

European Civil Justice Systems

The Hidden World of Consumer ADR

Redress and Behaviour

REPORT AND ANALYSIS OF A CONFERENCE HELD AT
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Introduction

This report describes a conference held in Oxford on 28 October, entitled: 'The Hidden World of Consumer ADR: Redress and Behaviour', which examined various approaches to consumer alternative dispute resolution (ADR) in the EU. Delegates came from all around Europe and beyond, with representatives from the European Commission, four governments, numerous ombudsmen, and consumer and business organizations, as well as leading scholars from Japan, the Netherlands, Spain, the UK and US.

Many governments are interested in ADR as an alternative to courts to improve access to justice, overcome problems of costs and funding for court mechanisms, and help maintain competitive markets.

The conference was opened with the reporting of results of a major comparative study on ADR systems in Europe, showing what actually exists, and what potential exists for extending both redress and

collective redress. It proceeded with a series of presentations on different national ADR systems, and enabled a wide-ranging debate about the policy decisions that many governments are currently facing as they look to encourage wider use of ADR for consumer disputes. The conference was structured around a series of questions, in general introduced by a visiting speaker; the foregoing report describes speaker commentary and the general discussion that ensued.

Consumer ADR systems have arisen in many EU Member States relatively recently, but remain unknown to many people. Many governments are interested in encouraging ADR as an alternative to courts for reasons of improving access to justice, overcoming the problems of costs and funding for court mechanisms, and because ADR systems can assist in maintaining competitive markets. The European Commission issued two legislative proposals in November 2011, one on consumer ADR and the other on ODR (online dispute resolution).

SESSION ONE

Models of ADR: The Research Findings – Revealing the Hidden World of Consumer ADR in Slovenia, Poland, Sweden, France, Germany, the UK, and the Netherlands

Professor Chris Hodges, Dr Iris Benöhr, and Dr Naomi Creutzfeldt-Banda, University of Oxford

After the welcome and introduction to the conference by Professor Hodges, Dr Benöhr gave an overview of the history and background of ADR in EU policy to set the scene. This was followed by a detailed presentation by Professor Hodges of the existing dispute resolution models investigated so far in the research project undertaken by the CMS Research Programme on Civil Justice Systems at the Centre for Socio-Legal Studies, Oxford, including some recommendations. Dr Creutzfeldt-Banda then presented statistical examples of specific sectors within the investigated countries to highlight some significant differences within the schemes.

Some key points from the presentations:

- There are many consumer ADR bodies across European States, most operating nationally, with some recently operating on a pan-EU basis (such as schemes by Eurolease, the Direct Selling Association) or globally (domain names).¹ They are often called 'ombudsmen' (copying the origin of that term from public sector ombudsmen) or in France *médiateurs*.
- The ADR models operate within different national *architectures* that present some challenges for harmonization. However, the *techniques* that they adopt are very similar. The main techniques are:

- a. requiring direct contact between consumer and trader as a mandatory first step;
- b. mediation/conciliation by the neutral party;
- c. statement by the neutral party of a recommendation for a solution (non-binding) or a (binding) determination.

■ Many variations are found in the extent to which ADR systems are *independent* and *transparent*. Some countries have ADR bodies that are clearly independent (such as the Nordic Complaint Boards that operate rather like courts, or the Netherlands Geschillencommissie board). Many large companies with major consumer brands have effective in-house customer-care departments, but do not usually call these ombudsmen (some French companies call them *médiateurs*). Some regulators have in-house ADR facilities, and some trade associations have semi-independent ADR facilities, often associated with deciding disputes under codes of business practice.

■ Important measures exist at EU level. The European Commission has produced two Recommendations relating to requirements for ADR bodies: 98/257/EC² on ADR associated with court proceedings and 2001/310/EC on separate ADR bodies.³ There is

1. The Uniform Domain Name Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN) on the recommendation of the World Intellectual Property Organization (WIPO).

2. Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/CE), available at <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:115:0031:0034:EN:PDF>>.

3. Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC), available at <http://ec.europa.eu/consumers/redress/out_of_court/adr/acce_just12_en.pdf>.

also a 2004 Voluntary European Code of Conduct for Mediators. Several sectoral regulatory measures encourage ADR systems or require them. An important recent measure is the Mediation Directive,⁴ which applies from May 2011. In the court sphere, a parallel instrument is the small claims procedure.⁵ Of great importance is the European Consumer Centres Network (ECC-Net)⁶ and its financial services equivalent FIN-NET.⁷

- There is considerable variation amongst ADR systems in the number of claims attracted. Many systems process claims relatively quickly (a few months) compared with courts.
- Many ADR systems do not charge consumers to use them: 'loser pays' does not arise in these systems. Some do charge, and some apply a 'loser pays' rule, but the sums involved are always less than litigation/court fees and are modest in amounts.
- Many ADR providers report that a significant number of contracts that they receive are requests for information and advice, rather than complaints, and that many complaints essentially involve simple issues and are not difficult to solve.

Redress through ADR: in what circumstances does ADR work – and work best?

What criteria should ADR satisfy: independence, expertise, fundamental rights, due process, fairness, justice, legitimacy,

governance, effectiveness, efficiency, speed, cost, flexibility – and access to justice? Are these the 'minimum standards' needed for ADR? Why? Are there others?

Dr Georg Starke, Federal Ministry for Agriculture, Consumer Protection and Food, Berlin

Dr Starke emphasized that, for the German government and especially for the Ministry of Consumer Protection, ADR systems appear to be an attractive alternative to solving a civil dispute between trader and consumer. However, ADR should not replace court procedures. ADR can be a welcome complement to court proceedings. Dr Starke then gave the example of the *Insurance Ombudsman* in Germany as one of the most successful schemes, which deals with disputes between consumers and insurance companies.

Dr Starke proceeded to outline the cost, speed, and flexibility of the Ombudsman:

- **Costs:** in Germany the 'loser pays' rule ensures that the successful plaintiff does not have to pay anything (except for attorney fees above the legal standard). For a €1000 value of claim with an attorney on both sides, the total risk is about €717 for the first instance in Germany. Bringing a dispute to the Ombudsman is free.
- **Speed:** the Ombudsman took an average of 4.4 months to resolve complaints, and in Berlin an average civil law case took 11.3 months to be resolved.

- **Flexibility:** ADR mechanisms are often more successful than courts in creating legal peace between parties. The Insurance Ombudsman will tell the consumer if their application is incomplete; the court will not help to make a claim conclusive.

Dr Starke emphasized that all relevant ADR bodies in Germany act in accordance with the Recommendations 98/257/EC and 2001/310/EC, which require: independence, impartiality, and

4. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>>.

5. Regulation (EC) No 861/2007 establishing a European small claims procedure: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0001:0002:EN:PDF>>.

6. <http://ec.europa.eu/consumers/redress_cons/index_en.htm>.

7. <http://ec.europa.eu/internal_market/fin-net/index_en.htm>.

competence; transparency; effectiveness; legality; and fair proceedings. The most important factors for the German Ministry of Consumer Protection are legality, effectiveness, independence, impartiality, and competence. Additional points of importance include awareness, voluntariness, and defeasibility.

Dr Starke concluded by stating that governments can only create preconditions for ADR systems. Since many of the positive aspects derive from the voluntariness of the instruments, the states should, as much as possible, refrain from influencing the set-up and the work of ADR bodies. Businesses need to be convinced of the advantages of ADR bodies.

Discussion

There was general agreement that the existing principles are correct. The Oxford team suggest that the principles should be updated, since they were drafted ten years ago and ADR systems have moved on significantly, and that they should be split into two aspects: binding 'essential requirements' and performance indicators. There should be a requirement that all ADR providers should comply with the essential requirements, and should produce transparent performance data so that comparisons can be made in time, cost, and outcomes, as well as ensuring democratic accountability.

Where do contrasting ADR models not satisfy the criteria? How should systems be improved?

Perhaps unsurprisingly, no-one volunteered to introduce this topic! The CSLS team therefore suggested that one of the key issues is the independence/impartiality of ADR providers, and that although a case can be made that some arrangements satisfy such requirements, the proof lies in the statistics that consumers or business do not *perceive* the arrangements to be independent/impartial, as shown in the comparatively lower usage figures. This would apply to some ombudsmen located in regulators and in companies (examples in France and Germany). These models can be explained in terms of historical development, but

might be due for reconsideration. At the other extreme, the UK Financial Ombudsman Service (FOS) attracts a high volume but is not perceived as independent by the business sector, and is seen as being too close to its regulator parent. However, issues arise out of the exact function of the ADR body (e.g. the extent to which it is designed to have a regulatory function) and the transparency of the data and operation of an ADR body. All aspects are interrelated.

Another potential issue is whether it is still necessary for ADR decisions to be made by a panel of *three* people: some ombudsmen involve a single case manager, although decisions may be passed up to the/a more senior ombudsman. The Dutch and Nordic models of three 'arbitrators' have symbolic value in including representatives of both consumers and business. They may also be able to include sectoral expertise on the panel, thereby saving costs, and attract judges as third members, since they seek the strong practical experience that the ADR panels provide. There are different models.

ADR bodies differ in whether decisions are based on law or codes; and also in whether decisions are based on (legal) rules or on what is 'fair and reasonable'. There may be a difference here between civil law jurisdictions (which can include concepts of fairness in contract law) and common law jurisdictions (which traditionally do not), although EU consumer law has increasingly included fairness. The UK FOS assimilated an insurance ombudsman that had for 100 years made commercial shipping decisions on the basis of what is 'fair'. It may be that ADR systems reflect the expectations of consumers that are in advance of the development of legal rules. But some businesses object that they are subject to double standards in having to observe legal rules and *ex post* considerations of fairness, and this creates considerable uncertainty and risk.

Should decisions be fully transparent?

Professor Willem H. van Boom, *Erasmus School of Law, Rotterdam, the Netherlands*

Professor van Boom opened his presentation with the observation that transparency in ADR means different things to different people involved. Moreover, ADR as such is a very broad ‘container concept’ in which just about any mechanism to settle, adjudicate, or sweep under the carpet civil claims without the help of ordinary courts will fit. One would not expect full online publication of names of the parties involved in an amicable settlement reached by a conciliator as a proper level of transparency. So, to be realistic, one needs to have a closer look at the particular ADR scheme – its aims as well as its factual socio-economic and political stature in a given jurisdiction.

Moreover, if the output of an institutional ADR scheme is a *decision*, whether binding or not, it should be a reasoned decision stating the relevant facts, norms, and argumentation. This could be described as ex post transparency for the persons and businesses involved. If *consumers* are involved, it should ideally be intelligible for lay people to the extent possible. And if these decisions are intended as precedents for future cases, then some form of publication is appropriate.

From the *traders’* point of view, every decision leads to a question: should we adapt our business to avoid similar cases going to ADR in future or is this a one-off that we can disregard completely? At an aggregate level, the same issues arise for both traders’ associations and consumers’ associations. (If company A is more frequently involved in particular conflicts which come before an ADR board or

Ombudsman than one might expect from its market share, then possibly there is a structural flaw in its business model involved.) Transparency could help to identify the patterns of such structural flaws and provide a feedback loop to both business and consumer constituencies.

Professor van Boom continued by highlighting that such transparency demands do not apply for all ADR schemes. One could see ADR as a continuum with, on the one end, completely voluntary and non-binding arrangements, and at the far opposite, a compulsory scheme which emulates state court practice.

Professor van Boom concluded his presentation by proposing the following:

- The exact meaning of transparency depends largely on legal culture. Rendering a reasoned decision might mean something different in France than in Germany. Respecting privacy when publishing decisions may mean something different as well.
- Transparency rationales are different for voluntary schemes and for mandatory schemes. In the latter case, constitutional warranties may come into play.
- Transparency is key: it triggers quality assurance, lays bare any inconsistencies or biases in the decisions produced, and puts pressure on stakeholders to find patterns and act upon these.

Discussion

Participants commented that the concept of a ‘reasoned decision’ differs between, for example, Germany and France. Furthermore, court decisions are not all published everywhere, and not all court judgments are published in any event. WIPO was raised as an example of an organization that publishes all decisions online. Another suggestion was for the number of ADR decisions that were later nullified in court proceedings to be made public. One delegate commented that the availability of a corpus of decisions (whether based on law or ‘fair and reasonable’ standards) enables businesses to know if they need to change practice, consumers to know if they have a valid claim before bringing it, practitioners

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to consider an indexed archive, and trade associations and regulators to identify trends that need to be addressed and which companies are worse than others. Participants also mentioned that mediators do not necessarily produce just outcomes, since their function is not to reach a decision on law but to assist parties to agree to acceptable compromises. A lot depends on whether the ADR model involves competitive or monopolistic ADR/court services.

Professor Hodges concluded the discussion by stating that systems and requirements should not be made too complex. The most important priority at present is to persuade companies to sign up to consumer ADR systems – they will just not do this if they are subject to too many requirements and risks at too early a stage. Attendees expressed clear support for the idea of transparency, but also concerns as to its implications.

What is the best architecture for ADR – nationally and internationally? ADR for consumer protection in Japan

Professor Ikuo Sugawara, Nagoya University

Professor Sugawara outlined the current situation of ADR for consumer protection in Japan. The only ADR for consumers in Japan until recently has been provided by product liability centres, which are industry-sponsored organizations that handle product liability disputes. They were established in response to an initiative of the Ministry of International Trade and Industry in 1994, but do not handle contractual disputes.

Japan has found a need to establish more wide-ranging structures to handle consumer disputes. Professor Sugawara surveyed the characteristics of ADR for consumer-related disputes. Firstly, many consumer disputes only involve small amounts of money. Therefore, consumers hesitate to resort to ADR if the procedure is costly. Secondly, disputes often concern a diverse range of matters, depending on the nature of the product or service in question, and require specialized knowledge for resolution.

Thirdly, it is necessary to satisfy the requirements of careful and thorough treatment of disputes, while weighing the opposing requirements of swift and simple treatment of individual disputes. Fourthly, it is not easy to find ways of adequately handling difficulties in proving facts.

Professor Sugawara noted the problems of administrative cost and manpower shortage experienced by ADR operators. From the user's standpoint, the neutrality and fairness of ADR operators, as well as transparency of the process, are constant requirements. He discussed new ADR initiatives by the National Consumer Information Centre and in the financial service sector. In conclusion, a range of challenges remain to be overcome in order to promote ADR for consumers, challenges that the Japanese legal system are beginning to address.

How do developments in consumer ADR relate to systems and developments in public sector oversight and dispute resolution?

Dr Angus Nurse, Birmingham City University

Dr Nurse noted that the UK government is encouraging ADR in both the consumer and public sectors. Many of the reforms being discussed in the two areas are similar but are not being coordinated. He outlined major reviews of public sector ombudsmen in the UK.

Important documents include:

- *Common Sense, Common Safety* (The Young Review), October 2010
- *Complaints & Litigation*: Health Select Committee proposals for Health Service Ombudsman reform, June 2011
- *Open Public Services*, Cabinet Office White Paper, July 2011
- *Public Services Ombudsmen Project*, Law Commission, July 2011

Dr Nurse noted the finding of the Cabinet Office White Paper that there exists the need for a means for individuals to enforce rights against public entities, and that ombudsmen are the appropriate means for locating a power of redress, investigating complaints, promoting local resolution, and speedy remedial action. All services should be covered by ombudsmen, and it would appear that there is to be an increased link between ombudsmen and the courts. Values at the heart of this service are modernization, accountability, and transparency. All public sector ombudsmen should publish their reports, and should be able to consider generic issues.

Discussion

The discussion highlighted that many states have public sector ombudsmen. It is important to consider developments in private and public ADR and ombudsmen systems together, in order to capture appropriate learning but also to avoid fragmentation. For example, a possible response to the problem of how to raise consumer awareness of ADR might be a wide understanding that ombudsmen could deal with complaints against government as well as traders, and that all ombudsmen operated to the same standards and effectiveness. Citizens would think 'ombudsmen' where they now think only 'courts'. Achieving that simple profile would encourage extensive access to justice.

How do we measure the function and success of ADR schemes?

Professor Deborah Hensler, Stanford Law School

Professor Hensler presented her perspective on how to measure the success of an ADR scheme. She started her presentation by making the point that there is a widespread perception that 'all we do in the US is litigate' and countered that by confirming that ADR is widespread in the US, and a requirement in the consumer area by virtually every state as well as a requirement of the federal court system and all of the larger metropolitan state trial courts as an adjunct to court processes.

Professor Hensler added that, like Japan, Australia and Canada also have discussions on ADR, not just for consumers, but ADR generally, including reform efforts and innovation. There is very little hard evidence of what ADR achieves in the consumer dispute arena or any other arena. Furthermore, there is no evidence of clear outcomes in arbitration or mediation, private or public, voluntary or mandatory. Whether a programme works is often at best loosely defined, and assertions on what works are based on anecdotes and intuitions.

Professor Hensler made the point that a party has to be free to reject dispute resolution procedural outcomes, and that ADR architects should be wary of placing substantial requirements on private sector initiatives, since what follows is misuse and eventual disuse. Businesses will rarely subsidize programmes that are not useful to them, which means that they may reject ideas not in line with their objectives, policy, or interests. Furthermore, there are scarce resources allocated to ADR, whereas resources are increased towards courts and court efficiency. As a condition to pursuing dispute in any forum, policymakers should set a higher standard for judging programmes as effective.

Further, Professor Hensler pointed out that one needs to be very careful when gathering data and evaluating it. One cannot merely focus on numbers when assessing the usefulness of a programme: the success of a process cannot be measured by the number of users. To meet the challenge, we need to narrow the kinds of programmes we are talking about. A possible research approach could be to look at what types of ADR programmes deserve support from private/public decision makers.

Professor Hensler concluded by highlighting the difficulty of data collection in finding the underlying problem in the relevant service or product sector. It is important to examine and aggregate data on programme outcomes, though such data is not easy to analyse and one needs to look for patterns and rely to an extent on interpretation. The practical challenge is that decisions should be made on hard data rather than guesses and anecdotes.

SESSION TWO

Where Next?

Improvements in ADR techniques

Peter Moerkens, *De Geschillencommissie Stichting, The Hague*

Mr Moerkens introduced the Dutch integral comprehensive digital system of complaint and dispute solving. It exists at three levels, which reinforce each other.

The umbrella organization currently administers fifty consumer complaints boards that solve disputes between consumers and entrepreneurs/suppliers. All those fifty boards are fully independent and impartial. A unique feature is that the logistical and judicial support of those boards is centrally organized at De Geschillencommissie Stichting. Also unique is that De Geschillencommissie has commitment from government, consumer associations, and trade associations.

Mr Moerkens highlighted the important initial feature that consumer and trade organizations agree bilateral terms of trade, which contain an agreement to refer disputes to ADR. Based on that general arrangement, the consumer has the right to lodge a claim over a dispute with a supplier with a consumer complaints board. The supplier is obliged to cooperate, as a term of its membership of the trade organization. The board deals with the conflict and gives a decision, which is binding on both parties. The system includes a compliance guarantee. If a consumer has not paid a bill, he has to pay part of it into deposit with De Geschillencommissie Stichting: if he is found liable, the Foundation will pay the money to the supplier. However, if the supplier does implement a decision against him, the trade organization will pay the consumer, and collect the money from its supplier member.

The government considers that this system is a good alternative to the courts, from the perspective of

In the Dutch system, an important initial feature is that consumer and trade organizations agree bilateral terms of trade, which contain an agreement to refer disputes to ADR.

both consumer protection and accessibility to law. It is a form of self-regulation by the private sector, supported by government.

The procedures are now digitalized, involving a form of online dispute resolution. This has been possible because of the evolving transparency of quality of service on the Internet. Quality management and complaint solving is, with the rise of comparison and complaint sites, becoming more and more important for business. Trade organizations can play a major role in this. Secondly, the electronic system that the Geschillencommissie has developed is expandable, so the Stichting can support complaint solving by trade organizations with this electronic system.

Belmed: The new Belgian digital portal for consumer ADR

Dr Stefaan Voet, *University of Ghent*

Dr Voet introduced the Belmed system. In April 2011, the Belgian Economy Minister (Mr Vincent Van Quickenborne) launched Belmed: *Belgian Mediation* (available in Dutch, French, German, and English). Belmed is a digital portal (platform) for consumer ADR, which the Ministry intends to promote and make more accessible. It offers information *and* solutions for consumers and enterprises. Belmed only applies to consumer disputes (noncommercial disputes are excluded) and disputes between a consumer and an enterprise (disputes between consumers and between enterprises are excluded).

Dr Voet explained that Belmed consists of two parts: an informative part and an online mediation part. On the one hand, Belmed offers a useful summary of all existing ADR tools in Belgium. It gives an overview of all mediation, arbitration, and conciliation agencies, authorities, and ombudsmen, and their contact information. The informative part also contains a consumer guide on how to settle a dispute in an amicable way (e.g. examples of letters to send to an enterprise to report a problem).

On the other hand, and this is the novelty, Belmed offers the possibility of making an online application for mediation. The idea is to create one uniform digital office for the consumer, so s/he doesn't have to find out which agency, ombudsman, commission, etc s/he has to go to. Use of Belmed is free of charge. The costs of the mediation procedure depend on the specific costs of the mediation authority/procedure that is involved.

Dr Voet highlighted that, as at November 2011, seven mediation authorities have signed a protocol to work with the Belmed system: the Ombudsman Service for Energy, the Mediation Service Banks – Credits – Investments, the Secondhand Vehicle Reconciliation Commission, the Travel Disputes Commission, the European Consumer Centre, the Furniture Disputes Commission, and the Real Estate Conciliation, Arbitration and Mediation Board. The long-term plan is to have agreements with all mediation authorities.

Dr Voet concluded by stating that although statistical data is not yet available, it seems that the majority of claims are related to energy.

What opportunities exist to extend ADR?

This session focused on innovations that are occurring in ADR, in and beyond consumer disputes. First, use of

Online dispute resolution is spreading as a means of resolving disputes internationally, as well as a more efficient form of resolving ADR disputes within existing systems.

ADR is being considered in order to solve the thorny problem of complex competition damages claims, since collective action procedures are inevitably complex, lengthy, and costly. Secondly, online dispute resolution (ODR) is spreading as a means of resolving disputes internationally, as well as a more efficient form of resolving ADR disputes within existing systems.

ADR in competition damages claims

Duncan Campbell, Confederation of British Industry

Duncan Campbell presented an ADR model for settling follow-on claims in competition cases. The Confederation of British Industry (CBI) supports the objective of providing effective redress to the victims of cartels and believes every effort should be made to facilitate this through ADR. The objective is to ensure fair and early disposal of legitimate claims with minimal costs and without recourse to the courts. This model of providing direct redress is designed to offer advantages to all the principal participants in a cartel case.

Mr Campbell highlighted the advantages. For the competition authority, there would be no cost to the authority or direct involvement in delivering the redress. For claimants, compensation would be obtained sooner without the risks and costs of litigation. And for companies, the exposure to follow-on claims can be quantified at an earlier stage and with more certainty than through protracted litigation. This would enable companies to draw a line under their involvement in a cartel at an earlier point.

There would be substantial savings in litigation costs and in internal resources. Furthermore, companies would be free to focus on future opportunities rather than past problems, having been enabled to repair their damaged image more rapidly and effectively through the earlier resolution of claims. This could help in rebuilding customer relationships.

Further, the ADR model would provide flexibility and could be adapted to each individual case. It would provide an optional model for settlement that

companies could offer for discussion with the authority. Flexibility is needed, as redress following a cartel affecting thousands of consumers would require a different approach than one involving a small number of industrial purchasers.

Mr Campbell concluded his presentation by stating that a reduction in the fine would be an important incentive for the defendants to agree to provide direct redress. If one element of the fine constitutes the confiscation of illegal profits, then this could justifiably be returned to the victims rather than the state. The reduction in the fine could be made conditional on the panel's report of the defendants' payment of compensation to the claimants.

Online dispute resolution (ODR)

Dr Pablo Cortés, *Leicester University*; **Dr Julia Hörnle**, *Queen Mary London*; and **Professor Fernando Esteban de la Rosa**, *University of Grenada*

Dr Cortés presented a definition and overview of online dispute resolution (ODR) mechanisms. He started by asking the question 'what is ODR?'. ODR is often referred to as a form of ADR which takes advantage of the speed and convenience of the Internet and information and communications technology (ICT). ODR is the best (and often the only) option for enhancing the redress of consumer grievances, strengthening their trust in the market, and promoting the sustainable growth of e-commerce. Hence, e-commerce is the most natural field for the application of ODR, in particular for settling complaints that are cross-border, low value, high volume, and occurring between Internet users.

For that reason there is ongoing work to enhance the use of ODR for resolving these types of disputes. The European Commission published a Directive on Consumer ADR and a Regulation on Consumer ODR establishing an ODR Platform at the end of November 2011. Another significant initiative is that of the UN Commission for International Trade Law (UNCITRAL) Working Group III (Online Dispute Resolution), which

is drafting procedural rules for ODR to settle disputes arising from e-commerce.

Examples were given of successful ODR schemes.

eBay and PayPal employ a tiered ODR process where parties first try to voluntarily settle their disputes by using assisted negotiation software; when they cannot reach a settlement the claim escalates to adjudication. PayPal freezes the money involved in the transaction of the dispute, thus ensuring the enforcement of the final decision. It resolves over 60 million disputes a year.

CyberSettle uses blind-bidding negotiation to settle insurance and commercial disputes. Parties make confidential offers that will only be disclosed when both offers match certain standards (usually ranging from 5% to 30%) or a given amount of money. The settlement is the mid-point of the two offers. CyberSettle has been working online since 1998, settling over 200,000 disputes with an accumulated value of more than USD 1.6 billion.

The issue of protection of domain names was then covered, with reference to the UDRP, developed by ICANN (see Footnote 1), which is an adjudicative ODR process that allows trademark owners to fight cyber-squatting (domain name holders who register a domain name in bad faith for the purpose of reselling it for a profit, or taking advantage of the reputation of a trademark). The UDRP is similar to non-legally binding (but enforceable) arbitration. The most important ODR service provider is WIPO Mediation and Arbitration Centre. Thus far, more than 20,000 disputes have been resolved.

Dr Julia Hörnle continued by explaining why, despite the need for ODR, its growth has been slow when compared with traditional ADR, accounting for a very limited number of successful ODR providers. ODR is currently used for specific subject matters (e.g. the UDRP for domain names) and it operates in specific market places (e.g. PayPal for eBay). Some of the defining features of those systems are that they incorporate incentives for parties to participate and rely on non-legalistic self-enforcement mechanisms.

Dr Hörnle proposed that the law should seek for ways to overcome the hurdles in the growth of ODR. Effective ODR will instil greater confidence in consumers while increasing their access to justice and recognizing consumers' legitimate rights.

Professor de la Rosa outlined the challenges for ODR in the EU, and started by making the point that there is a need to define who is a consumer. It is possible to apply the already existing definitions provided for by the European Directives recognizing consumer rights, according to which a consumer is basically a person acting for a purpose outside his trade or profession.

Professor de la Rosa continued by highlighting that the EU platform is only operational within European borders and in cross-border situations. This raises the following issues:

- European legislation is not exported beyond EU borders, and neither should be the principles and rules applicable to the functioning of the European ADR schemes.
- Only consumers having their habitual residence in the EU should benefit from using the EU ODR platform: the exclusion of non-residents can be fully justified.
- Habitual residence in a EU/EEA Member State is essential to tag a situation as cross-border, provided the trader is established in another Member State.

The Commission Recommendations 2001/310/EC and 98/257/EC play an important role in setting the standards for ODR/ADR. There is a binding and non-

binding option. The binding option indicates processes that terminate with legally binding decisions (arbitration); whereas non-binding refers to non-adjudicative processes where parties are free to reach an agreement (e.g. mediation and conciliation).

Professor de la Rosa emphasized that the principles provided for by the Recommendations must find a suitable reflection in the configuration of the ODR schemes in order to ensure adequate consumer protection. The principles of independence and impartiality, as well as the adversarial principle, should be equally applied to binding and non-binding processes, whereas for the principle of transparency, a distinction must be made between binding and non-binding processes. In binding processes the decision should be published, but in non-binding processes the settlement and the negotiations should remain confidential. The principle of legality is essential when the process has a binding outcome, as it should ensure that the consumer rights are fully respected. Lastly, consumers should not be contractually required to participate in a binding dispute resolution process (such as arbitration) before the dispute arises, unless they are covered by legal provisions: this Professor de la Rosa characterized as the principle of liberty.

Professor de la Rosa concluded by stating that the European initiative should set up a mechanism to guarantee that ODR providers comply with the rules establishing minimum standards. For this purpose he outlined two possible approaches. A new approach would be to award a European Trustmark to those ODR providers fulfilling the criteria; alternatively, a more traditional approach would be to leave the control in the hands of the Member States.

Consumers should not be contractually required to participate in a binding dispute resolution process (such as arbitration) before the dispute arises, unless they are covered by legal provisions.

ODR platforms

Zbynel Loebel, *external counsel of ADR.EU and coordinator of an international pilot on cross-border ODR*

Zbynel Loebel presented information about a pilot project on cross-border ODR infrastructure using UNCITRAL ODR Rules. After the announcement of the pilot in November 2011, the pilot will begin with an initial stage, probably to be carried out from January 2012 to end of June 2012, during which the following tasks are to be undertaken:

- verification and testing of the proposed functions of the cross-border ODR infrastructure platform and the services to be provided by the service team;
- clarification of costs involved for ODR providers with administering cross-border ODR disputes;
- necessity/desirability of some type of coordination structure of the participating ODR stakeholders;
- contacts and discussions with payment channels;
- contacts and discussions with associations of online sellers and large online sellers.

It may be possible to report the results of the initial stage during a subsequent UNCITRAL working group meeting and, at the very least, issue a progress report at the ODR Forum (held on 27-29 June 2012 in Prague), together with proposed next steps.

Mr Loebel indicated that the development of the infrastructure platform will be financed by the service team. Any costs associated with actual case-handling will be covered by individual participating programmes.

The Czech Republic is prepared to endorse the Czech Arbitration Court (ADR.EU) as the Czech ODR provider for the purposes of the pilot scheme. The confirmed participants in the pilot will probably include the Better Business Bureau (BBB) in the US and Canada.

Other countries that have been contacted to participate include EU (ECC-NET), Korea, Japan, Singapore, and Argentina.

Should ADR deliver behaviour control (improvements in performance through scrutiny and regulation) as well as dispute resolution?

Adrian Dally, *Financial Ombudsman Service, London*

Adrian Dally from the Financial Ombudsman Service outlined the spectrum of options available to those designing the functions of an ADR scheme.

Dispute resolution: the function is to resolve disputes between the parties. The decisions of the ADR scheme have little significance beyond the individual circumstances of the dispute.

Dispute resolution and 'nudged' behaviour control: 'making decisions work harder'. The function is to resolve disputes between the parties *and* report business behaviour, publish comparative performance data, and publish individual decisions. The transparency of the scheme's decisions create a 'civil incentive' for businesses to behave in ways considered fair by the scheme.

Dispute resolution and regulation: 'Delivering the wider public interest'. In addition to resolving disputes between parties and encouraging better behaviour by transparency, the function is also to link to a complaint-handling regime set by the regulator, report business performance to the regulator, and feed into the regulator's collective redress functions (and be bound by its collective redress decisions).

Mr Dally concluded by suggesting that if the ADR scheme sits within a regulatory system, that enables the regulator to act in a risk-based way.

How can regulators, business, and consumers deliver redress, dispute resolution, and improved standards?

Henrik Øe, Danish Consumer Ombudsman

The Danish Consumer Ombudsman (an enforcer, unlike many other ombudsmen) began his contribution by stating that ADR systems must be fair and respect procedural safeguards. The advantages are that acceptable ADR is informal, quick, and inexpensive for consumers (but not necessarily for companies) and that most decisions are followed. The disadvantages, however, are that decisions are normally not enforceable and it is often not possible to produce evidence (e.g. witness statements), which means that subsequent court procedures can be necessary.

Mr Øe suggested four possible solutions. Firstly, the decision is enforceable *by default* if the trader does not inform the ADR board that he does not intend to follow its decision. Secondly, *free legal aid* could be provided to consumers, or a small claims procedure. A third measure would be to '*name and shame*' wrongdoers, and finally, to make provisions such that a decision is *binding according to prior agreement* between the parties.

Another approach is 'one-case solutions only'. The advantage of this is a more general approach that allows for interventions, for example, by negotiation with trade and industry or court proceedings. This can rectify the market and give trade and industry 'ownership' of interpretation of the law (guidelines and guidance papers). The enforcement in cases that are of more general interest could have administrative orders, injunction/order, and/or a penalty imposed by the court, or a civil lawsuit (e.g. for compensation) on behalf of one or more consumers or collective redress. The disadvantages of this concept are that the cases or investigations can be very costly for the businesses concerned, the question of prioritization arises, and a penalty is often disproportionate to the profit made by the business and does not deliver redress to the consumers.

Mr Øe discussed the combination of ADRs and public enforcement. His recommendations for how to make ADRs effective are:

- not too comprehensive a system: not all types of goods and services should be included, as sometimes the claim is too small and costs are therefore disproportionate;
- mediation and settlements within the ADRs should be possible;
- decisions should be followed in the majority of cases.

The Consumer Ombudsman concluded that it is essential to have effective tools, such as collective redress (which can also facilitate settlements) and the suggestion in a white paper from the EU Commission COM(2008)165 of a new model for achieving compensation for consumers and businesses who are victims of antitrust violations. Finally, he reminded attendees of the importance of improving court procedures.

Discussion

The Danish Consumer Ombudsman was asked what happens to the claims he cannot deal with. He replied that he receives 5000 complaints a year, and can only investigate 1000; where he cannot act he tells consumers to go to the ADR system. If the Ombudsman does not agree with an ADR decision he can take the matter up. Further, the Ombudsman can seek a negotiated outcome, but can consider reference to the court. The power to refer a case to court fulfills the requirement for the system to have effective instruments of enforcement. The most important 'teeth' in that regard is the power of the Ombudsman to initiate collective redress. There is concern in Denmark over what will emerge as the new European ADR structure. The Ombudsman further emphasized that there should be a possibility of settling disputes (as in the Dutch model).

The discussion was brought to an end with a series of questions and clarifications regarding the *process* and *authority* in the Danish system, which, it was

explained, has at its pinnacle the Supreme Court. It was made clear that authority must be built into the system; in this regard, collective redress was characterized as the 'nuclear bomb' or background coercive threat available in the Danish system. It is not necessary to resort to its use in the vast majority of circumstances, but the existence of the power constitutes important authority and deterrent.

Why do we need courts? What for? What role should ADR, regulators, and courts have, and how should they work together?

Malcolm Carlisle OBE, European Justice Forum

Malcolm Carlisle stated that as far as his organization is concerned, the goal is to create an environment where business wishes to set up alternative mechanisms of settling disputes avoiding litigation, and above all, collective litigation. It is important to realize that the vast majority of complaints get resolved within companies. Secondly, there are a multitude of systems outside companies that facilitate conciliation, where outside conciliation is required. Everyone recognizes that they are a patchwork, in so far as they do not cover everything, and that, whilst they are quite different in structure and architecture, this is less important than that they achieve the objective of making parties recognize the merits or demerits of their case and come to a resolution. In order to accomplish that objective of encouraging a common-sense approach to the resolution of disputes, the new mechanisms created to achieve this must not introduce unnecessary complexity to the process.

Mr Carlisle continued by emphasizing the merit of creating alternatives to courts, that no system is perfect, and that we should not denigrate informal low-cost systems just because they may not fulfill every requirement that we may ideally wish them to meet. The courts will always act as a last resort, and any competition they are subject to by alternative mechanisms can only be of benefit to everyone, as long as the option of court action remains when all else fails.

In conclusion, Mr Carlisle asserted that courts and ADR should be kept as independent from each other as possible, since any ADR system that needs constant intervention of the courts is a sign of a failed system.

Collective redress was characterized as the 'nuclear bomb' or background coercive threat available in the Danish system: not necessary in the vast majority of circumstances, but an important deterrent.

Discussion

Professor Hodges noted that the German Insurance Ombudsman adopts a policy whereby any case involving a significant issue of (undecided) law should be taken to the court as the proper forum for deciding questions of law. That observation raises the issue of the relationship between the two fora: should courts be the proper forum for deciding issues of law, but ADR systems the better forum for applying decided law to (essentially straightforward) facts? Should the relationship between courts and ombudsmen be reviewed, on that basis, and the two bodies refer matters between them accordingly?

Other questions that were raised included the issue of whether ADR decisions should be enforced in court in the event of non-compliance by traders within a given time through a fast-track procedure, thereby avoiding unnecessary re-hearings about evidence that has already been considered. Should the trader's Article 6 ECHR rights require total re-hearing, or could s/he be permitted to produce only new evidence or arguments?

SESSION THREE

Panel Discussion

Sebastian Bohr, *European Commission DG SANCO, Brussels*; **Peter Avery**, *OECD, Paris*; and **Keith Richards**, *Raleo Ltd, London*

How should ADR be developed nationally, across the EU, and beyond? What are the implications for access to justice?

Sebastian Bohr, *European Commission DG SANCO, Brussels*

Sebastian Bohr began by demonstrating the importance of dispute resolution, with recourse to the statistics that, where consumers contact traders over a dispute, 46% of them give up. ECC-Net data shows that, over 50% of their cross-border cases relate to e-commerce, but ICT solutions to the disputes are not fully exploited.

The main problems include lack of coverage, the number of traders on board, getting the right information to consumers about where to go, qualifications for ADR providers (essential requirements), and disputes about which e-commerce transactions are appropriate for ODR solutions.

Mr Bohr continued to explain that the European Commission intends to make two legislative proposals before the end of this year: an ADR Framework Directive and an ODR cross-border e-commerce transactions Directive, plus a Communication. These measures will build on what exists now, in order to ensure:

1. each Member State should have an ADR scheme;
2. quality and trust is built in ADR, by applying quality principles across the many different states;

3. information is provided to consumers about which ADR scheme is most appropriate;
4. the exchange of best practices is enhanced;
5. a network of ADR bodies is established, such as FIN-NET;
6. cooperation between ADR bodies and enforcement authorities is encouraged;
7. performance monitoring of ADR bodies is undertaken, with feedback to each member state;
8. the establishment of an ADR database.

The principal difference between ADR and ODR lies in the fact that, while traditional ADR methods rely on an independent person handling the dispute, ODR involves a more technological approach to a solution. We should respect what currently exists, and not make things more complex, although it may be difficult to find the right balance of platform referral systems. There should be an EU-wide referral system to enable the structure to encompass all 750 ADRs, with a single entry point that gives immediate access to the requisite national scheme or ODR system. Rather than removing existing structures, it is important to build on the structure of the existing ECC-network.

Mr Bohr concluded by emphasizing that the aim of the EU is to achieve ADR schemes for all 'fifty sectors' as in the Netherlands, as well as providing a level playing-field for business. The legal basis will be under the Single Market Act, so the legislative procedure will be swift.

Peter Avery, OECD, Paris

Mr Avery agreed with the speakers before him and added that it will be important to focus on essential requirements and evaluation criteria. He affirmed the importance of ODR and the role of the intermediary in the evolution of ADR systems. He acknowledged the challenges presented by the opening up of cross-border ADR, and identified UNCITRAL as a potential means of addressing these challenges. He closed by confirming that ADR is on the agenda of the OECD for 2012.

Keith Richards, Raleo Ltd, London

Mr Richards made a compelling case for the need to celebrate differences between ADR systems, rather than seeking uniformity. Differences in national ADR systems also relate to the differences between countries in their *regulatory* architectures. He challenged the very meaning of the shorthand, 'ADR', claiming that it should be used to mean *Appropriate* Dispute Resolution, to reflect the present-day reality that justice is not simply achieved in court, but through a range of different systems. Each system imparts different expectations in the disputants, but often, expectations are unrealistically high.

He advocated that the slogan to bear in mind when extending consumer ADR must be to 'keep it simple'; ideally, by providing a one-stop shop. One must also consider the incentives for business: enhancing reputation, keeping regulation at bay, and learning from the lessons of past disputes. ADR need not necessarily be free, since consumers expect to pay for services, but it must be low cost.

Complainants generally have high expectations, and consumer counselling before the ADR process is undertaken may be beneficial to manage expectations.

Concluding, he said that there is a need for a filtering process, to force the consumer to think seriously about her complaint, and adopt a reasonable approach to its merits. This demands that assistance be provided at an early stage to evaluate the issue and its viability. Complainants generally have high expectations, and consumer counselling before the ADR process is undertaken may be beneficial in order to impart a measure of understanding of the process, and to manage expectations.

Conclusions

There are many consumer ADR bodies across European States, most operating nationally, with some recently operating on a pan-EU basis (such as schemes by Eurolease, the Direct Selling Association) or globally (domain names). They are often called 'ombudsmen' (copying the origin of that term from public sector ombudsmen) or, in France, *médiateurs*.

The ADR models operate within different national architectures that present some challenges for harmonization. However, the techniques that they adopt are very similar. The main techniques are:

- requiring direct contact between consumer and trader as a mandatory first step;
- mediation/conciliation by the neutral party;
- statement by the neutral party of a recommendation for a solution (non-binding) or a (binding) determination.

Many variations are found in the extent to which ADR systems are independent and transparent. Some countries have ADR bodies that are clearly independent (such as the Nordic Complaint Boards that operate rather like courts, or the Netherlands' Geschillencommissie Boards). Many large companies with major consumer brands have effective in-house customer-care departments, but do not usually call these ombudsmen (some French companies call them *médiateurs*). Some regulators have in-house ADR facilities, and some trade associations have semi-independent ADR facilities, often associated with deciding disputes under codes of business practice.

Important measures exist at EU level. The European Commission has produced two Recommendations relating to requirements for ADR bodies: 98/257/EC on ADR associated with court proceedings and 2001/310/EC on separate ADR bodies. There is also a 2004 Voluntary European Code of Conduct for Mediators. Several sectoral regulatory measures encourage ADR systems or require them. An important recent measure is the Mediation Directive, which applies from May 2011. In the court sphere, a parallel instrument is the small claims procedure. Of great importance is the European Consumer Centres Network (ECC-Net) and its financial services equivalent FIN-NET. The Commission announced two new legislative proposals, on ADR and ODR, in November 2011.

There is considerable variation amongst ADR systems in the number of claims attracted. Many systems process claims relatively quickly (a few months) compared with courts.

Many ADR systems do not charge consumers to use them: 'loser pays' does not arise in these systems. Some do charge, and some apply a 'loser pays' rule, but the sums involved are always less than litigation/court fees and modest in amounts.

Many ADR providers report that a significant number of contracts that they receive are requests for information and advice rather than complaints, and that many complaints essentially involve simple issues that are not difficult to solve.

Many ADR systems do not charge consumers to use them: 'loser pays' does not arise in these systems.

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