Index

access to justice 27, 51, 66–8, 81, 111, 130, 134–5, 141, 183, 235–6, 241–2, 248, 254, 262
access-to-justice movement 228–9

ADR
see alternative dispute resolution

alternative dispute resolution
Australia 198–201
definition and classification 223–4, 238–9, 245
England and Wales 108–109, 111–12, 126–9
origin and historical development 226, 229–32
regulatory requirements 237–8
scheme see Australia, “Storm Resolution Scheme”
techniques 223–4
area of judicial cooperation see European civil judicial area

Australia
Civil Dispute Resolution Act 2011 (CDR Act) 198–9
class action regimes 173–4
Federal Court of Australia Act 1976 (FCA Act) 172
Practice Note CM 17 see guidance on the conduct of class actions
section 33V 177, 178
federal court class actions
cost and funding 175–6
court approval of mass settlements 176–7, 179–82, 184–90
guidance on the conduct of class actions 173, 179–80, 185–6, 201

“guardian for group members’ interests” 197–8
“Storm Resolution Scheme” 199–201

Belgium
Belgium Mediation see Belmed
Belmed 6, 285–6
access 289–90
information on ADR techniques and agencies 286–7
online application to dispute resolution 287–9
class action proposals 271–2
ombudsman services 277, 278, 279
“partie civile” technique 280–82, 292
proposal of a procedure of collective claim settlement for consumers 272–3
public enforcement Belgian Institute for Postal Services and Telecommunication (BIPT) 277–8
Commission for the Regulation of Energy and Gas (CREG) 278
Federal Agency for Medicines and Health Products (FAMHP) 274–5
Federal Public Service (FPS) Economy, Small and Medium Enterprises, Self-Employed and Energy 274, 291
Financial Services and Markets Authority (FSMA) see regulatory supervision
regulatory supervision 275–7
public prosecutor 274, 279, 281, 292
Resolving mass disputes

CADR
see consumer alternative dispute resolution

Canada
class action
certification cost 136
certification statistics 133–4
evaluation 146
settlement rate 133–4
consumer protection 146–7
treble and punitive damages 137
case management 10–12, 109, 125–6, 134–5, 199

CDR
see consumer alternative dispute resolution

Chargeback procedure 301

China 3–4
“appealing to the higher authorities”
see “petitions by letters and calls”
class action
see group action
group action 3
division of cases 207
efficiency 214–6
independent case registration and combined hearings 205–206
independent case registration and individual case hearing 206
model suits 206–207
representative proceedings with a certain number of claimants (Art. 53 Civil Procedure Law) 204–205, 207
representative proceedings with an uncertain number of claimants (Art. 54 Civil Procedure Law) 3, 204–205, 207, 214–7
varying judicial practice 3, 204–207
lack of deterrent effects 218
lack of judicial authority and independence 4, 217, 218–9
mediation 4, 208–210
“mediation first” 4, 208
“rule-by-men” vs. “rule-by-law” 209
“petitions by letters and calls” 210, 217

“public interest litigation” 205, 218–9
social harmony and stability 4, 209, 210
civil judicial area
see European civil judicial area
class action
class certification 14
appeal of a certification decision 161
certification criteria 161, 174
certification cost 136
“conditional” certification 162
“overbroad” certification 160
significance 160
timing directive 159–61, 162
class counsel 158
“closed class” 17, 173–4, 182
closing the class
see identification of class members
cost and funding
compensation for acting as representative party 193
cost of class certification 136
“funding equalisation factor” 192–3
litigation funding agreement 174, 175–6
reimbursement of group members’ expenses 193–4
identification of class members 182–4, 195–6

collective action
abusive practices 13–14, 22–3, 56, 100–102, 123–4, 129, 146–7, 151, 236–7
conflict of interests
see principal-agent conflict
formation of the class 49
see also opt-out-mechanism
funding 100–103, 121–4
role of judges 9–12
“collective redress” 4, 9–10, 63–4, 67–74
see also collective action
consumer alternative dispute resolution
advantages over litigation 51–4
consumer trust and confidence 232, 240
“core sectors” 234

cost and funding 33, 52, 53, 267, 268
customer care and complain
departments
see in-house dispute resolution
definition and classification 2, 24–5, 224–5, 245
determination by national context 229
financial services dispute resolution 26, 247–8
see also EU-legislation on CADR
in financial services
insurance sector 254–62
England and Wales 127–8
Germany 244–5
in-house dispute resolution 233–4
historical development 227–8
regulatory principles for out-of-
court bodies 29–31, 249, 251, 265
regulatory effects 33–4, 52, 237, 239–40
stages 27–8
“vertical CDR spread” 240
compensation arrangements 120
compensation for crime victims in
criminal proceedings 279–84
Belgian and French “partie civile”
technique 280–82, 292
Dutch “clear case criterion” 284
EU Directive on the rights, support
and protection of victims of
crime 279–80
German Adhäsionsverfahren 284
outsourcing of civil claims 283
“piggyback” technique 6, 281
conditional fee arrangements 43, 55–7, 122–4
judicial review 129–30, 137
contingency fees
see conditional fee arrangements
consumer organizations
see representative organizations
consumer redress 234–7, 263, 293, 307–308
cost of litigation
see also litigation funding
class action
compensation for acting as
representative party 193
cost of class certification 136
reimbursement of group members’
expenses 193–4
cost aversion 42–6, 121
cost of formal disclosure 110
cost management 117–118
cost of objection to a settlement 188
cost problem 230–231
cost shifting 114, 116–17, 121, 124
court approval for cost agreements 190–91
English Rule 135–6, 175
legal fees 190–91
loser pays rule
see English rule
proportionality 110–11, 117–18
test of proportionality 111, 115
two-way-costs rule
see English rule
data protection
Art. 8 European Charter of Human
Rights 309
data controller 309, 310
data minimisation principle 312
EU directive on data protection 309
personal data 309–310
purpose limitation principle 311–12
“disappearing trials” 35–6
disclosure of information
see also pre-action protocol
cost 110
full disclosure 142–3
public policy benefit 108
discount coupons
see coupon mass settlements
dispersed losses 46–51

England and Wales
alternative dispute resolution 108–109, 111–12, 126–9
amount of settlements 107
Civil Procedure Rules (CPR) 11
incorporation of ADR techniques 230–31
Jackson reforms 11, 110–13, 114–8
Resolving mass disputes

part 36 115–16
Competition Appeal Tribunal 119
consumer alternative dispute resolution 127–8
Damage Based Agreements (DB) 124, 130
see also conditional fee agreements
incidence of multi-party actions and their outcome 118–20
legal aid arrangements 121
“legal aid blackmail” 121
Legal Services Ombudsman 244
mediation 109, 113
Qualified One Way Cost Shifting (QOCS) 116–17, 124
see also cost of litigation, cost shifting
“Which?” 119

EU legislation
CADR in financial services 249–50
Financial Services Complaints Network (FIN-Net) 236, 250–52, 258
revision of the regulatory framework 252–3
supervisory authorities 252–3
customer acquis 227, 234–6, 294, 303, 313
cooperation with law enforcement authorities 306
directive on consumer injunctions 15, 71, 234
directive on data protection 309
directive on the rights, support and protection of victims of crime 279–80
directive on mediation 2, 68–9, 106, 231, 235, 249–50, 258
regulation on consumer online dispute resolution 27, 69, 240, 241, 265–7, 285–6
see also ODR, European ODR Platform
see also ODR, European ODR facilitators’ network
implementation cost 313
procedure 305–306
scope 304
regulation on consumer protection cooperation 234, 308
see also European consumer protection cooperation system
small claims procedure 231, 235
EU policy
consultations on alternative dispute resolution 262–3
digital agenda for Europe 240, 302
green paper on consumer collective redress 71
green paper on damages actions for breach of EU-anti-trust rules 71
public consultation on a “coherent European approach to collective redress” 72–3
recommendation of the European Commission on common principles for injunctive and compensatory collective redress mechanisms 5–6, 10, 15–16, 64, 74
recommendations of the European Commission on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR 26, 19–30, 249, 251, 258, 289
white paper on damages actions for breach of EU-anti-trust rules 71
European Banking Authority (EBA) 252–3
European Consumer Centre Network (ECC-Net) 236, 241, 303, 306–307
European consumer protection cooperation system 308
compatibility with data protection measures 310–13
European civil judicial area
mass settlements 68–70
recognition and enforcement of judgements 65–7
Index

competence of the EU for judicial cooperation 67–8
European Insurance and Occupational Pensions Authority (EIOPA) 252–3
guidelines on complaints-handling by insurance undertakings 253–4, 268
European Securities and Market Authority (ESMA) 252–3

France
Fédération Française des Sociétés d'Assurance (FFSA) mediator 258–9
mediation 257–9

Germany
Adhäsionsverfahren 284
consumer alternative dispute resolution 244–5
Capital Market Model Case Act (CMMCA)
see Kapitalanlagemusterverfahrensgesetz (KapMuG)
insurance ombudsman
see Versicherungsombudsmann
Kapitalanlegermusterverfahrensgesetz (KapMuG) 19–20, 74
legal culture 243–4
Versicherungsombudsmann 255–7
group litigation
see collective action

International Consumer Protection Enforcement Network (ICPEN) 307–308
informal justice 230
information asymmetry 125, 255
insurance arrangements
see compensation arrangements

Key Performance Indicators (KPI) 30–31, 32

legal aid 46, 121–2
legal expenses insurance 43–4, 122–3
litigation funding 13, 16, 45–6, 123–4
Contingency Legal Aid Funds (CLAFF) 46

litigation funding agreement 174, 175–6
funding equalisation factor 192–3
Lord Justice Jackson 109–11, 123
Lord Woolf 108–109, 126
market failure 40–51
market regulation 33–4, 237–8, 239–40
mass litigation
see collective action
mass settlement 7–9
see also settlement
applicable law 20–21
“coupon settlement” 8, 23, 156–7, 158, 170
court approval
see judicial review and approval evaluation
see judicial review and approval fairness of the compromise 132, 176
court review and approval 13, 95, 129–30
application for approval 181–2
criteria, standards or framework 17–22, 76, 138–40, 177, 184–5
“fair, reasonable and adequate-standard” 13, 17–18, 157, 184–5
guardian for group members’ interests 197–8
inconsistency with adversarial procedure 155–7, 187, 197, 198
independent scrutiny 37, 145
presumption of fairness 139–40, 143
reputation and utility of judges 57–9
terms of funding 101–103, 190–93
notice to class members 22, 95, 138, 156, 157, 177, 179–81, 183–4
principal-agent conflict 176–7
recognition and enforcement in the EU 69, 82–9
right to object 22–4, 95, 138, 143–5, 156, 157
cost of objection 188
lack of objection 188–9
settlement funds
administration 194–5
calculation of the group members’ loss 196, 211, 214
distribution scheme 194–6
trade-off between precision and cost 196
mediation
EU mediation directive 2, 68–9, 106, 231, 235, 249–50, 258
France 257–9
mandatory mediation 112–13
incentives to engage in mediation 109, 209
model suits 206–207
National Legal Culture 242–5
the Netherlands
Dutch Mass Settlement Act of 2005
see WCAM
Geschillencommissie 25, 50, 227, 243
legal culture 243–4
WCAM (Wet collectieve afwikkeling massaschade)
amendments and proposals 98–100
applicability of Art. 32 Brussels I on “judgements” 83–4
applicability of Art. 58 Brussels I on “settlements” 84–6
applicability of the Brussels I rules on “recognition and enforcement” 16, 86–9
binding effect and opt-out-mechanism 16–17, 76–7
case examples 96–7
origin and further development 75, 91–3, 95
Jurisdiction in international cases 78–81
legal nature and mode of treatment 75–6, 77, 94–6
reasons for application 97–8
requirements for representative organizations 76, 94–5, 103–105
review of the settlement 18, 20–2, 76, 95
review of class counsel funding 100–103
the “nine-factor-test” 18–19, 184–5
see also judicial review of mass settlements
ODR
see online dispute resolution
ombudsman model 6, 226, 227–8, 232, 245
cost and funding 256, 259, 260–61
Dutch Geschillencommissie 25, 50, 227, 243
Englisch and Welsh Legal Services Ombudsman 244
European Ombudsman 226
German Insurance Ombudsman 255–7
Sweden 226
UK Financial Ombudsman Service (FOS) 25, 28, 29, 30, 31, 129, 237, 244, 259–62
online dispute resolution (ODR) 27, 240–42
see also consumer alternative dispute resolution; EU regulation on consumer online dispute resolution
Belmed (Belgium Mediation) 285, 287–9
blind-bidding negotiation 294–5
definition 294–5
European ODR facilitators’ network 266, 303
European ODR Platform 265–6, 267, 303, 304
“Clearing House” function 304–305
“Enforcement” function 306, 308
Lack of tools for negotiation 304
“Referral” function 305
“Transfer” function 305
“Transparency” function 305
implementation requirements for EU Member States 245–6, 266, 313
“mock trials” 294
UNCITRAL normative framework for ODR 27, 295–7, 314
see also UNCITRAL draft procedural rules
opt-out mechanism 16–17, 159, 182–3, 212
personal injury suits 109, 112, 116, 123, 124, 125, 152, 280
exposure to asbestos 152–3
Vioxx litigation 167, 169–70
“piggyback technique”
see compensation for crime victims in criminal proceedings
pre-action protocol 109–13
principal-agent conflict
collective action 12, 13–16, 48–9
guardian for group members’ interests 197–8
mass settlements 176–7
representative action 50
principal-agent relationship 154–5, 186–7
fiduciary duties 186
process evaluation
see Key Process Indicators
public enforcement 9, 210, 274–9
public-private partnerships
see litigation funding
rational apathy 46–51, 68, 102
representative action
Competition Appeal Tribunal 119
principal-agent conflict 50
UK Court of Chancery 173
representative organizations 14–15, 272, 281–2
ad-hoc-organizations 104
“Claim Code” 103–104
financial resources and funding 15, 163
incentives to act 159, 163–4
public pension funds 103, 105
requirements under the WCAM 76, 94–5, 103–105
“What?” 119
representative party
compensation 193
 selection and election 204, 211
withdrawal 178
representative suit
see representative action
securities cases 19, 20, 78, 79, 92, 97, 150, 199–201, 210–14, 252, 272, 281–2
settlement 2–3, 178
as standard practice in common law systems 106–108
effects of cost rules 109–10
financial incentives 144
cost management 117–18
cost shifting 116–17
English rule 135–7
sanctions for declining settlement offers 115–16
test of proportionality of costs 115
commercial incentives 128–9
information as prerequisite 106–107, 108, 142–3, 186–7
institutional incentives 109–113
Australian Civil Dispute Resolution Act 2011 198–9
scarce judicial resources 2, 5, 141
national cultural approaches 242–3
public policy benefit 108, 141
small claims 112–13, 217, 231–2, 235, 241, 248, 273, 298
statute of limitations 167
Sweden
consumer alternative dispute resolution 25, 243
ombudsman model 226
TFEU
see Treaty on the Functioning of the European Union
Third Party Funding (TPF)
see litigation funding
trial plan 162
transfer of claims 45
Treaty of Amsterdam 63, 65
Treaty on the Functioning of the European Union 66–70, 89, 293
UNCITRAL draft procedural rules 295–6, 314
application by contractual agreement 297–8
due process
language of dispute resolution 300
notification of the respondent 299
time-limits 299–300
Resolving mass disputes

scope (“cross-border low value and high volume disputes”) 298–9, 301
substantive legal principles 296
three-stage-procedure 295
United Kingdom
see UK
see also England and Wales
United States of America
see US
UK
see also England and Wales
consumer alternative dispute resolution system 244–5
court of chancery 173
Financial Ombudsman Service (FOS) 25, 28, 29, 30, 31, 129, 237, 244, 259–62
Financial Services Authority (FSA) 260–62
Group Litigation Order (GLO) 11, 19, 118, 126
Office of Fair Trading (OFT) 232–3, 260
trade association for the consumer package travel sector (ABTA) 232, 245
US
arbitration 164–5
class action 2
class certification 159–64
class counsel 158
“consumer class action” 151
fear of adoption outside the US 148
federal court jurisdiction 158–9
“magnet states” 158
“mass tort class actions” 152–3
origin and further development 149–50
Class Action Fairness Act 2005 158–9, 166, 168
common fund approach 193
multidistrict litigation (MDL) 165
judicial panel on multidistrict litigation 165, 167
scope 166
significance for US mass litigation 166–8
permissive joinder of parties
equation with class actions 168
Lone Pine Order 169–70
role of judges 10–11, 154–6, 167–8
rule 23 of the Federal Rules of Civil Procedure 16, 17, 23
amendment of 1966 149
amendment of 1998 161
revision of 2003 154, 157–8
Vioxx Litigation 167, 169–70