Swiss Re/CMS Research Programme on Civil Justice Systems Third Oxford Consumer ADR Conference

sponsored by:

The Foundation for Law, Justice and Society
Bridging the gap between academia and policymakers

CONSUMER DISPUTE RESOLUTION – IMPLEMENTING THE DIRECTIVE

Jesus College Conference Centre, Ship Street, Oxford, 30-31 October 2014

Executive Summary

This conference brought together policy officials, regulators, ombudsmen, ADR bodies, consumers, business and academics interested in ADR to examine the major topical issues arising out of implementation of the Directive 2013/11/EU on Consumer ADR (CDR).

- The CDR Directive is a major advance in resolving consumer-trader disputes across Europe. These are frequently small matters but rarely effectively addressed by traditional court systems, even small claims systems or collective redress procedures.

- Its primary motivation is to enhance the health of the EU economy, by enabling consumers to raise issues of dissatisfaction and have them resolved swiftly, cheaply and effectively.

- National CDR systems contain significant differences, despite many similarities and groupings.[i] National implementation of the CDR Directive is therefore likely to maintain rather than harmonise such differences.

- All Member States that reported here have plans to introduce residual CDR schemes.

- Features likely to be prominent in implementation are: enhanced grouping and signposting of CDR by national portals; CDR being free to consumers; CDR being voluntary for many businesses at least for the moment, but with increased pressure on sectors to join in.

- Some Member States are using the opportunity to significantly revise their national CDR and general dispute resolution landscapes, by reviewing the best approach for all types of disputes, and to adopting new and integrated models for both dispute resolution and also for delivering consumer advice and regulation of market behaviour.

- Two particular challenges arise in the next few years. First, how to increase the number of businesses that join the CDR system. Second, how to build and ensure professionalism in the ADR community.

MAJOR ISSUES IN BUILDING THE EU SYSTEM

In welcoming delegates, the Dean of the Faculty of Law at University of Oxford, *Professor Timothy Endicott*, drew an analogy between the organisation of the EU and its Member States and the relationship between the 48 Colleges and Oxford University. He mused that the traditional techniques of dispute resolution may not be relevant for 21st century problems, and new solutions must be found.

The EU Framework for Consumer ADR established by the Directive was outlined by *Christoph Decker*, Policy Officer at the European Commission's DG SANCO. He recalled the need for mechanisms that provided access to justice for consumer claims, especially unresolved claims, which represented 0.4% of EU GDP. Consumer issues overwhelmingly involve small sums of money, for which ADR systems are highly appropriate. He noted the requirements on Member States to establish a framework if consumer ADR bodies capable of handling any consumer-to-trader claims (apart from exclusions such as health and education), to provide suitable competent authorities to oversee consumer ADR bodies, and to impose information obligations on traders about the ADR bodies to which they belong. He also noted the criteria that consumer ADR bodies must satisfy.

Models, Issues and Lessons on Implementation

The opening session, chaired by *Professor Stefan Vogenauer*, Linklaters Professor of Comparative Law, University of Oxford, focused on the plans of the Member States for implementing the Directive. The main conclusions of this session were:

- The national models and architecture of Member States Consumer ADR (CDR) systems differ, and this will continue after implementation.
- Thus, individual Member States face different challenges in how to create a residual CDR function, and in how many gaps in full coverage need to be filled in.
- Member States are generally not intending to use state money to fund residual CDR schemes. Exceptions are Belgium (€500,000 plus logistics and accommodation, to be evaluated) and Northern states (such as the Swedish ARN or where ADR is carried out by public enforcement bodies, as in Lithuania).
- ADR will be free to consumers in many Member States. The clear consensus was that frivolous and vexations claims, feared by some business sectors, are not found to occur under any existing system.
- It does not necessarily follow from there mere creation of a residual CDR function that business sectors will join that residual CDR, or any other CDR scheme, or agree to use one in resolving any individual complaint. Serious work may need to be done in forcing or persuading sectors and businesses to use CDR.
- Some Member States are thinking strategically about imaginative ideas for reform of their CDR landscape.

Some particular points of note were as follows.

Austria (*Kirstin Grüblinger*, Federal Ministry of Labour, Social Affairs and Consumer Protection) has run a pilot project involving the three stages of electronic filing, conciliation if the trader accepts, and finally an oral procedure chaired by the head of the CDR entity. It has dealt with 250 cases involving a wide range of subjects, and agreement was reached in 50%. Some sectors already have CDR (e.g. telecommunications) and the residual scheme will be adapted from the pilot project. The law on ADR will contain a definite list of entities which are to be notified under the Directive. CDR will be free for consumers.

Belgium (*Patricia De Somere*, Council of State) has transposed the Directive.[ii] There are 21 notified ADR bodies. An umbrella Consumer Ombudsman Service has been established which acts as a coordinating structure for the existing CDR services (telecom, postal services, railways, energy, financial services and insurance) and which acts itself for residual claims. This Service has three missions: an information-point (in which the Belmed system ideally will have to be integrated), a portal which passes disputes to the relevant

competent ADR body, and an ADR body which acts itself when there is no competent qualified entity. . There is a federal subsidy of €500,000 for the residual function. All these mediation services will have one single front office and will be housed in one building, and run by a steering committee, whilst retaining separate legal entities, functions and competences. Each service will contribute to shared costs in the front office pro rata, and the Federal Public Service for the Economy provides logistics and the building for all. The Consumer Ombudsman Service can represent consumers in the negotiation stage of collective redress proceedings.

In *France* (*Nicole Nespoulous*, Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF)) the French Parliament has in October 2014 authorised the government to transpose the Directive without further debate. A draft of the future provisions will be elaborated by Ministry of Economy, Industry and Digital Affairs (DGCCRF) and will be presented to the Conseil d'Etat in February for adoption in late Spring 2015. Some of the future legal provisions will be based on the recommendations made by a working- group set-up one year ago. This working group has reported with 13 recommendations on mediation.[iii] Concerning the provisions, it is likely that professionals will be obliged to belong to an ADR of their choice; there will be a free access to mediation for consumers; there will be no thresholds; ADR entities will not make binding decisions, and in-house *mediation* will be maintained, subject to strict rules.

Germany (*Ulrike Janzen*, Bundesministerium der Justiz und für Verbraucherschutz) has a strong tradition of court dispute resolution, and alternative Consumer ADR structures are limited to certain sectors and there has been criticism of the Directive by academics. There is also a system of private consumer protection associations that are competent to take infringement actions and to give advice to and assist consumers in settling disputes. Swift and consumer-friendly implementation of the ADR Directive is part of the government's programme. Reliance will continue to be placed on privately-funded Consumer ADR bodies: these currently exist in transport, insurance, banking, and investment funds. ADR is only mandatory for electricity and air carriers; whether ADR decisions should be binding or not is likely to be left to individual ADR bodies. Decisions on organising residual public ADR will be matters for Länder governments.

Lithuania (*Algis Baležentis*, Department of Legal Institutions, Ministry of Justice) has an ADR structure based on the compulsory jurisdiction of public enforcement bodies, involving various sectors (financial services, insurance, communications and energy) and the residual National Consumer Protection Authority (NCPA). There are no private ADR bodies for consumers, although no obstacle to them. CDR is free, involves an adversarial procedure, mandatory, but generally not binding (with some exceptions like communications). In 2013, the NCPA had more than 1,400 ADR procedures, in which 657 (47%) were upheld, and 33% involved amicable settlement. The compliance rate (38%) gives cause for concern but has grown slowly: name and shame and court proceedings are options. A major reform is envisaged, shifting from public to mixed ADR provision. Nordic Boards of three decision-makers has been an inspiration, with the NCPA providing the secretariat. In order to improve compliance, traders might have a burden to ask for court review.

Portugal (*Teresa Moreira*, Director-General, Consumer Directorate-General) has a long history of ADR, with 10 ADR centres focused on the major areas of population since 1988. A national residual scheme was created recently, and three sectoral schemes exist (insurance, automobiles and e.commerce). ADR is mandatory for energy. A 2011 plan for a national network was not implemented after a change of government. The Framework Law 67/2013 for regulation entities includes an obligation to create ADR bodies. There is a moderate filing fee. Funding is mostly public (shared between the Ministry of Justice, Directore-general for Consumers, and local Municipalities), although business also contributes small sums. The aim is to establish a National Consumer Disputes Network. A national population of 10 million currently raises 15,000 inquiries and 8,000 complaints: 70-75% are resolved, 80% by mediation and 20% by conciliation/arbitration. Discussions are ongoing to create a banking ADR. Regional proximity to consumers and businesses is considered important: local business involvement is high. Provision of public funding

permits greater direction on the policy of architecture and operations. ADR is seen as an opportunity to identify and share best business practices.

The United Kingdom (*Nick Mawhinney*, Department for Business Innovation & Skills) is envisaging a residual scheme to sit alongside the wide range of existing sectoral ADR schemes. Claims statistics have been used to identify those sectors that can be expected to give rise to claims under a residual scheme: retail, second hand cars and builders are consistently raised. The intention is that CDR will remain voluntary for those sectors for which it is not mandatory by law. This will allow expansion of CDR by sequential targeting of high-complaint sectors. A national helpdesk will help consumers navigate the system. In response to the UK's consultation, those supporting overhaul of the landscape favoured an umbrella system with a single entry point. Debate on whether to make ADR compulsory involves balancing the benefits of simplification with a single point of entry with the possible cost to businesses. Initiatives to raise awareness will be timed so as to gain maximum benefit from the new arrangements. Guidance will be published in the Spring within the framework of extensive guidance on the forthcoming Consumer Rights Act. Implementing legislation will be in two phases: the first will designate competent authorities, so as to enable them to begin to carry out their functions, and the main Regulations will follow.

Developments in CDR: Aviation, ECCs and Regulators

The session chaired by *Professor Cosmo Graham*, Leicester University, began by focusing on developments in the aviation sector. He explained that most claims relate to delayed flights, for which compensation sums are prescribed under Regulation (EC) No 261/2004. A series of cases have been raised in national courts and the ECJ on its interpretation. In the UK, consumer claims may be made to the regulator, the Civil Aviation Authority (CAA), which handled 26,000 in 2013. Professor Graham noted the study that he has recently undertaken for the CAA on internal business complaint handling schemes.

In Germany, legislation in 2013 required all airlines operating from/to a German airport to join a CDR. *Dr Christof Berlin* of the Schlichtungsstelle für den öffentlichen Personenverkehr (söp), reported that most of the bigger airlines have joined söp. In the meantime, the experience with söp made them change their attitudes markedly: prior views about bias and lack of expertise have been replaced by plaudits about independence, efficiency, expertise and balance.

The UK CAA has undertaken a facilitated discussion with the airlines over the possibility of ending its current second tier complaint handling service, funded through general regulatory charges, and the establishment by airlines of a private, directly-funded CDR scheme to replace it. *James Tallack* of the CAA reported that decisions will be taken shortly, but support for the principle of private CDR appears strong. The debate was influenced by qualitative research commissioned by the CAA that showed that consumers saw significant value in an independent scheme but only if it provides a clear, concrete and enforceable resolution and preserves the consumer's right to go to court. Importantly, the research found that consumers do not see that they should have to pay anything to complain—a clear rejection of even a nominal fee being charged. A major driver of airline interest in CDR is that—spurred on the by the availability of high levels of fixed sum compensation under EU passenger rights legislation—no-win-no-fee Claims Management Companies have emerged in the sector that generate multiple, sometimes poorly justified claims, and withdraw cost from consumers. CDR appears to be seen by the airlines as a way to design CMCs out of the redress landscape in aviation.

Jolanda Girzl, Konsument Europa/ECC Sweden and Konsumentverket/Swedish Consumer Agency, noted that in the vast majority of ECC cases where ADR could be relevant, the ADR possibility does not exist. If it exist there are many limitations in the competences of many ADR-systems, such as only having regional competences, dealing only with cases concerning members of a certain organisation or only dealing with cases if the trader agrees, ADR-way is often not a possible approach in practice. The ADR system in Sweden involves a residual ADR entity, National Board for Consumer Disputes (the ARN), a public

authority, plus some sectoral ADR Boards. ARN registered 11,301 cases during 2013 and 76% of their recommendations are followed and a further 5% followed after threat of publication in the consumer magazine "Råd & Rön". This "black list" is given wide publicity and provides a strong incentive for business compliance. ECC Sweden informed about problems regarding disputes on air passenger rights. Jolanda Girzl raised strong concerns that some airlines do not follow ARN recommendations.[iv] She called for an evaluation on whether some types of ADR are better suited for cross-border claims and to look further into the barriers in ADR handling. Increased focus should be placed on transnational learning and a "good practice/lessons learnt" guide of ADR system building could be created.

The importance of the relationship between complaints and enforcement was highlighted by *Henrik Øe*, the Consumer Ombudsman of Denmark. He reminded delegates that in Denmark the word Ombudsman is restricted to two people: the Ombudsman for complaints against state entities and the Ombudsman for Consumers, and that the latter is the national enforcer of consumer law, whilst the ADR function rests with separate Boards. His enforcement function takes place under the shadow of a strong toolbox of enforcement powers, frequently resulting in undertakings, settlements and advance indications. He obtains information from various sources, including ADR (especially on unfair terms), and he decides to initiate action in 1,000 of the 6,000 contacts he receives annually. He noted the need for test cases to resolve some situations. He showed that regulatory redress powers can be more effective than ADR in some situations: he has used his mass redress powers in a succession of cases, without so far needing to resort to court battles. Mr Øe called for common rules on publication of non-adherence: Danish companies can be 'named and shamed' but not foreign ones: how is this to be remedied?

Building trust and legitimacy in ADR entities

Dr Naomi Creutzfeldt, ESRC Research Fellow at the Centre for Socio-Legal Studies, Oxford, reported on her ongoing research project on 'trusting the middle man'. A wide-ranging questionnaire is being sent to consumers who have used leading CDR entities in various countries. She encouraged more questionnaires to be sent. Initial results of three of the current ten CDRs indicate that many complainants expected the process to take three months, and complaints were generally handled within three months, although within one month by SöP. Complainants are generally mature, educated, white people.

Delegates were reminded that CDRs need to satisfy the following criteria:

a. Expertise
b. Training
c. Independence, lack of bias
d. Governance
e. Transparency
f. Regulation of CDR bodies
g. Cost
h. Verification/audit/peer review

Caroline Mitchell of the UK Financial Ombudsman Service (FOS) noted the trust deficit of banks and the higher level of trust on the FOS, but that trust can easily be lost. The FOS has grown to 4,000 staff including 300 ombudsmen. She outlined the challenge of establishing suitable and expert training, involving three aspects: technical; decision-making skills, including judgment and communication skills; and the highly important attribute of a sense of fairness. The latter involves listening, understanding what people are actually saying, and open and inquiring mind, a flexible approach, and qualities of bravery and resilience. The first two aspects can be taught, but the third is more inherent, and is looked for in recruiting. FOS employees undertake at least five full training days a year, which is frequently interactive and never didactic.

Stéphane Mialot, Directeur General, Le médiateur national de l'Energie, France, recollected that ADR used to have a bad reputation in France and that transparency for ombudsmen is vital. Publishing the names of

ombudsmen and their team is important to guard against decisions being made by trainees or people without any law background. Publication of at least major decisions (he published 5% a year) is key to prevent criticism of their quality. Publishing statistics shows effectiveness and efficiency, and highlights the state of a market. Repeatedly bad practices need to be identified and the names of the companies involved have to be disclosed if necessary. His service launched an ODR platform in 2013, which has introduced a major improvement in transparency, in which parties can see all information on their own cases. Unjustified concerns over maintaining confidentiality prevents improvement.

Eric Houtman, Energy Ombudsman of Belgium reported on the set of criteria for ADR entities in Belgium, which extends the list in the Directive:

1. Independence and impartiality;
2. Expertise;
3. Transparency;
4. Accessibility;
5. Free or inexpensive procedure;
6. Accuracy;
7. Reasons to refuse to handle a complaint;
8. Notification delays;
9. Dispute handling delays;
10. Reasonable thresholds;
11. Fairness;
12. Confidentiality;
13. Information.

Dr Ying Yu of the China University of Political Science and Law, Beijing and Wolfson College, Oxford noted that the Chinese Consumer Association had 13,000 cases in 2013, whereas the online trader Alibaba processed 50 times that. She noted that although the recent IPO of Alibaba (which raised $21.8 billion) was underpinned by its ODR system, the ADR scheme that is used for 80% of purchases, Alipay, had not been floated (valued at $231 billion). Alipay operates a highly effective escrow system, in which payments are held by the financial intermediary until the consumer confirms satisfactory performance of the contract. Mediation by ADR bodies has been included in the 2014 revision of the Chinese Consumer Protection Law 1994/2014, Article 39.

In general discussion, it was noted that the FOS aims to ensure consistent application of the law by internal procedures that support standard approaches to similar situations. It is law that the FOS, and some other ombudsmen, take the law into account but decide cases on the basis of what seems fair and reasonable to them.

A need was noted to ensure that CDR entities deliver consistent quality under a recognised brand, without competition between levels of quality. Spread of take-up of CDR by business should be led by governmental policy and supported by those businesses and trade associations that already see its value. Historically, CDR has spread either by top-down imposition by law, or bottom-up adherence by trade sectors, i.e. initiators have been governments or trade associations.

MAINSTREAM, NO LONGER ALTERNATIVE
THE IMMEDIATE ISSUES AND THE ULTIMATE VISION: THE EXAMPLE OF UK

How Consumer ADR fits in a Bigger Picture

Professor Christopher Hodges, Professor of Justice Systems, and Head of the CMS/Swiss Re Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, University of Oxford, noted the clear fall in claims statistics for courts—especially the small claims track, which is relevant for consumer claims, and currently stands at around 60,000 claims of which 30,000 are heard—and the inexorable rise in claims handled by CDR entities (currently at least 550,000). This shift in justice tracks accompanies development in other types of claims: modernisation of public sector complaints;[v] mandatory notification of ACAS before starting Employment Tribunal cases; not only extending mediation in family cases,[vi] but a suggestion by the President of the Family Division that judges should no longer decide divorce cases. Thus, he suggested that it is time to look holistically at modernising the complete justice system by reviewing what procedures and architectures respond best for every major type of dispute.

Professor Hodges also called for a migration from arbitration-based CDR to ombudsman-based systems. The reason is that the latter can deliver greater value by covering a wider range of functions. Arbitration schemes can deliver satisfactory dispute resolution, but ombudsmen systems are better at delivering widespread advice (initial contacts are frequently for general advice and assistance, rather than as a fully formed complaint) and able to provide aggregated data on market activities (trends, rouge traders, areas where compliance or improved service could be addressed). He noted the close relationship between complaint information and regulatory enforcement in Denmark and the UK, leading to highly effective and swift responses to market conditions, maintenance of competition, and payment of redress.

The Future of Dispute Resolution

Caroline Wayman, Chief Executive and Chief Ombudsman of the Financial Ombudsman Service, UK, gave an overview of the organisation and its current focus. Surveys report 80% awareness of the FOS by consumers. However, inertia in raising issues is an issue for many: ‘I didn’t know if this was OK or not’ and ‘I feel listened to’ are frequent responses. The FOS aims to look beyond the thing people complain about, so as to identify underlying issues and the issue that has to be decided. She asserted that decisions have to *feel* fair: it is not enough that they be fair. It provides strong feedback on findings. A recent report on payday lending showed that 1 in 6 complaints were about fraud: that issue could then be addressed by enforcement authorities.[vii] Many people are unaware that web-based payday loan operators are actually brokers: in such cases FOS officials aim to contact such brokers and resolve repayment quickly, but also follow-up subsequently to check that repayment has in fact been made. The FOS is reaching out to target problem areas identified and areas of population. The service does more than advice—three key words used are help, support and conversation.

Delivering Professionalism in Ombudsmen

Lewis Shand Smith, Chief Executive and Chief Ombudsman of Ombudsman Services and Chairman of the Ombudsman Association (speaking in the latter capacity) identified a need for professionalism in the ombudsman community. At the end of last year, four of the Association’s 70 members alone had 4,300 staff, handling 2.5 million contacts and 500,000 investigations annually. He warned against the risk that a proliferation of ADR entities in a sector would risk consistency and encourage the playing of one off against another. He mused that it is in fact unclear what the ‘ombudsman model’ is any more. He called for the brand to be recognisable, with common language and processes,[viii] easy access, and to be trusted. He called for a professional body to set and apply standards, with training and transferrable skills.

A panel discussion followed, chaired by *Brian Hutchinson* of University College, Dublin, with *Robert Behrens*, Independent Adjudicator for Higher Education; *Adam Sampson*, Legal Ombudsman; *Kevin Grix*, Furniture Ombudsman; *Christopher Hamer*, Property Ombudsman; *Gina Shim*, CEDR; *Richard Dilks*, Which?; and *Dr Sonia Macleod*, Centre for Socio-Legal Studies, Oxford. The consensus here supported the

importance of a single point of *access*, oversight and regulation for CDR, rather than particular structures. In the same way that ADR is challenging courts and lawyers, CDR and ombudsman structures have no absolute right to exist, and the public interest comes before imperialism. A future lead competent authority might take the lead in establishing professional standards and education but a separate professional association should otherwise drive these issues.

Professor Christopher Hodges is Professor of Justice Systems at the University of Oxford; Head of the CMS/Swiss Re Research Programme on Civil Justice Systems at the Centre for Socio-Legal Studies, University of Oxford; Erasmus Professor of the Fundamentals of Private Law at Erasmus University, Rotterdam; and a solicitor. From 2013 to 2016 he is Honorary Professor at the China University of Political Science and Law, Beijing and Guest Professor at Wuhan University, Wuhan. He is a Board Member of the UK Research Integrity Office, and chaired the Pharmaceutical Services Negotiating Committee for England.

Dr Naomi Creutzfeldt is ESRC Research Fellow at the Centre for Socio-Legal Studies, University of Oxford and a Research Fellow of Wolfson College, Oxford. She has been a member of the CMS/Swiss Re Research Programme on Civil Justice Systems since 2010. She holds a PhD in political science from the Georg August Universität, Göttingen, Germany.

Dr Sonia Macleod is a Researcher on the CMS/Swiss Re Research Programme on Civil Justice Systems at the Centre for Socio-Legal Studies, University of Oxford. She is a non-practising barrister, who has a background that combines biomedical and legal experience; a degree in Physiological Sciences, and a PhD and post-doctoral research in Neural Stem cell research.

---

[i] C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Oxford: Hart Publishing, 2012).

[ii] Belgian Code of Economic Law, Book XVI, in force from 1 January 2015. Book XVII covers collective redress.

[iii] See http://www.economie.gouv.fr/dgccrf/Recourir-a-la-mediation-ou-a-la-conciliation.

[iv] *Alternative Dispute Resolution in the Air Passenger Rights sector* (ECC, 2012), at http://ec.europa.eu/consumers/ecc/docs/adr_report_06022013_en.pdf

[v] *More complaints please!* House of Commons Public Administration Select Committee (PASC), Twelfth Report of Session 2013–14, Report, together with formal minutes relating to the report, Ordered by the House of Commons to be printed 26 March 2014, at http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/229/229.pdf; *Time for a People's Ombudsman Service*, House of Commons Public Administration Select Committee (PASC), Twelfth Report of Session 2013–14, Report, together with formal minutes relating to the report, Ordered by the House of Commons to be printed 1 April 2014, at http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/655/655.pdf.

[vi] Sir James Munby, '21st Century Family Law', the 2014 Michael Farmer Memorial Lecture by the President of the Family Division at the 2014 Legal Wales Conference at Bangor University on 10 October 2014, at http://www.judiciary.gov.uk/announcements/21st-century-family-law-speech-by-sir-james-munby.

[vii] *Payday lending : pieces of the picture. Financial Ombudsman Service insight report*, August 2014, at http://www.financial-ombudsman.org.uk/publications/policy-statements/payday_lending_report.pdf.

[viii] Note considerable current variations: Margaret Doyle, Varda Bondy, Carolyn Hirst, *The use of informal resolution approaches by ombudsmen in the UK and Ireland: A mapping study* (October 2014), at www.ombudsresearch.org.uk .