



The Chartered Institute of Arbitrators

Irish Branch

Submission to the Department of Jobs, Enterprise and Innovation

In response to

Consultation on the Implementation of the EU Directive on Consumer Alternative Dispute Resolution and the EU Regulation on Consumer Online Dispute Resolution June 2014

INTRODUCTION

This submission is prepared in response to the Consultation Document issued by the Department of Jobs, Enterprise and Innovation in June 2014. The EU Directive on Consumer Alternative Dispute Resolution¹ and the EU Regulation on Consumer Online Dispute Resolution came into force from July 2013.² The relevant transposition date is 9th July 2015 for the Directive and 9th January 2016 for the Regulation. There is an exception in the transposition date because Member States are required to notify the Commission about whether or not national legislation provides for disputes initiated by a trader against consumers are to be resolved by an Alternative Dispute Resolution (ADR) body. Member States will also be required to designate an ODR contact point from the earlier date which is 9th July 2015.

BACKGROUND

1.0 About The Chartered Institute of Arbitrators³

1.1 The Chartered Institute of Arbitrators (CI Arb) is the world's leading professional body promoting the resolution of disputes by arbitration, mediation and other forms of alternative dispute resolution (ADR). Working through an international network of branches and chapters, with global membership of over 13,000 ADR professionals in more than 120 countries. CI Arb provides services and support for all those involved with the resolution of disputes, the CI Arb's range of globally recognised professional qualifications offers practitioners, professional advisers and users the opportunity to demonstrate their level of ADR expertise and commitment.

¹ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on online dispute

² Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21st May 2013 on line dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC/ (Regulation on consumer ODR).

³ www.arbitration.ie: <http://www.ciarb.org/about/who-we-are/>

- 1.2 Founded in 1915, CI Arb was granted a Royal Charter in 1979. Today it is the only membership body that covers the entire range of alternative dispute resolution methods on a global basis. The primary Object of CI Arb in the Royal Charter is to ‘promote and facilitate worldwide the determination of disputes by arbitration and alternative means of private dispute resolution other than resolution by the court (collectively called "private dispute resolution").’
- 1.3 The Irish Branch was established in 1981 with a permanent secretariat in Dublin. The Chartered Institute of Arbitrators, Irish Branch, is an authority on the regulation, administration, training and promotion of ADR on the island of Ireland and has a very active Northern Ireland Chapter. At present the Irish Branch has over 750 members comprising Chartered Arbitrators, Fellows, Members and Associate members. The multi-disciplinary membership includes practitioners in law, engineering, architecture, surveying, information technology, shipping, finance, insurance, commodities, agriculture, accountancy, medicine and travel. CI Arb has close links and an excellent working relationship with the European Consumer Centre Ireland⁴, Chambers Ireland⁵ and the International Chamber of Commerce.
- 1.4 The Institute provides both training and accreditation in ADR and maintains a panel of Arbitrators, Mediators and Adjudicators. All members are subject to a Code of Ethics. The Institute has a complaints procedure and well established regulatory mechanisms in place. As noted in the DJEI Consultation document of June 2014, the CI Arb is one of five bodies in Ireland notified under European Commission Recommendations 98/257/EC and 2001/310/EC. CI Arb Fellows and Members are recognised by a variety of other professional and nominating bodies active in the ADR landscape.

2.0 WHAT IS ADR⁶

2.1 The concept of ADR has at its essence the ‘*alternative*’ in Alternative Dispute Resolution which refers to ‘a range of procedures that serve as *alternatives to litigation through the courts* for the resolution of disputes generally involving the intercession and assistance of a neutral and impartial third party.’⁷

2.2 The Law Reform Commission of Ireland in its 2010 Report on Alternative Dispute Resolution Mediation and Conciliation defines ADR as: a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes.⁸

2.3. It is necessary here to highlight the difference between alternative dispute resolution methods of mediation and conciliation. Although the words mediation and conciliation are sometimes used interchangeably, the two terms are different. Mediation is defined by the CI Arb as ‘the facilitation, by a third party, of a negotiated agreement... in which the mediator does not decide the dispute, but facilitates communication and problem-solving by the parties. In conciliation the neutral’s role

⁴ European Consumer Centre Ireland Report, ‘The Implication of the Proposed ADR Directive for the Regulation of Consumer Disputes in Ireland’, Lynnsey Delaney, December 2012 describes CI Arb schemes in more detail.

⁵ CI Arb is a corporate patron of Chambers Ireland, <http://www.chambers.ie/partners/corporate-patrons.html>

⁶ Jason A. Crook. 2010. What is Alternative Dispute Resolution (ADR)? In Julio Cesar Betancourt (ed.), London, CI Arb.

⁷ Brown, Henry et al., ADR Principles and Practice (London), 1999, p.12

⁸ Law Reform Commission, Consultation Paper on Alternative Dispute Resolution, 2008 LRC CP 50-2008 at 2.12.

culminates in a settlement proposal which is non-binding on the parties. The main difference is whether there are suggestions put forward by the neutral for settlement or whether the parties achieve their own solution.⁹ We recognise that, in EU documents (including the present Directive), this nomenclature is reversed: the DJEI Consultation document of June 2014 on page 2 mentions ‘ . . . *facilitating an amicable solution (conciliation), or procedures where the ADR entity proposes a solution (mediation)*’. Regardless that the nomenclature of the DJEI (and of the Directive) seems opposite to conventional usage in the English-speaking world of ADR, both nomenclatures recognise that mediation and conciliation are voluntary processes.

2.4 Arbitration is defined as a non-judicial ‘device whereby the settlement of a question... ‘is entrusted to one or more arbitrators who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement.’¹⁰

2.5 The CI Arb notes the provision in Article 38 of the Charter of Fundamental Rights to ensure a high level of consumer protection within European Union Policy. It recognises and supports the intention of the European Commission as set out in its Communications of 13 April 2011 in which the Commission identified legislation on alternative dispute resolution including the application of online dispute platforms to resolve disputes and promote competitiveness and growth.

3.0 CI Arb DISPUTE RESOLUTION SCHEMES AND ACTIVITIES

CI Arb has also developed special interest groups to review plan and deliver dispute resolution options and services. The primary areas are arbitration, mediation, conciliation and adjudication and example are provided below of some of the ADR schemes and activities.

3.1 Arbitration Schemes:

The arbitration schemes are highlighted below. It is notable in the context of this submission that several of these are consumer related arbitration schemes. All schemes are subject to a regular review and audit with the trade/professional body concerned with the objective of continuous improvement to promote quality and standards in ADR service provision. These schemes indicate a breadth of engagement in consumer related and ‘B2B’ related ADR by the Branch.

Irish Travel Agents Association (ITAA): This is a scheme allowing for the arbitration of a dispute between consumers and travel agents.

Society for the Irish Motor Industry (SIMI): This is a scheme allowing for arbitration between consumers and members of SIMI

National Roads Authority (NRA): This is a scheme allowing for independent valuations between landowners and the National roads Authority in respect of land purchases and compensation for road construction projects.

⁹ Jason A.Crook.2010. What is Alternative Dispute Resolution (ADR)? In Julio Cesar Betancourt (ed.), London, CI Arb,p.3,15.

¹⁰ See foot note 7,p.11

Public Works Contracts: The Branch is listed as a nominating body for Conciliators and Arbitrators for the Irish Government Public Works Contract and regularly makes appointments in that regard.

DTZ Sherry Fitzgerald: The Branch is listed as a nominating body for Mediators and Arbitrators for property related disputes and maintains separate panels in this regard.

3.2 ICC Court of International Arbitration

The Branch is a member of the Irish National Committee for the ICC International Court of Arbitration. The Branch is also a member of Arbitration Ireland which is working to promote Ireland as a seat for International Arbitration.

3.3 Statistics

In the years 2010 to 2012 inclusive, CI Arb was invited to nominate arbitrators across the NRA, SIMI and ITAA schemes and made 90 appointments. 45 nominations were made to the NRA scheme, 30 nominations to the SIMI scheme and 15 to the ITAA scheme.

3.4 Mediation

CI Arb membership includes accredited and experienced Civil and Commercial Mediators. The Irish Branch is also actively pursuing new areas in the mediation field and has a number of special interest groups working together with the Education and Training Officer to train and accredit panels of mediators in specialised areas such as Environmental & Planning Mediation, Court Alternative Mediation, Workplace Investigation and Workplace Mediation.

In November 2013, in recognition of the fact that greater use should be made of mediation to resolve legal disputes/court proceedings, a special interest group was formed to develop and promote an innovative and specialised form of mediation to facilitate parties in resolving their legal disputes.

The Mediators on the Court Alternative Mediation Panel, in addition to being trained and experienced Mediators, are required to have specific core knowledge and skills appropriate to resolving legal disputes. Members of the panel are required to attend specialised on-going training and to be fully familiar with the litigation process. In addition, panel members are required to share their experiences (without discussing specific mediations) for the purposes of developing core skills and specialised knowledge.

One of the primary benefits that Court Alternative Mediation has over formal court proceedings is that it facilitates unique and creative resolution of legal disputes. A court can often be limited in the remedies at its disposal.

Additionally the Institute was invited to make submissions (including oral submissions) to the Joint Committee on Justice Defence and Equality in 2012. These are recorded in the Report on hearings into the Scheme of the Mediation Bill June 2012.¹¹

¹¹ <http://www.oireachtas.ie/parliament/media/committees/justice/mediation-bill-report.pdf>

4.0 Response to Questions raised in the Consultation

1. Do you think significant gaps exist in the provision of ADR in the State to deal with any contractual dispute arising from the sale of goods or the provision of services between a consumer and a trader? If so, where do you think they exist?

There is a need for dispute resolution forums which facilitate inexpensive consensual outcomes and which as a first step promotes better claims handling and outcomes negotiated between the parties to a complaint or dispute. Examples of successful schemes are highlighted above.

To some extent the Small Claims Court has provided a quick and affordable dispute resolution service to consumers. However the service is limited to a maximum and can be considered an adversarial process.

Even under construction contracts, where ADR is routinely provided for, dispute resolution tends to be an adversarial process, regardless of whether the contract is one which involves a consumer.

The CI Arb therefore considers there are significant gaps. Whilst ADR options have been set down in some Irish legislation, there is a poor level of consistency and consolidation across those laws, which makes it difficult for consumers, traders – and even for ADR service providers and accrediting bodies – to understand and operate such provisions as do exist in law. Other ADR schemes are specified in written contracts, most of which are standard forms such as building contracts, insurance contracts, Irish Travel Agent contracts and Society of Motor Industry contracts. But the gaps are too numerous to list, since the range of contractual disputes is so large and varied.

2. Can you identify ADR entities which cover disputes in specific sector? If so, in your opinion are these entities in a position to comply with the requirements of the Directive?

There are other ADR entities working in the ADR sector. The Institute can only comment on its own suitability and willingness to comply with the requirements of the Directive. In this regard the Institute is aware that the sector is unregulated outside professional bodies such as CI Arb and other bodies. There are some practitioners particularly in the mediation field who have no formal training and are not governed by a Code of Ethics who are not members of any professional body and many may not be insured. It is our desire to see this issue addressed in the proposed Mediation legislation and it is an issue that we raised at the Oireachtas Committee hearings on the Mediation Bill.

3. In your view, is there an existing body which could fill the lacuna in ADR coverage?

Uniquely, the CI Arb's Irish Branch has membership trained and accredited in the widest range of ADR skills and experience: in mediation, conciliation, arbitration, adjudication and expert determination. However, to fill all the gaps in ADR coverage, even the CI Arb Irish Branch would need far more than the voluntary resources on which it currently relies. The funding sources and structures needed to fill the lacuna in ADR coverage requires considerable thought.

4. Can you propose a specific model that the State may use to implement the Directive?

The CI Arb Irish Branch already co-operates with trade bodies to deal with a large number of disputes. It would be almost impossible initially to cover every dispute that might arise through sectoral schemes so it will need to be flexible and remain a work in progress for some time, and be reviewed as further sectoral schemes are set up.

There are two options which would help the State to deal with regulatory aspects relating to ADR professionals:

4.1 The State becomes the regulatory body for consumer ADR and manages panels, accreditation, professional conduct, complaints etc on an ongoing, hands-on basis. Is the State willing to accept the responsibility, staffing and funding implications of this?

4.2 The State could nominate certain professional bodies to train, accredit, register and regulate ADR practitioners. Such co-regulation already exists in Irish legislation under the EU Qualifications Directive and Services Directive for e.g. medical doctors, nurses, architects etc. The Irish Branch of the CI Arb, as a notified ADR organisation under EU law, would be pleased to explore further how this approach can be adapted to cover ADR professionals.

The CI Arb is aware of hybrid models in other parts of the EU which can also be adapted, especially those models which are cognisant of requirements under EU Directives which regulate the Internal Market. The ADR approach to disputes arising will need to be flexible and should be reviewed regularly.

5. How would the model proposed under Q4 be funded (public funds, business, business organisation, case fees or a mixture)?

To meet the full obligations of the Irish State under the Directive public funds will be required. The hybrid models referred to in point 4 above indicate that implementation models ought to be funded by a mixture of sources. There will be substantial costs involved in setting up schemes, meeting trade bodies, drafting rules and in the administration of the system in to the future. But for example, nomination and registration bodies can be funded through:

- Members' subscriptions/registration fees
- Fees per case for nomination of the practitioner.

6. What are your views on relying on an ADR entity/entities established in another Member State or regional, transitional or pan-European dispute resolution entities?

It is important to ensure that such entities are recognised and competent ADR entities in individual member states which operate under strict guidelines and have audit and quality checking in place. This will provide the best solution. Consideration should be given to common European standards that each entity would need to meet before a pan European system could be implemented. There will also be a need for effective administrative co-operation between competent authorities across national borders, as already provided for under other EU Directives

7. In your view, should the implementing legislation provide for ADR procedures where the person(s) in charge of such procedures are employed or remunerated exclusively by the individual trader to be covered by the Directive provided they meet specific requirements?

A system where the consumer does not pay for any procedures in any circumstances is open to abuse and may be intrinsically unfair. There is a risk of conflict of interest and a lack of transparency if the approach in the question is adopted.

It is acknowledged that costs can be a deterrent to the consumer proceeding with a claim. In the conventional litigation system costs are awarded to the person who succeeds. In mediation costs are usually shared by the parties regardless of the outcome. Mediation is generally a low cost informal system where excessive legal representation and technical witnesses are discouraged. This low-cost procedure could be fairly shared between the parties.

There may be opportunities for a trade organisation to fund mediation schemes which would be free to the consumer and paid for by a levy. There should be a penalty for frivolous actions by the consumer (for instance where a consumer does not show up for a mediation). There could also be a sanction (e.g. name and shame, or suspension from a trade register) for a trader who fails to assist towards, or to implement, an ADR process.

The SIMI and ITAA schemes highlighted earlier are funded by the traders but the person appointed in each case is independent of the trade organisations.

Arbitration is an expensive and involved process, regulated under worldwide laws and treaties. It often requires substantial legal representation and technical input for the reason that an arbitration award is final and binding and seldom amenable to appeal. Any opt-out from the present system, updated under the Arbitration Act of 2010, e.g. to alter principles whereby the successful party is awarded costs, should be approached with great caution.

8. Can you identify any specific ADR procedures which may fall under this category?

This is dealt with in our answer at point no. 7.

9. Should the implementing legislation provide for ADR entities to use all, some or none of the exemptions in its procedural rules as provided for in the Directive? Please provide an explanation for your suggestion.

Items a to e should be adopted. Item f recognises the risk that an ADR entity could be overwhelmed with complaints (or particular categories of complaint) that cannot be resolved, or at least are likely not to be resolved within the 90-day maximum specified in Article 8(e) of the Directive.

10. Should the State prescribe minimum and maximum claim thresholds, if so, how much and the reason for the stated amounts.

Mediation and conciliation are consensual non-binding processes. There is no need to apply a threshold save in the case where a free-of-charge process is offered to the consumer. Each claim will attract some cost to resolve and any claim could be considered proportionate to a minimum cost. For cases where a dispute and/or claim is covered by an insurance policy, subject to one or more

maximum limits of indemnity, the State (perhaps through a competent authority or other supervisory means) ought to have discretion to regulate any limits prescribed.

11. *Should ADR procedures be free of charge to the consumer or should a nominal fee be charged, if so, how much and why?*

Please refer to our answer to question 7.

12. *Should the implementing legislation provide that the decision of notified ADR entities, which aim at resolving a dispute by imposing a solution, are binding on traders?*

Traders should not be deprived of their rights to have recourse to the Courts save where they have contracted to engage in an ADR procedure such as arbitration.

Mediation (as defined by the CI Arb: see 2.3 above) is a consensual process facilitating amicable resolution. The mediator makes no proposal or decision on the outcome.

Conciliation (again see 2.3 above) is a process whereby the conciliator seeks a mediated resolution: where this is not achieved he/she will make a recommendation on how the dispute may be settled. There can be a time limit (say 10 days) for either party to reject the recommendation before it becomes binding. Such a system works well under the RIAI standard building contracts.

13. *What are your views on the mandatory participation of traders in notified ADR procedures, which fulfil the requirement of the Directive, in other areas which are not already mandatorily required (financial services)?*

Most ADR procedures involve voluntary participation leading to a consensual outcome. The CI Arb would welcome further discussion on the issues of where and how participation and/or outcomes can have a mandatory character and, where participation is mandatory, of any sanctions for failure to engage with the process.

14. *Is the period beginning on the day on which the relevant dispute is referred to an ADR procedure and ending on the day which is 30 days after the ADR procedure has concluded sufficient time to extend the limitation period of taking judicial proceedings? If not, why?*

It depends on the nature of the ADR process. More flexibility may be required where a non-binding method used, with the recommendation binding unless challenged within a set number of days.

15. *Are you aware of any other Irish legislation where the limitation period may require amendment in order to meet the requirements of the Directive?*

Not aware at present, but we will try to be alert to laws and cases evidencing this.

16. *Do you have any views on the designation of competent authorities? Should the State designate one competent authority or more (sectoral regulators responsible for particular areas)?*

It may be prudent to use sectoral regulators and already notified ADR bodies (such as the CI Arb) as competent authorities for areas which they already deal with.

A State-funded competent authority (CA) could be made responsible:--

- For administrative cooperation between Irish sectoral competent authorities (CAs) and regulators;
- To act as a residual ADR entity for Ireland in disputes not covered by other CAs and regulators;
- For administrative cooperation between Irish CAs and those in other EU countries; and
- To act as the ODR Contact Point .

The CIArb would welcome discussion with the DJEI on how to promote ADR services, sectoral skills and experience in the context of these responsibilities.

17. In your view should disputes initiated by a trader against a consumer be included in the legislation giving effect to the Regulation. If so, why.

Yes, disputes initiated by a trader against a consumer should be included in order to ensure fairness and proportionality. In order to provide recourse to ADR options for both trader and consumer it is important to promote a level playing field. In any case the DJEI Consultation 2014 document clarifies that disputes initiated by a trader against a consumer are provided for in the ODR Regulation. Mediation and conciliation are processes far preferable to Court action in consumer disputes; preferable for both parties, not just for the consumer.

It may be intrinsically unfair if only one party could have recourse in any system which involves arbitration. The last part of the text in the June 2014 DJEI Consultation document highlights a disparity in this regard, in that disputes initiated by a trader are in any case *included in the legislation giving effect to the Regulation*. So for consistency it seems that such disputes should also be *included in the legislation giving effect to the Directive*.

18. The Department would welcome any other views on issues relating to the directive and the Regulation which you may wish to provide.

In general it should be recognised that provision of an ADR service to consumers at a low or minimal cost has a financial impact elsewhere, whether for the trader organisation or the ADR entity.

The CIArb looks forward to close cooperation with – and between – the Department of Jobs, Enterprise and Innovation together with the Department of Justice and Equality, so that there is a “join-up” between the transposition of the two Directives, 2011/13 and 2008/52, in the drafting and development of the forthcoming Mediation Bill.

The CIArb sees low awareness among stakeholders of the existence of Directive 2011/13, and (perhaps more particularly) of the ODR Regulation. Even among those who are aware of them, and who are preparing for their introduction, there is uncertainty about the likely impacts of implementation. The uncertainty extends even to the full scope and meaning of the Directive and Regulation. We look forward to working with the Department during the coming year, and to harnessing with you the energies and skills of the CIArb to realise benefits for Irish consumers and traders, and to promote and secure higher standards in ADR practice in Ireland, in the context of the Directive and Regulation.

CONCLUSION

The Institute supports the aims of the Directive. The CI Arb Irish Branch will be pleased to work with the Department in the development of consumer dispute resolution.

In addressing the five specific obligations the Directive places on member states as set out on page 2 of the DJEI Consultation Document of June 2014, the CI Arb is uniquely positioned to assist the DJEI, ECC Ireland and other ADR entities in offering the required extent and quality of service as follows:

- Giving consumers access to quality out of court alternative dispute resolution (“ADR”) procedures to deal with any contractual dispute arising from the sale of goods or the provision of services between a consumer and a business. The CI Arb has a strong record of accomplishment in this regard, as set out in 3.0 above;
- Helping ADR entities to meet quality criteria of independence, transparency, expertise, effectiveness and fairness. CI Arb accomplishment in these areas is also evident in 3.0 above.
- Helping traders to inform customers about ADR entities/schemes which cover the trader’s sector and about whether or not the trader subscribes to those ADR schemes. The CI Arb is a recognised ADR body worldwide and our brand/logo can be used effectively in the regard.
- Helping to establish a competent authority to monitor the functioning of ADR entities in Ireland. The CI Arb has the expertise and knowledge to make a considerable input to devising the competent authority system.
- Helping qualified ADR entities through CI Arb training, accreditation, continuing professional development (CPD) and systems of nomination and panels to secure resolution of disputes within 90 days; both through bespoke ADR procedures provided free of charge, and with self-funded procedures at moderate costs for consumers.

The CI Arb has member ADR practitioners with a proven record of operating in such contexts, who are highly qualified and motivated, and for whom the Irish Branch continues to innovate in developing specialised dispute resolution skills. Provision of consumer ADR need not be limited to conventional models, as the ODR Regulation shows. On line systems can be suitable to many consumer claims, so reducing stress, delay and cost for the consumer. The aim of the Directive and of the Regulation to provide effective dispute resolution for the consumer at low cost, and this will require the ADR practitioner to be properly remunerated, if the system is to be sustainable. The new laws must recognise and demand that ADR practitioners continue to invest in the training, accreditation and skills development which the CI Arb can help its highly motivated ADR practitioners to serve consumers and traders.

[end]

25 July 2014