



The Brave New World of Consumer Redress in the European Union and the United Kingdom



At some point, all of us have complaints against merchants and businesses, but are the courts the best place to resolve those disagreements? Although they have not yet been fully implemented throughout the European Union and country-specific and sector-specific regulations will affect them in some cases, new EU rules on consumer redress have the potential to offer dissatisfied customers routes to resolution that are quicker, easier, and less expensive than going to court. In the process, the rules also should help people throughout the European Union gain a clearer understanding of what alternative dispute resolution is and what it can accomplish.

The new rules, in the form of a Directive on Alternative Dispute Resolution for Consumer Disputes¹ and a Regulation on Online Dispute Resolution for Consumer Disputes,² which took effect in July 2015 and January 2016 respectively, require all EU member states to ensure that consumer complaints can be resolved online by nationally certified alternative dispute resolution entities. Together, these two legislative instruments set up a ground-breaking framework for consumer ADR to tackle both national and cross-border disputes within the European Union and create a network of accredited ADR providers, all with the aim of stimulating trade, especially in the online arena. These ADR providers, which may be public or private bodies, can offer a variety of ADR techniques, including mediation, arbitration, and ombuds services.

Not Compulsory — but Available

The ADR Directive does not make participation in ADR compulsory, but it requires all EU national governments to ensure the availability of certified ADR providers (called ADR entities) that meet the procedural standards set in the directive. Among these requirements: certified ADR entities must be able to process complaints online; be free or low-cost for the consumer; and comply with the principles of independence (for instance, ADR entities cannot be employed or remunerated by an individual trader unless the national law allows for this option and ensures additional safeguards), effectiveness (resolving disputes online within 90 days, for example), transparency (such as publishing annual activity reports), fairness (such as giving consumers a cooling-off period before they agree to settle a claim), legality (ensuring that mandatory consumer law is respected, for instance) and liberty (such as guaranteeing that consumers agree to arbitration after the dispute arises). In addition, all merchants established in member states are obligated to inform a consumer resident in the European Union about the availability of these ADR entities every time the merchants have an unresolved dispute with that consumer or the consumer is not satisfied with the remedy offered by the merchants.

The ODR Regulation complements the directive by requiring the European Commission to run an ODR platform, which is in essence a web site that acts as a hub to channel all consumer complaints arising from e-commerce to these certified ADR entities. The platform, which started operating in February 2016, allows consumers (and merchants, when the national law permits) to submit complaints related to online contracts in all the EU languages.³ All merchants operating online and online marketplaces established within the European Union (such as Amazon) have the obligation to provide an easily accessible link to the ODR platform.

At the same time, because the focus of the EU platform will inevitably be on cross-border issues, a number of EU countries, including Belgium,⁴ have already built or are building national ODR platforms to complement the EU platform.

It is still too early to assess how effective the new system is, but its implementation has faced a number of challenges. Despite strong support from all national governments in the European Union, the transposition of the EU legislation into the domestic law of many member states has been subject to delays; the EU's ODR platform's official launch was delayed by more than a month.

EU Primer for US Readers

To fully understand this situation, US readers should be aware that more than 70 percent of the national laws in the European Union come from the transposition of European legislation. Delays are common, often the result of the slow machineries of national parliaments and governments subject to their own renewals and busy schedules. In fact, implementation sometimes comes through an urgent national legislative procedure, approved only after the threat of a fine by the European Commission. Hence the reality is that not all the EU member states transpose the new legal requirements by the official deadline — especially when, as with these changes, the implementation is required in record time.

Another peculiarity about EU law is that most legal instruments are directives, which lay down broad legal obligations, allowing national governments to decide how best to achieve them. Accordingly, the ADR Directive requires national governments to ensure

the availability of ADR entities, but each member state can decide, for example, whether it will certify arbitration bodies (Portugal, for instance, has opted to certify arbitration bodies, while Germany has opted not to do so). It's also worth noting that nothing in the directive prohibits an ADR entity certified in one EU country from operating in another EU country, even if the ADR entity does not meet the more stringent national criteria in that second country. Although the ADR directive does set forth minimum standards for providers, the omission of a pan-European control could lead to forum-shopping.

ADR and ODR Are Now Available — But Will They Be Used?

Many observers are interested in the new European law's requirement that all businesses established in the EU notify consumers with unresolved complaints (i.e., those who have used the merchants' own internal complaint mechanism) about the certified ADR entities, confirming whether they are going to participate in their ADR processes.⁵

Although the new law does not require businesses to actually *participate* in ADR, sector-specific laws may create an obligation to do so. For instance, when consumers in the United Kingdom have unresolved complaints against banks or energy providers about poor service or overcharging, these providers must inform them in a "durable medium" (meaning e-mail or postal mail) of the possibility of escalating their complaints free of charge to an ADR entity.⁶ Typically, outcomes reached with the help of the ADR entity are

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binding only on the merchant when they are accepted by the consumer, who has the choice of pursuing the matter in court (although most consumers rarely do so). Other sectors in the United Kingdom where it is mandatory for merchants to participate in these ADR/ODR entities are telecommunications businesses, real estate agents, legal services, and gambling organizations. In addition, a number of trade associations, such as travel agents and motor services, also require their members to opt in.

In other sectors, however, the choice of ADR/ODR rests completely in the hands of the merchants. Those merchants can choose non-certified ADR providers (though they will need to inform consumers about the existence of certified ADR providers), so there is a risk that merchants operating in unregulated sectors, areas where they do not need licenses to operate, can choose any ADR provider and that cost competition among these ADR/ODR bodies could lead to a race to the bottom in terms of due process, independence, and impartiality. Even in sectors where merchants can choose non-certified ADR providers, however, ADR/ODR can offer consumers a route to obtain compensation where they have no other option. In the EU, class actions are extremely rare, and small claims courts are not always user-friendly, let alone accessible online.

My own experiences serve as examples of the need for further awareness about ADR providers, and how their mere availability leads to better compliance with consumer protection rules. In Spain not long ago, I had a problem with the cancellation of my mobile phone contract, for which the company overcharged me about \$100. When I complained to the phone service provider, its representative told me that I was not entitled to compensation and that there was nothing I could do to escalate the complaint. But I knew that the service provider had joined the Spanish public arbitration system, so I filed a claim online, which is available for free. A few weeks later, the telecommunications service refunded me the contested amount: case closed. More recently, after a flight I was scheduled to be on was delayed for five hours, I emailed the airline to ask whether I was entitled to compensation. The EU law on these cases is pretty clear about the circumstances and amounts to be compensated in cases of flight delays, but the airline did not respond. I then escalated the claim online to the ADR entity

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(i.e., the Civil Aviation Authority PACT program, which only issues recommendations), and, astonishingly enough, received an email from the airline three days later asking for bank-routing information that would allow the airline to deposit about \$300 in my account. These businesses were members of independent ADR providers, and that membership alone ensured that I received the compensation I was entitled to. If my only avenue for redress had been the courts, I certainly would not have pursued my complaints.

Unfortunately, the old system benefitted only well-informed consumers; I suspect few of the other passengers on my delayed flight or few of my fellow cell phone users understood their rights and knew how to seek compensation. Effective individual redress is insufficient when it benefits only the well-informed. A truly effective system must ensure that all those who are entitled to compensation (especially the vulnerable members of society who may need it the most) can also obtain redress. In this regard, the new law's most significant feature may be making ADR and ODR more visible to all consumers.

Despite this benefit of greater awareness, the EU directive's effect will be limited and might even lead to confusion, as in the great majority of consumer transactions in most EU countries, such as retail purchases, home repairs, car rentals, and even airline travel, traders are required only to inform customers about the availability of ADR/ODR processes, not to participate in those processes. The rationale behind this information obligation is to raise awareness, forcing businesses facing consumer complaints to consider participating in processes provided by a certified ADR entity. But imagine how confusing this could be for consumers: You buy a computer that fails. You complain to the computer vendor, which says you are not entitled to any compensation but lists some ADR providers you might consider — and

then adds that the vendor isn't interested in those providers' processes. In a similar fashion, anyone can submit a claim in the EU's ODR platform (or in a national equivalent platform), but merchants are not obligated to participate in ADR/ODR — unless, as outlined earlier, a sector-specific law requires. Indeed, merchants, particularly those who are unfamiliar with ADR/ODR, are often reluctant to opt into these out-of-court systems. Where does this leave consumers?

The Role of Online Courts — Changes in England and Wales

Perhaps one answer lies in technology. EU member states could do more to promote traders' adherence to ADR by offering these consumers (those who cannot use ADR because traders refuse to participate in the ADR process) an effective dispute resolution forum with residual jurisdiction. National governments could consider at least the following three options: they could sponsor a statutory ADR/ODR entity, following the parameters of those already operating on a sectorial basis; they could develop an online consumer tribunal along the lines of the Civil Resolution Tribunal that is being launched in British Columbia;⁷ and they could develop a much improved and user-friendly online small claims court, such as the one that is now being considered in the United Kingdom. Indeed, tribunals and courts can also incorporate triage and ADR in their small claims procedures, offering a multi-door process that accommodates the forum to the fuss,⁸ without the need for legal representation.

The UK experience kicked off with the efforts of the Civil Justice Council, an independent body advising the Ministry of Justice on civil procedure, which produced a report back in February 2015 asking the UK government to equip the civil courts with technology and a tiered procedure that enables self-represented litigants to settle and resolve low-value claims online.⁹ Soon thereafter JUSTICE, a nonprofit human rights organization, also recommended a similar overhaul in the civil courts. Key to these proposals are the roles of

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facilitators who would help litigants without legal representation settle their claims expeditiously through ADR/ODR, or in some cases, help them prepare for trial.¹⁰ These proposals have recently received the endorsement of the judiciary of England and Wales in a landmark report drafted by Lord Justice Michael Townley Featherstone Briggs, a Court of Appeal judge, that reviews the structure of the civil courts.¹¹ The report proposes measures to address the reality that English courts are now beyond the reach of most citizens for low- and medium-value disputes.

Lord Justice Briggs's main proposal is the creation of an online court for claims under £25,000 (approximately \$35,800 in US dollars). The proposal for the online court is expected to be implemented in 2017 on a pilot basis, given that the UK government has already committed £700 million (more than \$1 billion US) to fully digitalize the court system and create a more modern operation. Part of this money is expected to be allocated for the creation of the online court, which would have its own procedure designed for self-represented litigants. In a way, the proposed court would depart from the traditional adversarial process, operating instead an online tiered procedure with three main stages. The first stage would be a fully automated triage process in which parties would be required to fill in an online claim form and offered simple commoditized online advice. In the second stage, the case would be passed to a case officer, who would offer a mix of mediation services and case management, both online and via the telephone — and ideally, settle the majority of cases. In the third stage, unresolved disputes would be sent to a judge for final determination on the documents (and occasionally, when necessary, via telephone, video, or face-to-face hearings). A final fourth stage may be incorporated to streamline the enforcement of judgments through an online process.

The proposals have encountered criticism from some members of the legal profession, who may see their business threatened (though low-value disputes are far from their bread and butter), and it was received with skepticism by those who question the success of government-sponsored IT projects. Yet most observers agree that English courts are in great need of modernization, especially now that secure online communications are possible.

The Institutionalization of ADR and ODR

The European legal framework for consumer ADR/ODR incorporates recognized best practices, and in doing so, those who created the EU Directive and Resolution have started a process of professionalizing a traditionally unregulated sector. The rationale behind this regulatory effort is the promotion of ADR/ODR as the primary form of dispute resolution for consumer disputes. This institutionalization process is moving ADR from the unregulated models of redress to an increasingly important part of the civil justice system in the United Kingdom and the rest of Europe.¹²

From a European Union viewpoint, consumer ADR is more than a mere tool of dispute resolution; it is an essential mechanism to ensure better compliance with consumer protections laws.¹³ Accordingly, a key element of a successful consumer redress system should be effective pathways from ADR processes to courts, regulators, and public enforcement bodies, as these public bodies play an important role in ensuring regulatory compliance and clarifying the interpretation of the law. This interconnection would ensure that merchants tackle the causes and consequences of their disputes with consumers, and in doing so, they would improve industry standards benefiting the society at large. The EU and national governments have yet to figure out how these ADR/ODR entities will complement (or even compete) with modern judicial processes, especially deciding how and when cases should proceed to court. In such discussions, policy makers would do well to focus on the needs of citizens, not those of lawyers, who will always have important roles to play in providing legal advice and legal representation, especially for cases involving more than small claims.

The new EU rules have been designed to ensure the availability of high-quality ADR services, and the stage is set to accomplish the much-needed feat of raising awareness and understanding of ADR and

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ODR. The rules' success, however, will depend on whether merchants see their participation in ADR as beneficial for their business and whether a residual jurisdiction (such as an accessible online court) will incentivize ADR options. ■

Endnotes

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- 2 REGULATION 524/2013, 2013 O.J. (L 165) 1.
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- 4 ECONOMIE, <http://belmed.fgov.be> (last visited April 12, 2016).
- 5 Council Directive 2013/22, art. 13, 2013 O.J. (L 165) 75, 76 (EC).
- 6 See FINANCIAL OMBUDSMAN SERVICE, <http://www.financial-ombudsman.org.uk/> (last visited April 12, 2016); OMBUDSMAN SERVICES, <http://www.ombudsman-services.org/> (last visited April 12, 2016).
- 7 See CIVIL RESOLUTION TRIBUNAL, <https://www.civilresolutionbc.ca> (last visited April 12, 2016).
- 8 Frank E. A. Sander *Varieties of Dispute Resolution* in 1 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice 147 (National Center for State Courts 1976), and Frank E. A. Sander & Stephen B. Goldberg *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure* 10 *Negotiation Journal* 49(1994).
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