



24th July 2014

Department of Jobs, Enterprise & Innovation,
Earlsfort Centre,
Earlsfort Terrace,
Lower Hatch Street,
Dublin 2.

Attn: Competition & Consumer Policy Section.

By Post & By Email conspol@djei.ie

Re: Consultation on the implementation of the EU Directive on Consumer Alternative Dispute Resolution and the EU Regulation on Consumer Online Dispute Resolution – June 2014

Dear Sir / Madam,

I refer to the invitation to respond to the Consultation Paper.

We compliment the DJEI on this excellent initiative and I now set out the RIAI responses and discussion on the questions posed in that paper: -

Q. 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?

Response: I am confining this response to circumstances where there is a dispute between a consumer and a service provider, and, specifically, a member of the RIAI acting as a service provider to a consumer.

Up until recent years, the RIAI provided a mediation service scheme to clients who had disputes with members of the RIAI. The service was delivered by a senior member of the RIAI with ADR expertise and experience.

This service was paid for by the RIAI on a multi-annual retainer basis with a senior RIAI ADR practitioner at no cost to consumer clients. The service was provided impartially and without prejudice to any rights that any client consumer otherwise had.

Historically, it worked quite well and many satisfactory outcomes resulted for the client consumers concerned.

The RIAI wishes to look at the potential to revive this scheme in a manner which would be consistent with the terms of the Directive, the Building Control Act 2007 and the regulation of the profession of Architect provided for in that Act, to include mediation under the provisions of that Act.

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

Response: We are not aware of entities which cover disputes in the architectural service area – other than ad hoc arrangements made - occasionally on a *pro bono* basis. In a circumstance where it would be permissible for the RIAI to establish an ADR entity (including the possibility of a sole person ADR entity) the RIAI is desirous of entering into discussions with the Competition & Consumer Policy unit within DJEI so as to investigate the possibility of establishing such an ADR entity for the benefit of client consumers and traders.

With regard to disputes between clients as parties to Building Agreements (Employer – Contractor contracts), a proportion of these contracts are consumer contracts. Where RIAI forms of Contract are used, the President of the RIAI is the designated nominating / appointing authority (in default of agreement) for conciliators and arbitrators. This scheme has worked well and the Courts have been supportive over the years.

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

Response: The RIAI is an existing body which could fill the current lacuna in this client consumer – and – Architect area, provided of course that such an RIAI ADR entity properly would meet the requirements of the Directive and Irish Law,

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

Response: If we understand the underlying point in the question, the first step is the designation by the State of a *competent authority* in accordance with Article 18 of the Directive.

As a relative small State, we are of the view that the *competent authority* to be designated should be a section or unit within DJEI. We do not think that the State should designate a non-State institution or professional institution to fulfil this important role.

An example of this line of thinking was the decision in the Construction Contracts Act 2013 to maintain a Minister's panel of Adjudicators. This was an outcome which we had advocated for support.

This was in preference to opting for the “nominating authorities” route (to be chosen by the initiating party) taken in the UK and some other jurisdictions.

The interest of the consumer will be best reserved if the *competent authority* role is fulfilled by a unit or section within DJEI in our view.

With regard to the ADR entity which we would like to explore and discuss with you, it would be specific to client consumer – Architect disputes.

As with other professional bodies, the RIAI has a long standing tradition of members providing ADR services in the context of construction contracts (mediation, conciliation, arbitration – and upon commencement of the CCA

<p>2013, adjudication). The ADR training and accreditation commonly undertaken by our members includes post-graduate studies, professional body training and accreditation schemes (e.g.; Chartered Institute of Arbitrators, Centre for Effective Dispute Resolution, etc.). We also operate pupillage schemes with experienced ADR practitioners.</p> <p>Our RIAI CPD Manager and her team currently carries out the function of Administrator for the CIArb accredited Adjudication Training Course for experienced Construction ADR practitioners run by the CIArb-Irish Branch with the ACEI, EI, RIAI and SCSI.</p> <p>We are confident that we have a pool of trained, accredited and experienced ADR practitioners to provide this service in the context of the spirit and purpose of the Directive.</p>
<p><i>Q.5 How would the model proposed under Q.4 be funded (public funds, business, business organisations, case fees or a mixture)?</i></p>
<p>Response: We envisage that the <i>competent authority</i> role which might be undertaken by a section or unit of DJEI would be a State expense. The cost is likely to be relatively modest and the economic benefit underlying the purpose of the Directive (the smooth flow of transactional business with consumers) would be more than self-financing in terms of increased tax revenues from such consumer confidence and smoother economic transactional activity.</p> <p>With regard to the cost of operating the ADR entity (should the RIAI be permitted to establish such entity), the costs would be borne by the RIAI as before in the example described in the responses to Q1 and Q2.</p>
<p><i>Q. 6 What are your views on relying on an ADR entity/entities established in another Member State or regional, transnational or pan-European dispute resolution entities?</i></p>
<p>Response: We can see advantage in relying on an ADR entity / entities established in another member State, etc. in the context of cross border disputes (as described in the Directive). We do not see any conflict with the concept that we have outlined for an RIAI ADR entity to deal with client consumer – Architect disputes.</p>
<p><i>Q.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?</i></p>
<p>Response: Yes, a high standard of protection for the consumer is required in the circumstance set in Q7.</p>
<p><i>Q.8 Can you identify any specific ADR procedures which may fall under this category?</i></p>
<p>Response: Other than the construction contract nominating / appointing scheme mentioned in the response to Q.2, we are unable to identify any specific ADR procedure used in the circumstance described in Q7.</p>
<p><i>Q.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 suggestions.</i></p>
<p>Response: We assume for the purposes of this response that this</p>

question relates to provisions of Article 5.4 (a) – (f).

These provisions appear to be fair, reasonable and sensible and we recommend that the implementing legislation should provide for the exemption provisions in procedural rules to be developed.

If the question relates to matters which are exempted from the Scope of the Directive as set out in Article 2, it appears that there is no room to expand or contract the exemptions set out in that Article.

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

Response: We suggest that this might be in the form of *Guidelines & Procedures* which provide for the essentials and discussion - and are not overly prescriptive.

In the context of a client consumer – Architect agreement, the monetary values could be quite high (e.g.; a one-off residential project of high value). High value disputes are as amenable as low value disputes are to resolution by ADR techniques.

Provided that the protections set out in the Directive are in place (i.e. ; that the ADR process does not prejudice the right of the consumer to access to the Courts and the other provisions set out in the Directive and under Irish Law), such flexible *Guidelines* with regard to upper limits should work out as fair and reasonable.

The guidelines might set out broad considerations such as the nature, complexity, scale and time required from the ADR practitioner as considerations which the ADR entity might take into account in deciding whether or not to take on a particular case and in setting out the value of the nominal fee.

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

Response: We suggest that a nominal fee would be a usual requirement – so as to dissuade frivolous cases and abuse of process. Flexibility to waive the nominal fee should be provided for.

Some disputes do not involve money. Again, the use of *guidelines* might be more appropriate (e.g. ; €50 for cases which might have a notional value claimed of up to c. €5,000, €150 from €5,000 to €10,000 and otherwise as the ADR entity might set in a particular reference).

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

Response: This brings us into quite specific issues. There are different meanings given to the words mediation and conciliation in different jurisdictions and cultures.

In Ireland the prevailing interpretation is that the practice of *mediation* is one where the mediator acts as a facilitator using facilitative mediation techniques. It should be noted that such techniques are continuing to evolve and that they are not always absolutely facilitative, sometimes a skilled facilitative mediator can discretely prompt solutions to parties in the process.

Conciliation under a *contractual conciliation procedural rules system* is one provides that where all matters are not resolved through the facilitative phase of the Conciliation procedure (Med/Rec Conciliation as it has developed here – i.e.; mediation / recommendation), a Conciliator may, but only with the consent of the parties, prepare a written (reasoned) Recommendation.

The RIAI conciliation procedural rules typically provide for a time period within which one or both parties may write to formally reject the recommendation after it has issued – and if neither party rejects the Recommendation in writing within time, the Recommendation becomes binding. If rejected by one or both parties within time, the Recommendation is not binding - though often used subsequently to inform a negotiated settlement. There is recent caselaw which is supportive of this contractual scheme.

A scheme could be devised which would be binding only on the trader and not the Consumer. This is an area of rapid development internationally and there is the potential here to develop a state of the art model flexible enough to suit individual sets of circumstances.

We advocate the position that the implementing legislation should provide for a broad range of ADR techniques to include the option of procedural rules which would provide for an imposed solution binding on traders.

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

Response: We regard it as outside of our competence to respond on your question as it relates to financial services activities. We can say that the ADR services envisaged in the Directive are equally applicable to non-consumer disputes.

Q.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 for taking judicial proceedings? If not, why?

Response: We think that the period stated is sufficient.

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

Response: No.

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

Response: This is certainly an area for discussion – at this point in time, our view is that one single *competent authority* is likely to be sufficient for the size and scale of our economy and the population of this country. With experience in operation, it could always be expanded out.

Q. 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.

Response: Again, this is a complex area and one for discussion. We can see merit in the idea that if a trader took some form of legal action against a consumer, the consumer should, if he or she had good reason (e.g. a defence of poor service and / or a counter-claim) be in a position to avail of a consumer ADR procedure. This would, of course, be without prejudice to the right of the trader or the consumer to have access to the courts and to run the ADR procedure in parallel with court action.

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

Response: Other than to complement DJEI in it's positive approach to this initiative and consumer affairs generally, the RIAI would welcome an opportunity to engage with officials at the competition & consumer policy unit DJEI generally on this subject - and specifically on the subject of how the RIAI can provide for consumer ADR in relation to the provision of architectural services.

We trust that our responses assist you and we look forward to hearing from you in due course.

Yours faithfully


John Graby,
Chief Executive Officer