15 March 2011

Our ref: ICAEW Rep 31/11

Your ref: Consultation on ADR

European Commission
"Consultation on ADR"
Directorate – General Health and Consumers
Avenue de Bourget 1-3
B-1140 Brussels (Evere)
Belgium

Dear Sirs

ALTERNATIVE DISPUTE RESOLUTION IN THE EUROPEAN UNION

The ICAEW is pleased to respond to your request for comments on *the use of Alternative Dispute Resolution (ADR) as a means to resolve disputes relating to commercial transactions and practices in the European Union.*

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW REPRESENTATION

ALTERNATIVE DISPUTE RESOLUTION IN THE EUROPEAN UNION

Memorandum of comment submitted in March 2011 by ICAEW, in response to the consultation paper on the use of Alternative Dispute Resolution (ADR) as a means to resolve disputes relating to commercial transactions and practices in the European Union published by the Health and Consumers Directorate General of the European Commission in January 2011

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INTRODUCTION

1. The ICAEW welcomes the opportunity to comment on the consultation paper *The use of alternative dispute resolution (ADR) as a means to resolve disputes related to commercial transactions and practices in the EU* published by the Health and Consumers Directorate General of the European Commission in January 2011. ICAEW is listed in the Commission's Interest Representative Register (ID number: 7719382720-34).

WHO WE ARE

2. The ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, we provide leadership and practical support to over 134,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. We are a founding member of the Global Accounting Alliance with over 775,000 members worldwide.

3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. We ensure these skills are constantly developed, recognised and valued.

MAJOR POINTS

Support for the initiative

4. Alternative Dispute Resolution (ADR) can represent an effective and reliable means of resolving disputes related to commercial transactions, and can be far faster and more cost effective than court proceedings. We are therefore pleased that the European Commission are considering ways in which ADR systems across Europe can be improved, and consumer awareness of the opportunities for ADR can be raised.

5. There are, of course, a wide range of ADR techniques, with a corresponding range of characteristics. Differing forms of ADR will be appropriate for use in different circumstances and for different purposes. It will be important that the EU maintains a flexible approach so that these will continue to be available for consumers and other users. Efforts to promote consistency or the rights of consumers should not lead to a lack of flexibility or the loss of some types of ADR which are specific to particular groups or circumstances.

6. The most frequent forms of ADR that we are aware of are:

   - Compulsory schemes – that is, schemes which apply to certain categories of supplier, as a condition of their membership of a regulated sector, representative body or profession, and which must be complied with by them, under the terms of their membership. Examples of these schemes are ombudsmen and professional complaints systems

   - Voluntary systems – that is, systems of ADR that are undertaken by the parties to a dispute either as a contract term when they first agree to do business (such as a contract arbitration clause) or once a dispute has arisen, in an attempt to reach a mutally satisfactory solution without having to resort to legal action (such as mediation).

7. We refer to these two types of ADR in our responses to specific questions posed in the consultation document. Voluntary systems include many other methods of using experts or other third parties to assist in resolving differences which might otherwise lead to court action. These include, but are not limited to, the use of professional valuations to reach a transaction value, rather than relying on the parties reaching agreement; expert determination (which is analogous to, but different from, mediation or arbitration). For example, over the last ten or twenty years

chartered accountants in the UK have increasingly been asked to carry out valuations of shares or businesses. Where the participants in a small company or partnership disagree and need to go their separate ways, this can help in sharing the proceeds equitably, often saving the business and minimising the sometimes inevitable acrimony. ICAEW has a "President's Appointments Scheme" under which we are pleased to appoint one of our members to carry out these or similar projects on behalf of anyone approaching us for such assistance.

RESPONSES TO SPECIFIC QUESTIONS/POINTS

Consumer and Business Awareness of ADR

Question 1

What are the most efficient ways to raise the awareness of national consumers and consumers from other member states about ADR schemes?

Question 2

What should be the role of the European Consumer Centre's network, national authorities (including regulators) and NGOs in raising consumer and business awareness of ADR?

The Role of the European Consumer Centre's Network

8. We were impressed by the quality of the home page of the European Consumer Centres' Network at http://ec.europa.eu/consumers/ecc/index_en.htm, and the ease with which users could link through to the network member body for either their home state, or the one where they have experienced a problem. We suggest that the easiest way to increase general awareness of ADR schemes and other systems of ADR would be to ask member states to undertake a comprehensive publicity campaign to draw attention to this site, and the sites of their national European Consumer Centre (ECC). This could include posters placed in all public buildings where citizens habitually seek information, such as town halls, public libraries and post offices.

9. The sites of the national ECCs are (understandably) less consistently good than the central site. All are useful, though few appear to be comprehensive in covering all, or even a large number of, the ADR schemes that are available in their country. The more these sites can be made comprehensive, the more that citizens will refer to them themselves and also refer other people to them.

10. We suggest that the national ECCs are also asked to give information on voluntary systems of ADR, and how they can be accessed, as well as compulsory ADR schemes.

Awareness of Mediation and Arbitration

11. Within the UK, the legal profession tends to be the 'gatekeeper' of voluntary ADR processes such as mediation and arbitration. Indeed, the 'fourth mediation audit' by CEDR (Centre for Effective Dispute Resolution) recorded that nearly 65% of civil and commercial cases originate from clients and their solicitors making direct referrals to mediators rather than through service organisations. Legal service providers as well as the court system should actively promote ADR and provide information on how to access such services.

12. Consideration could be given to a requirement that the parties to a consumer dispute attend an 'information session'. This would be similar to family mediation in the UK where divorcing couples must attend a mediation awareness session before embarking on litigation. A similar process could be considered for civil and commercial disputes. No party to a dispute should be forced to accept mediation or arbitration, but they could be required to attend an 'information session' and be properly informed as to the benefits of these processes in order to make an informed decision as to

whether to proceed or not. For example, in British Columbia, they have a 'Motor Vehicle Notice to Mediate' and, in the first four years of launching the process, it was used in over 6,000 actions with a success rate of 74%[1]. A 'Notice to Mediate' is sent after the filing of the defence and requires the compulsory attendance of a pre-mediation session but the mediation process afterwards is voluntary. Courts have discretion to penalise parties resistant to a mediation session.

ADR Pledges by Government Departments and other organisations

13. In 2001 the UK government launched an 'ADR Pledge' to aim for all government departments to have an ADR clause in their procurement contracts and to utilise ADR whenever possible in government disputes. Recently, it has been announced that the government hopes to relaunch that pledge and to involve businesses and organisations with it. A number of regulators including the ICAEW and the Law Society together with bodies such as the Chartered Institute of Arbitrators and the Royal Institute of Chartered Surveyors all offer various ADR schemes to their members (and sometimes to a wider market) and this should be encouraged throughout the EU.

14. It is suggested that the creation of a 'pledge' to utilise ADR within business would be a very positive step and would be a cost-effective and efficient way of communicating awareness of ADR to the wider business community. There should be considerable encouragement for organisations and companies to sign up to the pledge, which should require a real commitment and needs to be proactive, not merely paying 'lip service' to the concept.

TV and Radio

15. Television and radio programmes which focus on consumer rights could be approached, with a view to their giving periodic coverage of ADR schemes and other ADR techniques.

Question 3

Should businesses be required to inform consumers when they are part of an ADR scheme? If so, what would be the most efficient ways?

16. We suggest that all ADR schemes should have it as a condition of membership that participating businesses should be required to inform consumers and other customers or clients of their rights under that scheme. The way in which this information is given should also be laid down in the rules of the scheme, to ensure that they are readily apparent to customers or clients. This could, for example, include coverage on all correspondence, invoices and other business communications, on the businesses' own websites and in sales literature and advertisements.

Question 4

How should ADR schemes inform their users about their main features?

17. The ICAEW has been proactive in trying to inform potential users about various ADR systems, by way of magazine articles, various letters, emails to its member base, presentations, and utilising its members to arrange meeting with senior executives of FTSE companies. Other ADR providers who may not have similar resources or contacts, should utilise the Internet and make approaches to their local courts and Citizens Advice Bureau to ensure that they have information in relation to their local ADR services but also to consider putting presentations on to their local Chamber of Commerce, business organisations, courts and solicitors.

18. Individual schemes should have information available on their website, to inform all potential users of their terms and conditions. They should also have information available to give to consumers or

[1] http://cpdseminars.ie/articles/mediation-ireland-lessons-from-other-jurisdictions/

providers, at the start of a dispute resolution procedure, to inform them of how the process will be undertaken.

Involvement of Traders/Suppliers

Question 5

What means could be effective in persuading consumers and traders to use ADR for individual or multiple claims and to comply with ADR decisions?

19. In the UK over the past five years, there have been a number of decided cases in the UK that have imposed costs sanctions upon parties where they may have 'unreasonably' refused the opportunity to mediate a dispute. Research appears to show that the uptake of mediation is highest when the use of mediation is publicised. Giving practical examples of cases (as the UK government does in its annual ADR Pledge report) would make it more obvious for consumers, traders and businesses to recognise situations in which they find themselves which are capable of being resolved through the use of mediation. Such examples could be contained in literature and on websites of service providers.

20. There are also numerous fees that need to be paid for proceedings to be issued at court. A fee could be 'discounted' or even exempted if the parties had attempted mediation first.

21. In respect of the means to ensure compliance with ADR decisions, mediation (for example) is a process designed to find a resolution which is then encapsulated into a legally binding contract and therefore the parties would be bound by contract law to fulfil their obligations. Alternatively, a settlement could be made admissible as evidence in future litigation if one party fails to comply with the terms of the agreement.

22. Where a consumer or trader has rejected a decision made by an ombudsman or a professional body's decision on a complaint, and appealed to a Court, similar cost sanctions to those described in 19 and 20 above could be applied, where the Court is of the opinion that the original ruling was appropriate and should stand.

Question 6

Should adherence by the industry to an ADR scheme be made mandatory? If so, under what conditions? In which sectors?

23. Where any particular sector is already subject to statutory regulation, such as regulated financial services, it is in general appropriate for that system of regulation to include a mandatory ombudsman or other ADR scheme, for the protection of consumers.

24. Any group of citizens should be able to make membership of their organisation conditional upon individual members or member firms participating in their ADR scheme. This is the basis upon which ICAEW operates its system of dealing with complaints against our members. We would not consider that any set of skilled persons would justify a description as a profession, or should be entitled to self-regulation of functions that would otherwise be regulated by a Government agency, if they failed to protect the interests of the clients of their members in this way.

25. We see no harm in requiring parties who are considering litigation against each other to be required to consider mediation as an alternate way of resolving their disputes. Indeed, a research article in 2001 for the Ontario Mandatory Mediation Program[2] showed a high level of support for their scheme, evidenced by a willingness of participants to take a similar approach to resolution of issues not covered by the mandatory scheme.

[2] http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/eval_man_med_final.pdf

26. Outside these circumstances, we would not consider it appropriate to make adherence to an ADR scheme mandatory. However, once a commercial organisation has signed up to either an ADR scheme or to individually arranged ADR, such as mediation or arbitration, compliance with the ADR should be enforceable by the courts.

27. As an alternative to mandatory schemes, encouragement of organisations voluntarily to pledge to dispute resolution (and within that pledge a positive commitment towards using ADR) may be a more appropriate way forward.

Question 7

Should an attempt to resolve a dispute by individual or collective ADR be a mandatory first step before going to court? If so, under what conditions? In which sectors?

28. Where an individual or collection of consumers or other parties has rights under an ombudsman or other ADR scheme which is mandatory on industry members, we see no reason why it should not be compulsory for the consumer(s) to attempt resolution under that scheme before going to court.

29. Regardless of whether or not the individual has access to an ombudsman or other mandatory scheme, it would be highly desirable for them to be made aware of other non-scheme opportunities for ADR, before taking their dispute to court. It may be appropriate to require parties to attend a mediation awareness session before embarking on litigation. The success of the British Columbia Motor Vehicle Notice to Mediate process is evidence of the success of that type of scheme.

Question 8

Should ADR decisions be binding on the trader? On both parties? If so, under what conditions in which sectors?

30. Where any party voluntarily enters into any ADR process then the terms of that process should be binding on that party. For example, both mediation and arbitration are ADR systems which are entered into voluntarily by both parties. Mediation, if successful, converts an agreement into legally binding obligations on both parties. Arbitration will impose a decision on both parties. Parties going into the process must be reassured that, if a settlement is found, that will put a legal obligation on the parties to comply with it.

31. However, where ADR schemes are in place which are not entered into voluntarily by both parties, such as ombudsmen schemes set up as part of a system of statutory regulation or as a mandatory requirement of entry to membership of a profession, then either their decisions should not be binding or there should be a system of appeal, whether or not to the courts, to ensure that decisions made are not unjust to either party.

ADR Coverage

Question 9

What is the most efficient way of improving consumer ADR coverage? Would it be feasible to run an ADR scheme which is open for consumer disputes as well as for disputes of SMEs?

32. An ‘umbrella’ organisation or organisations (see question 11 below) could be well placed to identify gaps in the coverage of individual ADR schemes both in a particular country and throughout Europe. Having identified the gaps, they could then, perhaps, work with industry members, regulators and other interested parties, to extend existing schemes or set up new ones to fill the gaps.

33. We see no reason why a single ADR scheme should not cover both consumer and SME disputes. In our own case, the way we deal with complaints made against any of our members has to accommodate complaints from any client of an accountancy firm, whether an individual or a business of any size. It is sufficiently flexible to act appropriately, in accordance with the circumstances of each dispute. Similarly, the voluntary systems we provide for the resolution of disputes are open to anyone, though some may be less suitable to individual consumers for reasons of cost.

Question 10

How could ADR coverage for e-commerce transactions be improved? Do you think that a centralised Online Dispute Resolution (ODR) scheme for cross-border e-commerce transactions would help consumers to resolve disputes and obtain compensation?

34. Where our members provide services by electronic means, we would expect to address any complaints against them in the same way as we address any other complaints, albeit we would expect the primary means of communication with the parties concerned to also be carried out electronically.

35. In principle, a centralised ODR scheme could be a good first step and allow consumers to access all the information that's necessary to help them resolve disputes from one central place. However, it is important that any centralised ODR scheme does not undermine a better focussed scheme with a closer understanding of the underlying issues for a particular industry or profession, regardless of the means of supply. In some circumstances, it will often be appropriate for a centralised ODR scheme to refer consumers on to an industry scheme. If this is not done, it is essential that there is a means in place by which decisions can be made on which scheme should deal with specific complaints. It could be highly damaging to the reputation of ADR as a whole, if different parties to a dispute approach different ADR schemes, more than one resolution process was initiated and duplicated costs (and possibly decisions) resulted.

Question 11

Do you think the existence of a 'single entry point' or 'umbrella organisations' could improve customers' access to ADR? Should their role be limited to providing information or should they also deal with disputes when no specific ADR scheme exists?

36. The current European Consumer Centres' Network should be developed to provide more comprehensive information on qualifying ADR schemes, thus extending themselves to supply the single entry point to all compulsory ADR schemes. It could also provide information on the means to access voluntary forms of ADR, such as mediation or arbitration - for example, in the UK this could consist of a cross reference to the Civil Mediation Council.

37. At present, in the UK, there are plethora of organisations, groups and individual mediators, though the market continues to be dominated by a select few. While this provides competition which favours consumers, it can likewise confuse them. An umbrella organisation, like the Civil Mediation Council in the UK, could help minimise any confusion, clarify to the consumer the right organisations and provide details of a range of appropriate organisations. We would welcome the introduction of an equivalent service on a cross-European basis.

38. It would be preferable for the role of the single entry point or umbrella body to be limited to providing information and referrals. This would avoid conflicts of interest between ADR services provided by the umbrella organisation and those provided by the other organisations about which it provides information.

Question 12

Which particular features should ADR schemes include to deal with collective claims?

39. No comment.

Question 13

What are the most efficient ways to improve the resolution of cross-border disputes for ADR? Are there any particular forms of ADR that are more suitable for cross-border disputes?

40. Our own complaints mechanism is open to clients of our members throughout Europe, and we suggest that all such schemes run by professional bodies or business organisations should be run on a Pan-European basis. In principle, it could be mandatory for all single state ADR schemes to cover cross border disputes within Europe in the same way that they apply to home state disputes. However, cross border disputes may be more costly to resolve, and we would not like to see effective nationally based schemes having to close or become too costly, through lack of resources to deal with cross border cases on an equivalent basis.

41. An active programme of ensuring ADR providers who meet appropriate criteria are placed on the ECC lists should be pursued. When a complete list is available, there should be an examination of the scope of service of those providers and, where there are limits on the provision of a particular service, active steps should be taken to try to work with other providers to fill that gap.

Funding

Question 14

What is the most efficient way to fund an ADR scheme?

42. It is probably most efficient for ADR schemes to be funded directly by professional bodies, trade organisations and similar bodies, since their members will be motivated to ensure that they are run efficiently and cost effectively, to minimise their own need to contribute funds.

Question 15

How best to maintain independence when the ADR scheme is totally or partially funded by the industry?

43. In the UK, many professions (including our own of profession of accountancy as well as solicitors, barristers and doctors) deal with complaints (disputes) against their members through their own internal mechanisms. It is in the long term interests of the members of a profession that their reputation is maintained, thus providing the motivation to ensure that the process is clear and transparent, and independent of the interests of individual members of the profession. This will also tend to apply in relation to ADR schemes set up by industry sectors.

44. Similarly, ombudsmen schemes set up and administered by statutory regulators are funded by the industry, in that they are supported by regulatory fees paid by them, but independence is promoted by the involvement of the regulator.

45. Notwithstanding this motivation for fairness and independence, we suggest that ADR schemes run or funded by professions, industry sectors or their regulators should always have a procedure included by which either party can appeal to a higher authority, whether or not this is to a Court of Law.

Question 16

What should be the cost of ADR for consumers?

46. It is important for any ADR scheme to have a method of controlling the costs caused by complaints that have little or no merit and vexatious claims. Consumers should not be denied access to an ADR system, even if their claim initially appears to have little foundation, as they must have access to justice in whatever form they would seek. However, consideration could be given to some kind of contribution reflecting a party's financial circumstances with the possibility of that contribution being 'refunded' as a result of the ADR process.

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