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The growth of ADR in consumer disputes

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Dispute Resolution analysis: How is the new regime for alternative dispute resolution (ADR) for consumer disputes going to work in practice? Russell Kelsall, partner in the litigation and financial services practice groups at Squire Patton Boggs (UK) LLP, considers how the new legislation will affect consumer disputes.

Original news

Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015, LNB News 17/03/2015 139

The Consumer ADR Regulations were made on 16 March 2015 and come into force in two stages. Parts 1 to 3 come into force on 7 April 2015 and the remainder on 9 July 2015. They implement EU Directive 2013/11/EU on ADR for consumer disputes (the ADR Directive). Their stated aim is to help consumers across Europe get greater access to redress should something go wrong with their bought goods or services without having to resort to legal action. The Department for Business, Innovation & Skills (BIS) says it will provide a more efficient and cost effective way for consumers to resolve disputes with traders, and provide traders with an opportunity to show how seriously they take the effective resolution of disputes with consumers.

Why have the Consumer ADR Regulations been introduced? What do they provide?

The Regulations implement in part the ADR Directive dated 21 May 2013. The ADR Directive is part of an overall package of measures from the EU which also includes Regulation (EU) 524/2013 (also dated 21 May 2013) on online dispute resolution for consumer disputes (the Online Disputes Regulation). These EU measures are not entirely new because they build on existing EU rules set out in Directive 2009/22/EC on injunctions for the protection of consumers' interests (the Injunctions Directive) and Regulation (EC) 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Compensation Regulation).

Broadly the Consumer ADR Regulations provide that a business must be a member of an ADR scheme (either a statutory one or one run by a trade association) and to promote that fact on the website for the business and in consumer facing terms and conditions. UK ADR providers need to be approved by BIS. Where a business has been unable to resolve a dispute with a customer, then the business must tell the customer the name and address of an ADR provider and whether it is obliged to or prepared to submit to the ADR provider's jurisdiction.

When do they come into force? Are there any surprises?

Parts 1 to 3 of the Consumer ADR Regulations come into force on 7 April 2015. Part 1 deals with definitions and interpretation. Part 2 deals with competent authorities and ADR entities. Part 3 deals only with designating the Secretary of State at BIS as the single point of contact for the purpose of the Consumer ADR Regulations.

Parts 4 and 5 of the Consumer ADR Regulations come into force on 9 July 2015. Part 4 sets out the information requirements that traders are obliged to provide in relation to ADR services they use. Part 5 makes a small consequential amendment to the Enterprise Act 2002, Sch 13.

BIS has adopted a copy out approach from the framework Directive and the Consumer ADR Regulations do not, therefore, contain any surprises.

What are the implications for consumers?

Consumers will be able to use an ADR scheme that a business belongs to in relation to any contractual dispute that arises between the consumer and the business. Where, for example, the consumer is in the UK and the dispute arises out of financial services provided in the UK, then there will be little change because the consumer ADR provider will remain the Financial Ombudsman Scheme (FOS).

However, where UK based consumers are shopping in other EU members states (and this is where the Online Dispute Resolution Regulation completes the jigsaw) then they will have to be told the details of the ADR provider that applies to that EU business. This may provide a much easier way to resolve a contractual dispute with a business based elsewhere in the EU.

The European Commission has to maintain a list of ADR providers notified to it by the governments of the member states. This list can be consulted by consumers where there is doubt on what ADR scheme can (or should) apply.

What are the implications for businesses?

The Consumer ADR Regulation, reg 7 gives an express exemption for health services provided by health professionals to patients to assess, maintain or restore their state of health including the prescription, dispensation and provision of medicinal products and medical devices. This is the only business exemption. All other businesses will be subject to the Consumer ADR Regulations.

Businesses will need to be a member of an ADR scheme--either a statutory one such as the FOS (which applies to financial services businesses) or a voluntary one run by a trade association.

Most businesses will find they will need to make slight adjustments to their standard terms of trading. This is because the Consumer ADR Regulations, reg 19(1) states that a business must provide the name and website address of the ADR entity on:

- o the website of the business, and
- o the consumer terms and conditions

For financial services businesses, this will mean that the name and website address of FOS must be included in consumer terms and conditions. The Consumer ADR Regulations do not appear to be retrospective so that a notice of variation will not need to be sent to existing credit card holders (or consumers under existing credit or hire agreements).

Where a business is a member of an ADR scheme run by a trade association to which it belongs then the name and website address of that ADR provider has to be given to the consumer.

What are the implications for lawyers?

With the new enhanced court fees now in force, litigation in the courts is now an even more expensive option--that even well-resourced businesses will see as a last resort. This should therefore make ADR more attractive and those lawyers who are qualified as mediators should see this as an opportunity.

What next for consumer ADR?

The Consumer ADR Regulations, reg 2(4) provides for reviews of the consumer ADR scheme every five years with the first report due in April 2020. The review is meant to assess the extent to which the objectives intended to be achieved by the Consumer ADR Regulations have been achieved as well as assessing whether those objectives remain appropriate or whether the same outcome could be achieved in a manner

requiring less regulation. It seems neither BIS nor the European Commission are entirely sure what the future shape of consumer ADR should be.

For financial services, consumers have shown a great willingness to use the services of the FOS. This is probably because the service is free for consumers to use (except in unusual circumstances) but the firm has to pay a case fee. In the last published figures to March 2014, FOS received 512,167 new cases which were referred to adjudicators or ombudsmen and 31,029 cases were resolved by FOS by ombudsmen making formal decisions at the final appeal stage of its ADR process.

Some trade bodies continue to operate their own ADR scheme. For example, the Finance and Leasing Association (FLA) has its own lending code that its members follow. Where a consumer feels that this code has been breached, the FLA can help resolve the situation using one form of ADR--conciliation. However, the FLA's ADR scheme cannot award compensation or compel subscribing business to make a payment to a consumer.

Bringing civil claims appears increasingly unattractive. While disputes for amounts of less than £10,000 will usually be allocated to the small claims track, this means that no costs (other than fixed costs, court fees or witness expenses) will be recovered even in a successful case (unless a party behaves unreasonably). In January 2015 the Ministry of Justice (MoJ) proposed (Cm 8971) startling increases to civil courts fees which for some claims will see increases of over 600% in court fees. This will see an enhanced court fee for issuing a claim of £25,000 (a price of, for example, a medium to top end car) rising by 227% from £550 to £1250. This would on the face of it make using the court an unattractive option. However, the Law Society of England and Wales has issued an application for judicial review of this decision. A hearing is awaited and if successful the MoJ will have to re-think its proposals on enhanced court fees.

For cross-border ADR, the obvious barrier will be language and unless a scheme is in English it will not be of much use to UK based consumers who cannot speak the local language.

Interviewed by David Bowden.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.