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# INTRODUCTION

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## Consumer ADR

This book examines the recent phenomenon of Alternative Dispute Resolution (ADR) for disputes between consumers and businesses in the context of a European-wide debate on methods of dispute resolution. By ADR we mean *any* ‘alternative dispute resolution’ mechanism, that is, any mechanism that is ‘alternative’ to the traditional model of civil proceedings issued in the courts. However, this book is about the specific area of *consumer* ADR, which is distinct from other manifestations of ADR. Many are familiar in Europe with ADR in the form of mediation, frequently in the context of resolving disputes that are, or would otherwise be, proceeding in court. However, consumer ADR occupies a different context, and one that is currently far less well known, at least to many lawyers and judges, and many consumers. Indeed, the world of consumer ADR is so distinct that we propose to coin a new acronym for it in this book: CADR.

## The Different Meanings of ADR

There is nothing new about ADR: the Chinese were using it to resolve disputes three thousand years ago<sup>1</sup> and it has existed in North America for some decades.<sup>2</sup> ADR has a number of different meanings in different contexts. The traditional way to examine ADR is as a range of possible *techniques*. The following list was published in 2010:<sup>3</sup>

- a. **In-house complaints procedures:** many ADR schemes stipulate that individuals must have exhausted the company’s in-house complaints procedures before using the ADR mechanism.
- b. **Mediation:** mediation is conducted confidentially and consists of an independent third party actively assisting the parties in working towards a negotiated agreement of a dispute.

<sup>1</sup> S Roberts and M Palmer, *Dispute Processes. ADR and the Primary Forms of Decision-Making* (Cambridge: Cambridge University Press, 2005).

<sup>2</sup> M Shapiro, *Courts. A Comparative and Political Analysis* (Chicago, University of Chicago Press, 1981).

<sup>3</sup> *Mapping UK consumer redress. A summary guide to dispute resolution systems* (Office of Fair Trading, May 2010), available at [http://www.offt.gov.uk/shared\\_offt/general\\_policy/OFT1267.pdf](http://www.offt.gov.uk/shared_offt/general_policy/OFT1267.pdf).

- c. **Conciliation:** this is a process similar to mediation but in which the neutral third party takes a more active role in putting forward terms of settlement or an opinion on the case.
- d. **Arbitration:** in arbitration an independent third party considers both sides in a dispute, and makes a decision that resolves the dispute. In most cases the arbitrator's decision is legally binding on both sides.
- e. **Adjudication:** like arbitration, adjudication involves an independent third party considering the claims of both sides and making a decision. This usually produces a decision that is binding on the company but not on the consumer.
- f. **Ombudsman schemes:** ombudsmen are independent, impartial intermediaries who consider complaints. The particular mechanisms of ombudsman schemes vary but they often combine neutral fact-finding, mediation and adjudication in various tiers.
- g. **Legal mechanisms:** formal legal action is usually the last resort employed by consumers to obtain redress. Consumers can, however, take legal action without going through other mechanisms if they wish.

Different combinations of the above techniques can often be found to exist in practice. For example, a combination of different techniques can be used sequentially, so as to encourage parties to deal with disputes in simple and cheap ways first, through direct negotiation, before escalating unresolved disputes into other techniques involving third parties. Hence, some business sectors have tiers of approaches, starting with direct negotiation, ending with the courts, and in between involving one or more other techniques.

## The World of CADR

All of the above techniques share the meaning that they are dispute resolution procedures that are outside of, but closely linked to, the court process, and take place within its shadow. In this meaning, ADR is a technique, such as mediation that is used in conjunction with a claim that is being brought, or potentially brought, in the court system. Such mediation might precede the issue of court proceedings, or occur after proceedings have commenced so as to try to reach resolution of the proceedings through negotiated or other means as an alternative to final adjudication by the judge. This ADR process (direct negotiation assisted by mediation, or early neutral evaluation of the merits of a claim) might or might not result in resolution of the dispute by agreement between the parties. If no agreement is reached, the ADR process may, nevertheless, have been valuable in clarifying the issues in dispute and the strength of the arguments of the parties involved.

In the wider sense, however, CADR might not be associated with court proceedings at all. All that is required is that a dispute exists, and any technique, or combination of techniques, may be used in order to resolve it, whether this involves a court at some stage or some other technique. In the context of consumer-to-business (C2B) disputes, dispute resolution takes place within a different architectural structure that is entirely separate from courts. It may be that the dispute could end up being taken to the court process, but this rarely happens. The important point is that CADR structures have emerged that operate wholly separately from courts, and process many disputes with no reference to courts.

This book is concerned with CADR in this wider, non-court sense. We seek to uncover the new universe of CADR systems, to find out how they operate, to evaluate them, and determine how they might be extended and improved.

The starting point is that many sectoral ADR systems exist in EU Member States, and the national architectures differ significantly. CADR schemes have emerged piece-meal over the past forty years, and in many Member States within only the last decade. But they are now a major phenomenon. CADR systems need to be examined in relation to both courts and regulators in order to see whether their functions are in competition or synergistic.

This book seeks to analyse some of the major existing national models. The facts and analysis presented here are far from complete, and no claim is made that this work is comprehensive. The diversity of CADR systems that currently exist is considerable, and may surprise many readers. CADR has expanded significantly in recent years, and is clearly still expanding: a state of stability has not yet been reached, so it is premature to propose final conclusions or standard models. But the current analysis should provide a useful starting point.

## Policy Decisions

CADR is important and topical at EU level. On 29 November 2011, the European Commission adopted two legislative proposals on CADR (one being on the related area of online dispute resolution, ODR). Many people may be unclear exactly what CADR is, and frequently confuse it with court-related mediation, especially since they may only be familiar with the EU Mediation Directive, adopted in 2009 for implementation in 2011.

The European Commission has sponsored three studies on CADR in preparing for its 2011 proposals, which provide a highly important map of CADR across the 27 Member States. Professor Stuyck's study of the position within the Member States<sup>4</sup> reveals that there is a huge variation in national mechanisms for collective redress. It has been noted that 'redress' is itself a wide concept, and can encompass mechanisms that operate both within and outside traditional court-based litigation, such as arbitration, small claims procedures, mediation and other 'alternative dispute resolution' techniques, public oversight of restoration and compensation (such as ombudsmen, public enforcement activities, *partie civile* piggy-back claims, recovery of the proceeds of crime) and self-regulatory or voluntary mechanisms (such as no fault schemes, codes of conduct and other informal mechanisms).<sup>5</sup>

We pay tribute to the excellent work done in those studies by Professor Stuyck and his Leuven team and to Dr Alleweldt and his Civic Consulting team.<sup>6</sup> It is always a challenge to obtain such a vast amount of data on a new subject from 27 Member States, and to present the information and the picture coherently, particularly within the methodological, time and budgetary constraints that arise in connection with any such Commission or

<sup>4</sup> J Stuyck, E Terryn, V Colaert, T Van Dyck, N Peretz, N Hoekx and P Tereszkiwicz, *Study on alternative means of consumer redress other than redress through ordinary judicial proceedings* (Catholic University of Leuven, 17 January 2007), published April 2007, para 384, the Comparative Report and the 28 National Reports are available at [ec.europa.eu/consumers/redress/reports\\_studies/index\\_en.htm](http://ec.europa.eu/consumers/redress/reports_studies/index_en.htm).

<sup>5</sup> See European Commission, *Green Paper on consumer collective redress*, COM(2008) 794 final, 27 November 2008, available at [ec.europa.eu/consumers/redress\\_cons/greenpaper\\_en.pdf](http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf).

<sup>6</sup> *Study on the use of Alternative Dispute Resolution in the European Union*, (Brussels, Civic Consulting, 2009).

governmental study. Nevertheless, a number of questions remained after reading those studies—and it is an unfortunate fact that not many people do in fact read such long and detailed studies.

Hence, we set out to try to illuminate further the world of CADR in Europe, and how it actually works. We wished to have this book available at the time that European Member States and the European Parliament would be considering the Commission's CADR proposals, so as to inform their deliberations. Whatever the outcome of those deliberations, however, it is clear that national and individual CADR systems will continue to spread and evolve. Hence, this book should intend to inform discussions about how that might best happen.

It is important to understand that this book is not about the various mechanisms that might be used to seek or deliver consumer redress. CADR systems are, of course, primarily intended to deliver consumer redress, but they are not the only possible pathway. Various other public or private systems, whether individually or in combination with themselves and/or with CADR systems, may also deliver consumer redress. CADR systems are certainly emerging as one of the most important and promising possible pathways for consumer redress, and this book seeks to illuminate them. But a comprehensive picture of all the possible pathways, and an evaluation of them, must await another occasion.

## The Research Questions and Approach

This book is primarily concerned with the following issues:

- What is the current state of CADR in Europe? What systems currently exist? How do they work? How extensively are they used? How much do they cost, how long do they take, and so on? These are micro-level empirical issues.
- How might European governments and those providing or wishing to use CADR best extend and improve their CADR systems? What are the best national or international architectures for CADR? This involves examining CADR systems at their macro levels, and comparing different architectures.
- How can individual CADR systems be improved? This is a micro level issue, with a comparative perspective. This involves examining a number of current CADR systems, preferably those that differ significantly, together with any formal criteria that are applied to them, so as to be able to answer the question: What is, or should be, current best practice for CADR systems?

Accordingly, in order to answer the above questions, we designed a research project with the following main elements. It is necessary to examine a number of differing CADR systems, so as to identify the current phenomenon of CADR, and to have a sufficient range of models from which to draw comparative conclusions. It transpires that there are many different models of ADR and CADR. It would not be practical for us to have undertaken research into the position in all 27 Member States, given firstly that we wanted to go to a certain level of detail and depth and, secondly, that we wanted to finish this project so that this book could be available soon after the publication of the Commission's proposals. Accordingly, we have selected ten Member States, which we believe give a sufficiently wide spectrum of the current European phenomenon of CADR. The States selected are: Belgium (albeit not in

the same format as other chapters, but to highlight the important development of Belmed), France, Germany, Lithuania, Poland, Slovenia, Spain, Sweden, the Netherlands, and the United Kingdom.

We are well aware that this list omits Member States that have interesting CADR schemes. We are grateful for discussions with experts from, for example, Denmark, Italy and Portugal. Regrettably, constraints of time and space have not permitted us to include those and other countries in this book. However, we continue to research ADR and dispute resolution systems, and hope to include those and other countries in our future work. CADR is clearly a developing phenomenon, and current EU-level debates will only encourage further swift development.

Since the goal is to examine both national architectures of CADR systems and the modes of operation of leading CADR models, this project has not attempted to give a complete picture of CADR in every Member State. It would simply not be feasible to examine every single CADR scheme that exists in even the ten Member States that we selected. Therefore, we may have inadvertently omitted some important schemes, but we believe that the picture that we have painted is, nevertheless, sufficiently robust and accurate for the purposes of this project. At the least, our work will have illuminated a number of leading CADR systems.

For reasons of limiting the scale of this project, so that it could be accomplished within around eighteen months, we have limited the focus to CADR models as defined in the Commission's proposals, namely contractual disputes between consumers and businesses (what are known as B2C issues: business-to-consumer). This omits a number of other important ADR models, notably those for personal injury claims. There are notable examples of personal injury compensation schemes, especially in Nordic States and France, but consideration of these will have to await another occasion.

Although, for the same reason, consideration of court-annexed mediation and similar models are outside the scope of this analysis, it is, nevertheless, necessary to say something about such matters for some jurisdictions. This is because both the historical development and current operation of CADR models are often strongly influenced by both the pre-existing court systems and regulatory systems of a state that cover private and public enforcement of consumer law. Hence, we aim to give a brief indication of why national CADR systems have developed the way they have, highlighting influences from civil procedure, regulatory and cultural systems.

CADR systems are often found clustered in particular industry sectors. This may have occurred because of market conditions in particular sectors, or specifically because legislators have encouraged or required CADR systems to be introduced within them. There is little consistency across different Member States of those business sectors that do, or do not, have CADR systems. However, we have tried to focus on the position in the Member States covered here of national models for financial services, telecoms, energy, and general consumer trading, so that comparisons can be made across countries.

## **Plan of the Book**

The first chapter examines the development and current status of CADR at EU level. This is followed by ten chapters that describe the architecture of CADR systems in ten selected Member States, and illustrate the current modes of operation of important schemes. The

state of best practice in relation to the important topic of companies' in-house customer care functions is then illustrated with selected examples from the United Kingdom (chapter 12). Chapter 13 then examines some examples of cross-border dispute resolution schemes, both at EU and global levels.

We then draw together the findings of the preceding chapters on national CADR systems, so as to examine the policy issues that arise, based on a comparative empirical analysis of the information from the status of CADR systems in the ten Member States. Some of the most important statistics collected during this study are presented in chapter 14. We finally set out our findings and conclusions in chapter 15. It reviews the following main points: the factual findings on the state of CADR in Europe; the conceptual issues that arise; the issues that arise for the architecture of national systems; and best practice for CADR schemes. Based on the information collected, we return to consider the three central questions posed, namely:

- What is the current state of CADR in Europe?
- How might the architecture of CADR systems be improved?
- How might individual CADR systems be improved?

We conclude by setting out a suggested model for how CADR schemes should be designed, both in relation to general coordinated architecture and general mode of operation.

It must be repeated that it has only been possible, for reasons of time and space, to include ten Member States in this study. There may be useful information from other States. In addition, many—but not all—of the CADR systems and techniques are relatively new and as yet undeveloped. For both these reasons, sufficient experience and data on which to found a mature evaluation of CADR and its models may not yet be available. Accordingly, the findings are preliminary. There is undoubtedly scope for further research. Nevertheless, it will be seen that a wealth of material has been assembled in this book.

## Methodology

The information and findings presented here are some of the fruits of the ongoing CMS Research Programme on Civil Justice Systems at the Centre for Socio-Legal Studies at the University of Oxford.<sup>7</sup> This research has also been carried out in collaboration with colleagues at the Behavioural Approaches to Contract and Tort (BACT) Programme at the Law Faculty of Erasmus University, Rotterdam.

Consideration of the various options for dispute resolution prior to 2008 had led us to various conclusions: that far more dispute resolution options exist than are widely known; that there has been no systematic overview of all the options, no evaluation of them, or coherent plan for how they might be used or prioritised within a contemporary civil justice system; that some ADR pathways might be extremely useful for certain types of disputes; and that previous policy assumptions (notably that courts and lawyers are not only the principal dispute resolution option but also always the preferable one), need to be robustly tested. In short, it is time for a comprehensive review of the options for dispute resolution,

<sup>7</sup> For details of the Programme and its various constituent projects see [http://www.csls.ox.ac.uk/european\\_civil\\_justice\\_systems.php](http://www.csls.ox.ac.uk/european_civil_justice_systems.php).

without pre-conceived notions. This work on CADR therefore fits into a far wider ongoing research agenda.

In 2009, Dr Magdalena Tulibacka, in conjunction with the United Kingdom's consumer association *Which?*, carried out an internet-based survey of how many ADR pathways could readily be identified in the United Kingdom, and found some 130 mechanisms.<sup>8</sup> Since January 2010, we have undertaken more detailed research into CADR in the ten Member States noted above. The first stage was to draw up a list of questions to be asked about individual schemes, such as: what are the rules, what is the governance, how transparent is the scheme, how much does it cost (both to participants and overall), how long do disputes take to be processed, what outcomes occur, and so on.

The second stage was to answer as many of those questions as possible from materials on the websites or elsewhere. The third stage was to interview CADR providers, users, and representatives of government, consumers and business, to check the facts but more importantly to gain an understanding of the history and context of CADR at both micro and macro levels. It is, of course, that third stage that has taken most time.

We are very grateful to colleagues who have collaborated in the research and writing of various chapters. Franziska Weber of Erasmus University has worked on the Netherlands, Spain and Sweden. Dr Magdalena Tulibacka has looked at Poland. Dr Stefaan Voet of Ghent University has looked at Belgium. Professor Aleš Galič has produced a chapter on Slovenia in record time.

We have undertaken around 100 interviews. We are most grateful to many who have made themselves available for interview, frequently at short notice, whose names are listed at the end of this chapter (and we apologise if we have inadvertently omitted anyone from that list). Many have also provided considerable assistance with insights and arrangements. We are also grateful to Professor Lisa Webley and Dr Angus Nurse, who contributed respectively draft chapters on mediation in family law in England and Wales and the UK Local Government Ombudsman, and for kindly agreeing to hold those pieces over to a future publication.

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<sup>8</sup> An updated list is at <http://www.csls.ox.ac.uk/AlternativeDisputeResolution.php>.