

CI/2022/06

Tuesday, 5 - Wednesday, 6 July 2022

Zadar, Croatia

EJTN CIVIL JUSTICE SEMINAR

E-Commerce

**C2B Litigation & ADR**

**Directive 2013/11/EU**

**Regulation (EU) No 524/2013**

**Apostolos Anthimos**

## The basics of consumer protection in the field of e-commerce transactions

- Massive production of directives on substantive consumer protection law.
- Minimal production of procedural consumer protection legislation in the EU. Examples:
  - **Brussels Regulation (I & I bis)**
    - ❖ Related to the unfair terms
  - The **collective redress** directive proposal
  - **Consumer ADR directive & ODR Regulation**

# The topic of the presentation

- Procedural aspects of consumer protection in C2B cases
- Exploration and presentation of basic questions remaining unharmonized.
- A glance at the Consumer ADR directive and ODR Regulation in comparison with pertinent national legislation

# PART I: Non-harmonized domains

- A special consumer forum.
- Exemption from legal representation.
- A special court for consumer disputes
- A special procedure for consumer matters
- A special duty of the judge in consumer cases

# Is there a special forum for C2B actions?

- No, general rules on territorial competence (venue) apply.
- Hence, difference compared to
  - international jurisdiction (Brussels I bis)
  - Other weaker parties (workers, children in maintenance cases)

# SPECIAL CASE: LATVIA

Dr. Apostolos Anthimos -  
Zadar 2022

Any consumer dispute shall be settled amicably.

- if it is not possible, initially, a consumer shall submit a claim directly to the e-trader or e-service provider in respect of the non-conformity of goods or service with the provisions of a contract (Article 27 Consumer Rights Protection Law).
- Only if the e-service provider or e-seller does not agree with claim, the consumer may choose to settle the dispute
  - 1) in mediation organized by the Consumer Rights Protection Center;
  - 2) in out-of-court dispute settlement proceedings organized by the Consumer Rights Protection Center or private parties;
  - 3) in the court.

The court shall not proceed if the consumer-claimant has not complied with the preliminary extrajudicial procedures for examination (Article 219 Civil Procedure Law).

If a consumer wants to bring or defend an action relating to a consumer protection dispute, is there a legal (or otherwise formal) requirement that he or she has legal representation?

- **Mandatory:** Austria, Greece, Portugal (over 5000 Euros), Italy (over 1100 Euros), the Netherlands (over 25000 Euros), Spain (over 2000 Euros)
- **Non-mandatory:** Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, Poland, Romania, Slovenia, Sweden

Are ordinary courts competent to hear such claims? Is there also a specialized tribunal for consumer protection disputes?

- Ordinary courts' competence is the rule.
- Exceptions: Malta + Slovak Republic.
- Also: Denmark (Consumer Complaint Boards)



What is the nature of the procedure at first instance, e.g. is it a simplified or a summary procedure, and is there an assessment of the merits?

- **THE RULE:** Ordinary proceedings with assessment on the merits
- **EXCEPTION I:** Small claims proceedings
- **EXCEPTION II:** Fast track in various fashions
  - Bulgaria (Art. 310 CPC)
  - Spain (juicio verbal, up to 6000 Euros)
  - ❖ No special formal requirements for a consumer dispute [e.g. time limits applicable to the filing of the action/defence, etc.]

# PART I: Harmonized domains

- **Consumer ADR directive,**

Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165.

- **Consumer ODR Regulation**

Regulation (EC) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR) [2013] OJ L165.

# Really harmonized domains?

Not that much...

- CDR systems demonstrate considerable differences in their domestic architectures and modes of operation.
- The national differences between the Member States produce the following broad variations in practice:

## Really harmonized domains?

- In some States CDR is very well established, mainstream procedure for C2B disputes, whilst courts are basically not used for consumer-trader disputes.
- In other States, CDR is hardly available, schemes have not properly developed, and are almost unknown, so only the courts and possibly mediation might exist.
- A harmonised EU approach to CDR is only just beginning to appear...

# Really harmonized domains?

- In practice, the statistics indicate that civil procedures are little used for cross-border consumer-trader claims.
- There is evidence that CDR is an increasing phenomenon.
- The number of contacts and complaints to ECC-NET offices has risen steadily over the last decade.

# Some national examples

## ITALY

### ***conciliazione paritetico***

- Usually unpaid representatives nominated by consumer associations negotiate on behalf of a consumer with a trader who has agreed to join a relevant scheme.
- If a solution is identified, the consumer is free to agree or not: in the former case it becomes a settlement contract.
- This methodology is fairly widespread in Italy, and considered there to be effective, although it is arguably not classifiable as ADR.

## CENTRAL & EAST EUROPE

- Within the past few years, a number of regulatory authorities (such as for telecommunications, energy, and financial services) have operated complaint resolution schemes for consumer-trader disputes.
- In most Central and Eastern European states, consumer-trader complaints are examined by public regulatory consumer or sector authorities.
- In contrast, in each of the Nordic states separate CDR entities were created up to 40 years ago.

# Some other national examples

- In other Member States, specific CDR schemes or procedures have been developed, whether based on mediation and/or arbitration
  - the *geschillencommissie* system in the Netherlands,
  - consumer arbitration-type schemes in Spain and Portugal, or
  - a model involving sector Ombudsmen (Belgium, Greece, Ireland, Germany, limited in France)



# CDR after the Directive & Regulation

- Since implementation of that Directive, every Member State should have a 'consumer ADR' network, which includes the capacity to handle any types of C2B dispute.
- The ODR platform connects the national networks. However, it is well understood that CDR is, as a cross-border mechanism, partially undeveloped, even if it may have considerable advantages for the future.

# CDR after the Directive & Regulation

- In theory, the EU ADR/ODR framework should facilitate cross-border CDR.
- In practice, it is somewhat difficult to say how quickly this system develops into a fully functioning system.
- **Problems:**
  1. levels of consumer awareness of CDR, either nationally or internationally;
  2. internal landscape problems, gaps and performance of CDR bodies;
  3. concern over the complexities and differences in national CDR entities and landscapes; and
  4. the extent to which traders agree to ADR/ODR, or are required to do so.

# Mandatory/Non-Mandatory Nature of Consumer ADR

- Given the different approaches in Member States on whether ADR systems should be binding or non-binding, the consumer ADR Directive refrains from mandating either approach as standard, and merely imposes generic regulatory requirements and provides specific conditions for those systems that impose a solution on consumers.
- Article 11.1

# Mandatory/Non-Mandatory CADR

- Two issues need to be distinguished in considering this question.
  - i. The first point is whether a consumer or a trader must *use an ADR procedure, and is barred from using a court or any other type of procedure.*
  - i. The second point is whether one or both parties must *use an ADR procedure before using some other procedure, such as court proceedings.*

# Mandatory/Non-Mandatory CADR

- The predominant position across Member States is that ADR is currently not mandatory for consumers, and often not mandatory for traders, either at all or before accessing a court.
- *Where CDR schemes are well-developed, their use is often encouraged, and they may be widely used in preference to court proceedings, such that they are de facto binding on traders, but it is usually not a legal requirement for a consumer to use them.*
- *This preserves the right of access to a court in Art.6 ECHR. But some significant exceptions exist to that predominant position.*

# Mandatory/Non-Mandatory CADR

- First, many ADR schemes are only accessible to consumers who have first attempted to contact the trader and resolve matters, typically within a reasonable or stated time period [BE/HU].
- Special case: ITALY / GREECE  
'mandatory mediation', limited to an exploratory meeting between parties and mediator, before court proceedings can be initiated.

# Mandatory/Non-Mandatory CADR

- ECJ held, following Case C-317/08 to C-320/08 *Alassini and Others* EU:C:2010:146, that

*mandatory mediation as a condition for the admissibility of proceedings before a court can be compatible with the principle of effective judicial protection, providing the result is not binding, does “not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs — or gives rise to very low costs — for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed”*

- (Case C-75/16 *Rampanelli* EU:C:2017:457, para.61).

# Mandatory/Non-Mandatory CADR

- Second, it is established EU law that a contractual clause concluded before the contract, was entered with the aim to bind a consumer to arbitration, HENCE, it is not binding.

*Directive 93/13/EC on unfair contract terms, Arts.3.1, 6 and 7 and Annex point (q);*

*Case C-168/05 Mostaza Claro [2006] ECR I-10421*

*Case C-40/08 Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira [2009] ECR I-9579.*



# Mandatory/Non-Mandatory CADR

- Third, some states place some form of barrier or discouragement for one or both parties to start court proceedings until they have attempted to use an ADR mechanism or procedure. [DE]
- Fourth, some traders are required to belong to an ADR scheme under national legislation in some states and sectors [DE/IE]

# ADR Decision and Enforcement

- The issue here is whether ADR entities can or should issue binding decisions, and whether they can enforce them themselves.
- The ADR outcome will be legally binding in three circumstances:
  - settlement agreement between the parties,
  - binding arbitration award is issued, or
  - statutory law provides that the result will be binding on one or both parties.

# ADR Decision and Enforcement

- If the mechanism is mediation, any agreement that the parties agree will be a contract reached between them, enforceable in court.
- If the mechanism is binding arbitration, the parties are bound by the arbitration award.
- If the mechanism is non-binding arbitration, the result of a decision/recommendation by the CDR entity may either not be legally binding or may be binding by law.
- Where the result is binding by legislation, one model is that the result will bind the parties only if the consumer accepts the recommendation
- ❖ CDR entities do not themselves enforce their decisions. That power is reserved to the courts.

# Review of ADR Decisions

- ***Scope For and Limits of Recourse to Judicial Dispute Resolution***
- The first issue here is the extent to which ADR arrangements preclude access to courts, and determination of parties' rights by a judge, which is regarded as a European fundamental right under Art.6 ECHR, and the associated Art.47 of the EU Charter of Fundamental Rights.

# Review of ADR Decisions

- The Consumer ADR Directive specifies two key points here (**Art.10**):
  1. Member States shall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.
  2. Member States shall ensure that in ADR procedures which aim at resolving the dispute by imposing a solution the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. Specific acceptance by the trader is not required if national rules provide that solutions are binding on traders.

# Review of ADR Decisions

- It has long been established that an agreement *to refer a case to binding arbitration is a valid legal choice after a dispute arises, and does thereby generally preclude the right to submit the case to court.*
- *The same approach would apply to a post facto agreement to refer a case to ADR, but that would not preclude a case being subsequently submitted to a court, depending on the terms of the agreement, or if the outcome of the ADR process was that no agreement was reached or a 'determination' by the third party was not legally binding.*

# *Judicial Review of ADR Decisions*

This issue raises a difficult problem of balancing two issues.

- On the one hand, the policy is to uphold strict application of the law in every case; hence, to uphold the rule of law, social and commercial predictability.
- On the other hand, the principle is to give effect to individual self-determination; hence, to respect the freedom of individuals and businesses to make agreements in respect of their rights as they see fit.

# *Judicial Review of ADR Decisions*

- Where a decision is binding, as a matter of settlement contract, arbitration, or legislation, the scope for judicial reconsideration is generally governed by well-established rules.
- Annulment proceedings based on review of unfair procedure or bias or manifest irregularity of law or procedure is regulated for arbitration under the New York Convention and similar national legislation.
- The general result is that decisions by properly constituted bodies adopting fair and predictable procedures cannot be reopened on the merits by a court.



# CONCLUSIONS

- No equal level of procedural protection among MS
- Difficulties in the implementation of the CJEU case law concerning procedural consumer protection
- The attitude of national courts varies (full application ▪ discarding EU law as ‘erroneous’)
- Consumer’s access to Justice must be improved
- Legal certainty and transparency must be increased

# THE WAY AHEAD

- Minimum standards for consumer protection in civil proceedings.
- Ex officio obligation of EU consumer law by national courts should be defined and clarified
- Civil Procedures should empower judges to assist the “weaker party”
- MS should adapt their CPC to the case law findings of the CJEU

# THE WAY AHEAD

- Ordinary proceedings: Proactive role of the judge
- General prohibition of jurisdiction clauses in consumer contracts, OR
- Extend the Brussels I protection to purely domestic cases
- Simplification of proceedings – not only courts
- No lawyer representation obligation

# THE WAY AHEAD

- No specific difficulties are identified with the provisions of Directive 2013/11/EU on consumer ADR or operation of national provisions.
- Concerns exist with points that are not covered by that Directive, such as whether CDR should be mandatory for traders.
- Concern exists over the state of 'ADR', at least in some Member States, and that concern includes the relationship between ADR entities and courts.
- ADR is perceived differently, and has therefore a confusing diversity.

**THANK YOU !**

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