. Publication provides publicity and can be seen by stakeholders to show consistency. However there are a number of risks when parties are named. Publication can bring about a media frenzy, leading consumers to make ill-timed decisions. Publication can lead to a surge in complaints. Information about third parties, who are not party to the complaint, and security information may not be protected.
- An ADR scheme is an alternative to the courts. However, if a scheme was a public open function would the scheme still be viewed as an ADR scheme?
- Sam Parrino thought that ADRs should operate as public open functions. The media, community support groups and consumer industry can be criticised if detailed information is denied.

Is guidance about the ombudsman's approach back door regulation?

- Guidance can be given directly by an ombudsman or through input to industry codes, legislation and regulation.
- Some ombudsman schemes could be described as quasi-regulators, providing not just guidance but rules or principles. However, care should be taken in managing any overlaps between the scheme, the regulator and government.
- The UK Financial Ombudsman Service is party to a 'wider-implications' process with the Financial Services Authority and Office of Fair Trading (see www.wider-implications.info) to manage overlaps.
- The publication of practice notes by a scheme can provide a clear indicator of how the decision maker will respond to an issue.

- Sam Parrino described a new regular open forum on determinations when firms are invited to present concerns they have about particular decisions and allow the decision maker to explain their approach. This forum is used by some firms as part of their training process.

Maintenance of consistency

- Total consistency can be difficult to achieve in an ADR scheme.
- Forming an appropriate model of measuring consistency can be problematic for past performance comparisons and can therefore be difficult to demonstrate to stakeholders. The publication of decisions could be used to demonstrate consistency.
- If a particular determination appears inconsistent in comparison to similar complaints, the decision maker should explain the change in approach in the determination.

Publication of precedents or decisions:

- Broadly the variations on confidentiality of decisions are –
 - no publication, except to the parties
 - publication of some decisions (but who chooses which?)
 - publication of all decisions
 - whether or not the consumer is identified in a published decision
 - whether or not the business is identified in a published decision
- The publication of key decisions can be of enormous value to the industry and other interested parties which can also allow academic analysis of industry sectors and products. However this can discourage businesses from participating in the scheme, especially if it is voluntary.
- Publication can demonstrate stakeholders' consistency in the scheme, but it can also highlight inconsistencies.
- The publication of data may not have a significant impact on large national firms, but may have a dramatic impact on small local businesses. The Danish Complaint Board for Banking Services reported that publishing decisions had not caused any problems.
- The Insurance Ombudsman in Australia said that since the scheme's inception, it had published and widely distributed a detailed *Index of Determinations* to firms and, due to the internet, is now freely available. There were some 20,000 determinations listed and it was considered to be an effective way of communicating the scheme's approach to certain issues.

Statistics and league tables:

- Consideration must be given to how the data is collated – by product, sector, or by individual businesses.
- If information was in the public domain, this does not necessarily illustrate a business's performance. A poor performer could settle the majority of complaints in-house and therefore any data about that business is not likely to be in context.
- Due consideration should be given to selecting the right model to produce the statistics, as the model should be fair to all parties.
- Whose role is it to publicise data – the scheme, regulator, or the industry?
- Should this information be made public? The current regulatory focus is on disclosure and transparency to enable consumers to make informed decisions. Information about the performance of firms will help consumers to make an informed decision.
- Individual company performance is reported at scheme level by the IOS, in the form of league tables.
- In the USA, data is available to businesses, but not to the public. This has had a positive impact in the US and has helped to improve the customer experience.