

MEDIACIÓN: EXPERIENCIAS DESDE ESPAÑA Y ALREDEDOR DEL MUNDO

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CONSUMER PROTECTION IN SPAIN AND ALTERNATIVE DISPUTE RESOLUTION IN CONSUMER CLAIMS (CADR)

LA PROTECCIÓN AL CONSUMIDOR EN ESPAÑA Y LOS MECANISMOS ALTERNATIVOS DE RESOLUCIÓN DE CONFLICTOS DE CONSUMIDORES Y USUARIOS

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Abstract: In this presentation, the author explains the Spanish consumer legislation and how we are implementing ADR to resolve consumer claims.

Resumen: En esta presentación se explica la legislación española en materia de consumo y cómo se están implementando en España los sistemas alternativos de resolución de conflictos para resolver reclamaciones en cuestiones de consumo.

Key words: Consumers claims, Alternative Dispute Resolution, Spain, European Union, Mediation, Arbitration, Conciliation.

Palabras clave: Reclamaciones en materia de consumo, Resolución extrajudicial de conflictos, España, Unión Europea, Mediación, Arbitraje, Conciliación.

SUMMARY: I. CONSUMER LEGAL SYSTEM IN SPAIN.—II. ACTIONS TO PROTECT CONSUMER RIGHTS AND INTERESTS IN SPAIN.—III. CONCLUSION.

This chapter is a paper presented at the International Scientific Conference titled “Settlement of consumer disputes in the European Union” at the Catholic University of Lublin in Poland dated 27.11.2015.

In the International Scientific Conference titled “Settlement of consumer disputes in the European Union” I was asked to explain the Spanish consumer legislation and how we are implementing ADR to resolve consumer claims in Spain.

The landscape legislation and alternative dispute resolution in consumer matters in Spain are very complex so I shall divide my article in two sections:

- First, to speak about the landscape of consumer legislation in Spain.
- And secondly, to speak about alternative dispute claims in consumer cases especially with the implementation of the Directive on ADR for consumer disputes.

I. CONSUMER LEGAL SYSTEM IN SPAIN

Spanish law grants consumers and users protection in several aspects. The most important is article 51 of the Constitution that reads as follows:

"1. The public authorities must guarantee the protection of consumers and users, protecting their safety, health, and legitimate economic interests through effective procedures."

In the Spanish system, consumers' rights have always been regulated, not in the Spanish Civil Code, but in a special Consumer Protection Act, which developed article 51 of the Constitution. The Consumer Protection Act applies to the relationships and contracts between consumers and businessmen or companies. It is the most relevant Spanish law concerning consumer protection and covers the subjects included in the European Union regulation for the protection of consumer interests. It sets out:

- The basic rights of consumers,
- The legal system of the consumers' associations,
- The public sanctions and,
- The judicial and arbitral procedures to implement consumers' rights.

The basic rights of consumers and users include the following:

- Protection against risks that may affect health or safety,
- Protection of legitimate economic and social rights, particularly against unfair commercial practices and the inclusion of abusive terms in contracts,
- Indemnity of damages and repair of the injuries suffered,
- Right to accurate information on different goods and services and to proper education to facilitate adequate usage,
- Right to an audience,
- Protection of rights through efficient procedures, especially in situations of inferiority or subordination.

Under article 21 of the "Consumer Protection Act", companies must provide consumers with claim forms at their offices as well as the procedure to file the complaint. The company must reply to the claim and solve the problem within one month. There are numerous claims made in Spain by consumers in this way.

There are also "Consumer and User Associations" to protect consumers and users rights and they are expressly authorized to exercise certain actions.

We have some modifications of the "General Act for the Protection of Consumers and Users" with a very important law dated 27 March 2014.

In Spain we also have other acts and regulations:

- The "Industry Act" which establishes provisions on safety controls for industrial facilities, equipment, processes and products that may cause damage.
- In addition to those controls implemented by the companies, the Spanish territorial public administration also analyzes and tests products merchandised in the Spanish market at the Quality Investigation Control Center.

- The Spanish system contains particular rules for advertising alcohol, medicine, health products and motor vehicles.
 - The "Act on General Advertising"
 - The "Act on Audiovisual Communication", which lists prohibited advertising practices
 - The "Act on Administrative Television Coordination", specifically dealing with advertising issues.
- We have additional legislation in these areas which incorporate the provisions of Directives from the European Union, for example, the "Act on Retail Trade" that provides the principle of "free pricing policy", the "Unfair Competition Act", and the "Consumer Credit Act".
- In Spain there are special systems as well for other fields:
 - Telecommunications
 - Financial services
 - Insurance
 - Food
 - Medicine
 - Toys
 - Motor vehicles
 - Tools and machinery
 - Investment services
 - Travel
 - E-commerce
 - Energy and gas, etcetera.
- Furthermore, as the legislative power is shared between the Spanish State and the Autonomous Communities, most of these Autonomous Communities have enacted laws and regulations on consumers' protection applicable in their respective territories.

So the landscape of Spanish consumer legislation is quite complex with numerous specialties.

II. ACTIONS TO PROTECT CONSUMER'S RIGHTS AND INTERESTS

In Spain consumers and users are provided with different types of actions to protect their rights and interests.

When a problem with a product is detected, it is possible to contact the shop or the manufacturer. The companies must have a department for consumer claims. If the problem is not resolved in this way, the consumer must be informed about the procedures to be followed at the Municipal Consumer Information Offices or through consumer organizations. If no result is obtained, the consumer has different options: administrative claims, legal proceedings at the courts and alternative dispute resolution in consumer cases, especially Consumer Arbitration.

Administrative Claims:

The consumer can turn to the administrative body for consumer protection in order to file a claim against the offender, against whom the provincial consumer bodies, or the regional bodies may initiate disciplinary proceedings. The administrative body inspects and imposes fines on companies who fail to comply with the regulations on consumer protection; but it does not establish any compensation for loss or damage suffered by the consumer as a result of the effect of a product or service.

Legal Proceedings:

A consumer who suffers loss or damage may turn to civil or criminal law by submitting a claim before a civil or criminal court, depending on the case against the manufacturer or supplier of the defective product, in order to claim compensation for loss and damage.

In this case, there is a special regime for civil liability arising from defective products.

The consumers' actions are recognized in the Civil Procedure Act that provides a special mechanism for consumers to file a collective claim for loss and damage caused by a particular product or service.

In all proceedings filed by entities or organizations, individual consumers may take part in the action when they have been directly, effectively, and materially affected by the use of a product or the hiring of a service that has resulted in damage against their person or property.

Access to courts however, is restricted by multiple factors:

- Parties must have a lawyer in most cases
- There are court fees to pay
- Consumers spend time and money to prepare for the trial
- Consumers do not want to go to court for small amounts of money because they feel inferior to their opponent.

Consequently the court door is, in fact, closed for a lot of potential claimants.

Traditionally it has been understood that access to the courts might not be the best way to resolve consumer claims.

In Spain several studies have shown that only 16% of claims have access to administration tribunals or courts.

Alternative Dispute Resolution (CADR or CDR):

As a consequence of this situation, the European Union, in 2013, enacted two laws intended to make dispute resolution easier for European consumers: the ADR Directive, and the ODR Regulation. Certainly this path is not entirely new and ADR techniques have been utilized for a considerable period of time. Now the landscape needs a significant change.

The attitude of public authorities in relation to ADR has also changed profoundly. Now the public authorities are obligated to regulate and ensure the existence of ADR systems available to litigants, similar to the judicial system.

The ADR directive entered into force on July 9, 2013. European Member States have to implement the legal framework, and with it, develop particular structures for consumer ADR within 24 months (by summer 2015). The Spanish legislator has not implemented the Consumer Rights Directive on a timely basis.

The CADR is designed to provide faster, more flexible, easier and low cost "out of court procedures" between consumers and traders arising from the sale of goods and services. The actual functioning of consumers ADR however is still relatively unexplored, like "a hidden world".

In Spain, as in many other countries in Europe, the spectrum of ADR is very wide:

—**Mediation:** regulated in general under the Act on Mediation in civil and commercial matters.

This important Act replaces the Directive of Mediation.

Mediation in Spain means that the parties adopt the main roles in the procedure. The mediator approaches the parties and assists them in the process of reaching their agreement.

The main principles in which mediation stands are: voluntariness, impartiality, neutrality and confidentiality.

This Act has some matters explicitly excluded from its scope of application: criminal mediation, labor mediation, consumer mediation, and mediation with public administration.

In Spain there is no specific regulation on mediation in consumer law.

In Spain we have, as well, an absence of a Mediation culture.

—**Conciliation:** a procedure where a third party makes its own suggestions for a possible settlement and is currently regulated under the new Voluntary Jurisdiction Act.

—**Arbitration:** similar to a court procedure where the third party renders a binding decision. Arbitration is the ADR system most broadly implemented in Spain. The basic regulations are contained in the "Arbitration Act".

Mediation is considered an initial stage to arbitration because the Consumer Arbitration System states that the arbitrators will try to mediate between the parties so they can reach an agreement to resolve the conflict. The Consumer Arbitration system refers to mediation, as an initial step to arbitration and it is an instrument that the public administration offers to citizens in order to effectively resolve the conflicts and claims.

This is the star system to resolve conflicts in consumer and user claims in Spain. The procedure has no special formalities and has executive character for both parties.

—**ODR (Online Dispute Resolution):** public policies in the EU are promoting the use of technology in dispute resolution, especially in regards to consumer affairs. Yet, recent studies show the limited use of ODR mediation especially in Spain.

We have to consider the European guidelines to resolve the disputes in consumer matters with a simple process in the European Platform "Tu Europa or Your Europe".

In Spain the promotion of ODR is done particularly in two Acts: The "Act on Mediation in Civil and Business conflicts" and the "Act on Information Society Services". There are several organizations, which offer these types of services, but ODR has limited use.

III. CONCLUSION

To summarize, I would like to present my conclusions regarding the resolution of Consumer disputes in Spain:

1. The landscape of legislation in consumer and user areas is very complex with multiple specialties.
2. In Spain, there are no specific regulations on mediation in consumer law and we have, as well, an absence of a "Mediation culture".
3. Arbitration is the star system to resolve conflicts in consumer and user claims in Spain.
4. In Spain we need to implement the Consumer Rights Directive. In this way I would like to mention three new questions about Spanish legislation: in October 2015 we had a important change to our Mediation Act in promoting a mediation culture in Spain yet we continue to have a lot of mediators and no mediations to do; we are expecting, in Spain, the publication of the new Royal Decree on Alternative Dispute Resolution relative to consumer protection, which will incorporate the Directive on alternative dispute resolution for consumers into national law, whose main goal is to improve the European market ensuring free movement of goods and services. In Spain we only have a special Decree on mediation in consumers relationship in the Autonomous Community of Catalonia with its own "Consumer Agency" based in Barcelona. The Catalonia Consumer Agency offers advice to consumers from Catalonia with queries or complaints concerning consumer acts or contracts involving companies all over the EU, as well as EU consumers who need information about consumer transactions with professionals located in Catalonia (www.consum.cat).

We hope, that, in the future, mediation in Europe and Spain will be the best ADR system for resolving conflicts between consumers and companies, because today litigation is not the best solution.