The implementation of the consumer ADR Directive in Spain

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Public ADR entities

• The Consumer Arbitration System (SCAS)
• OMICs (Local offices for the information of the consumers)
• The Arbitration boards (AB) for transport. They have been created inside the administration, and there exists one in every region and in the autonomous Towns of Ceuta and Melilla.
• The Office for the attention of the telecommunication user, depending on the Ministry of Industry, Energy and Tourism
• The Claims Service of the Spanish Central Bank.
• The Investors’ Department of the National Stock Exchange Commission
• The General Directorate for Insurance and Pension Funds
• Minister of Industry, Energy and Tourism directly knows of the disputes between consumers and providers of electricity and gas
• Minister for Infrastructures knows of the disputes in the field of postal services.
Private ADR entities

- Consumer associations (not for profit)
- Chambers of Commerce (not for profit)
- The Ombudsmen in areas such as banking and insurance can be for profit entities.
The legal frame for mediation

- Act 5/2012, of 6\textsuperscript{th} of July, on mediation in civil and commercial matters excludes consumer
- consumer mediation takes place in the field of Spanish consumer arbitration system, under the rule of arts. 37 and 38 Royal Decree 231/2008.
- Mediation also takes place in the procedures before Local Offices, consumer associations and chambers of commerce, to mention but a few.
Who pays for the CADR?

- AECOSAN (Spanish Agency for consumers, food security and Nutrition), depending on the Ministry of Health, Social services and equality.
- Public entities depends on the State.
- Consumer Associations are sometimes also financed by membership fees or from external means (OCU, FACUA or AUC).
- Chambers of Commerce used to be financed by their associated.
- The Ombudsmen in the areas of banking and insurance, as optional ADR entities for the financial services, are also financed by the businesses.
Time and cost in resolving disputes

6 months and free of charge: Consumer arbitration, Arbitration board for transport and the Office for the attention of the telecommunication user.

• Special rules for costs derived from the provision and handling of evidence.

4 months and free of charge: public entities in the financial services sector.

2 months and free of charge for the consumer: Ombudsmen in the banking and insurance matters.
Can parties have access to the process online?

• Access online is envisaged for:
  Consumer arbitration
  Market Conduct and Complaint Service Department of the Spanish Central Bank
  the Investors’ Department of the National Stock Exchange Commission
  The General Directorate for Insurance and Pension Funds
  The Office for the attention of the telecommunication user

• For the Ombudsmen, it is envisaged the possibility of filing the complaint through email, to an address provided for by the Bank.

• The online access is not envisaged for the proceedings before the AB for Transport and Local Offices.
Are they used by many consumers?

• Consumer arbitration: 2007 (61.759 cases), 2010 (92.355 cases)
• Arbitration for transport: 1999 (2.105 cases), 2009 (6.801 cases)
• Telecommunication office: 2010 (29.299 cases), 2014 (38.797 cases)
• Central Bank: 2004 (5.000 cases) 2013 (35.000 cases)
• National Stock Exchange Commission: 2010 (2.296) 2012 (10.900)
• General Directorate for Insurance and Pension Funds: 2004 (4.615 cases) 2013 (12.457 cases)
Do they provide consumers with information or advice?

- The ADR entities provide the consumers with information and advice, but not always to the same extent.

- Worth mentioning the wide extension of the information provided by: Tele Office, Central Bank, Investors Department of the NSEC and the General Directorate for Insurance and Pension Funds.

- In the information provided there are not only statistical data related to the number of cases filed and resolved, but also information about the criteria followed.

- The decisions, however, are not made public by any of the ADR entities.

- The consumer arbitration system also provide some information, but not that related to the criteria followed nor do they offer advice to the consumer.
Can parties opt out and go to court?

The possibility of opting out is always open, with the only exception of the claims submitted to the Spanish consumer arbitration system and the Arbitration Boards in the field of transport. In those cases the existence of an arbitral agreement closes the possibility of going to courts.
What are the economic sectors where traders’ adherence to an ADR entity is compulsory by national law?

• **Telecoms** are compulsory submitted to the proceedings before the OATU.

• **Companies in the electrical sector** are legally bound by the proceedings before the Minister of Industry, Energy and Tourism.

• **Banks** are legally bound by the decision of the Ombudsmen (should that exist)

• **Users and transport companies**.
What are the sectors where voluntary adherence to CADR is very common?

• According to data from 2008 (INC Annual Report 2007), the adhesion to the Spanish arbitration consumer system was more common in the following sectors:

• 1. **Electronic communication sector (telephone and Internet).** (70%)
• 2. Dry-cleaning
• 3. Gas
• 4. Furniture
• 5. Textile and Leather clothing
• 6. Household appliances
• 7. Cars
• 8. IT
• 9. Travel Agencies
• 10. Housing
The way forward...

• New art 57 LGDCU (Act march 2014).
• On the 16th of April the Minister of Health, Social services and Equality presented a Draft Act for Consumer alternative dispute resolution in order to bring into force the ADR Directive.
• Two Reports issued by the General Council of the Judicial Power and by the Economic and Social Council have supported the draft but indicating some concerns related to the solutions followed.
• As the legislative process is taking time it is possible to imagine that, finally, the bringing into force of the Directive will take place through a Royal Decree Law, to be validated by the Parliament.
The national competent authorities and the certification process

• As a general rule the Spanish competent authority is envisaged to be the Presidency of the AECOSAN. With two exceptions:
  • Related to the financial sector, the Spanish Central Bank, the Office of attention to the Investor of the National Stock Exchange Commission and the General Directorate of Insurance and Pension Funds are named as competent authorities
  • It also allows other competent authorities in sectors where the complexity of the disputes so advise.
The accreditation process

• The application will be filed before the Presidency of the AECOSAN
• If the application does not include every single required data complainant will be given ten days to complete it. If the application is not completed in such time, it will be archived.
• The evaluation of the Spanish competent authority will be notified in no later than six months. In the case there is no express decision, the application will be considered as declined.
• Art. 33 contemplates the possibility for ADR entities to be removed from the accredited ADR entities list.
• The draft Act does not envisage the payment of any fees for the certification.
Definition of consumer

• According to art. 1.2 it is considered as consumer any natural person acting for aims different as his commercial, professional or enterprise activities.

• However, it will be also considered as consumer the legal persons, only if a special provision does not limit filing a complaint of these kind of persons.
  • Telecommunication Office
  • Electrical and gas sector.
Who can be an European ADR entity?

- Natural persons.
- Public entities
- Private entities
- Consumer associations?
- Chamber of commerce?
- Professional Colleges?
- Companies?
- Foundations?
- Solicitors?
The challenges…

• Draft does not allow private entities to resolve disputes by imposing a solution.

• Drat does authorized procedures according to art. 2.2 a) ADR Directive.

• However, the Spanish legislator does not envisage this possibility as general. It is not possible to know when will it happen this exceptional case, and who is going to establish its existence. Would it be possible through a Royal Decree? Or will a new Act be needed? The actual provision is insufficient.
Challenges...

• To become European ADR entities they will have to adapt to the new Spanish legislation, in many cases by adopting new legal measures.

• The draft does mention the need for such legislative measures related to the SCAS and the newly to be created by law, ADR entity of financial services.

• There are no legal criteria for the other public ADR entities:
  • Local Offices
  • Arbitration for Transport,
  • Tele Office,
  • Minister of Industry, Energy and Tourism,
  • Minister of infrastructures, Bank and Insurance
Challenges...

• Art. 15 contemplates the grounds for refusing to hear a case by an Spanish ADR entity.
• Similar to art. 5.4 ADR Directive. But, Spanish law indicates that for disputes of quantity less that 50 Euros and superior to 3000 Euros, the ADR entity will be able not to admit the dispute.
• Is this in conformity with EU Law? And with Spanish Law?
Challenges...

• “traders will have to reply to the complaints of the consumers without delay and always no later than one month from the time the complaint has been filed”.

• It seems that it will not be possible to file a claim before an ADR entity before this term has been finalized.
Evaluation

- Spain has numerous ADR entities that nowadays fulfil most of the criteria set forth by the Directive.
- Spain has not yet finished the implementation of the Directive.
- It seems clear that the implementation will take place mainly through the adaptation of the SCAS, and the new public ADR entity that will be created by law shortly.
- Spain apparently seems to follow the easiest, and cheapest, way in order to implement the Directive.
Evaluation

• The current Draft, however, raises a number of questions, out of which we name but a few:

  • What will happen with the majority of existing public ADR entities?
  • And the Ombudsmen for banking?
  • Will the access to the ADR activity be open to every kind of private legal person, also for profit entities?
  • What will happen, for instance, with the Ombudsmen in the area of banking and insurance?
  • Is there any real reason to exclude the access of private legal persons offering procedures finalizing with a binding award?
Evaluation

• Who will decide about the fulfilling of the requirement established in art. 17.4 in order to allow as procedures under the Directive the procedures before dispute resolution entities where natural persons in charge of dispute resolution are employed or remunerated exclusively by the individual trader?
• Why does not the Spanish legislation think about charging the traders who use highly the SCAS instead of charging the consumer?
• Where is the improvement of the position of the consumer increasing to 50 € the minimum quantity of the dispute to be filed?
• there is still a problem related to the legal frame to be given to the consumer mediation.
Evaluation

Let’s hope the future Act gives more answers.
Thank you for your attention

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