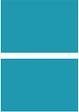


ARTICLE



Mediation in Consumer Matters. An Approach in European and Spanish Law

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Abstract

Given the obvious inadequacy of ordinary legal procedures to resolve consumer disputes, it is necessary to look for alternative models which, without excluding administrative and judicial proceedings, are more accessible to consumers. Although arbitration is the most widely used model, consumer mediation is becoming increasingly more important.

Consumer mediation lacks a systematic organisation in Spanish law and the rules on consumer arbitration only refer to mediation, remitting to regulation by the autonomous communities, some of which have exclusive competence in mediation in their Statutes of Autonomy.

Although mediation in consumer affairs often falls within arbitration procedures, the optimal solution would be to separate mediation linked to arbitration procedures (intra-arbitration) from consumer mediation detached from arbitration (extra-arbitration) to offer more alternatives for out-of-court conflict resolution, taking into account that a resolution obtained in a process of mediation will be enforceable if it is in the form of a court settlement or if it is recorded by a notary.

The conclusion is that consumer affairs are especially suitable for mediation, although the rules on consumer arbitration are inadequate for normalisation, making it necessary to introduce specific regulations on mediation for their application in this field.



Keywords

arbitration, mediation, consumption, consumer arbitration procedure, extra-judicial conflict resolution, consumer mediation, European law, Spanish law

1. INTRODUCTION

It is generally agreed that ordinary legal procedures are not the most appropriate way to resolve consumer disputes. Due to the disparity between the economic value of the claim itself and the disproportionate cost and duration of court proceedings many consumers forego claiming their rights through these procedures.¹

Therefore, it was vital to seek alternative models of conflict resolution that would not deter consumers from exercising their constitutionally recognized rights, of course, without prejudice to administrative or judicial procedures.² Although arbitration was, and still is, the most widely used model for resolving consumer disputes, me-

diation is becoming increasingly more relevant, as demonstrated by successive reports published by the National Consumer Institute.³

The special feature of consumer mediation relative to other types of mediation is that the conflict is between a consumer or a user and company or a tradesperson. Both parties need to have that status according to the law (Royal Legislative Decree 1/2007 of 16 November, approving the Revised Text of the General Law on the Protection of Consumers and Users and other complementary laws). The origin of the dispute must be a legal relationship in the area of consumption, for example purchasing a product or contracting a service. The mediator will offer help and guide the conflicting parties to narrow the gap between them and adopt a mutually acceptable agreement.



2. CONSUMER MEDIATION IN THE EUROPEAN UNION

Interest in alternative techniques for dispute resolution in consumer matters is not limited to individual member states and the techniques have also been promoted by the EU.

The need to build consumer and business confidence at EU level, assuring them that their conflicts will be treated equitably and effectively, has led the European Commission to take initiatives. They include the Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to bodies responsible for judicial settlement of consumer disputes (OJ L-115/31, 17 April 1998). This recommendation is limited to the procedures which, regardless of their nature, lead to the resolution of the dispute through the active intervention of a third party who proposes or imposes a solution.⁴

A further important reference is the Commission Recommendation of 4 April 2001, on the principles applicable to the extra-judicial bodies for consensual resolution of consumer disputes not covered by Recommendation 98/257/EC (OJ L-109, April 19, 2001). The Recommendation applies to those responsible for bringing the parties together to find a mutually agreed, out-of-court settlement, who must respect the principles of impartiality, transparency, effectiveness and fairness of the proceedings.⁵

More recently, the European Commission Communication of May 7, 2002, on the "Consumer Policy Strategy 2002-2006" directed to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, re-emphasizes alternative dispute resolution as an ideal means for cross-border conflicts.⁶

Finally, mention must be made of Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ, 24 May) although it does not apply to the matters under consideration here. This is pointed out explicitly in point 11: "This Directive should not apply to pre-contractual negotiations or to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute."

3. CONSUMER MEDIATION IN SPANISH LAW

Currently, consumer mediation lacks a systematic regulation in Spanish law. At state level, consumer mediation is not covered by the Royal Decree 1/2007 of

16 November, approving the Revised Text of the General Law for the Protection of Consumers and Users and other complementary laws. Royal Decree 231/2008 of 15 February, which regulates the Consumer Arbitration System, has 64 articles, of which Article 38 is the only one dedicated to mediation, while noting that "[...] mediation is governed by the applicable legislation on the subject" (Royal Decree 231/2008, Article 38.2). Furthermore, the explanatory memorandum of this Royal Decree states that it does not include regulation "in coherence with competences the autonomous regions have in these matters" (paragraph 9 of the Explanatory Memorandum). It should be noted that most Autonomous Communities have full authority to regulate consumer mediation and, in fact, some of the recent Statutes of Autonomy claim exclusive jurisdiction "to regulate mediation procedures". To cite a few examples:

- The Statute of Autonomy of Catalonia (approved by LO 6/2006 of 19 July) (BOE of 20 July 2006). Article 49.2 establishes that "public authorities must guarantee the existence of instruments for mediation and arbitration in consumer matters, promoting awareness and use, and must support consumer and user organizations."
- The Statute of Autonomy of the Balearic Islands (approved by LO 1/2007 of 28 February) (BOE of 1 March, 2007). This autonomous community has exclusive competences to "protect consumers and users", and in particular, to "regulate mediation procedures" (Article 30.47).
- The Statute of Autonomy for Andalusia (approved by LO 2/2007 of March 19) (BOE of March 20, 2007). The autonomous community of Andalusia has exclusive competences for the "defence of consumer rights, the regulation of mediation procedures, information and education for consumption and claims" (Article 58.2.4º). It also states that "the Andalusian government can develop mediation and conciliation tools and procedures to resolve conflicts in matters within its competence" (Article 150.2).
- The Statute of Autonomy of Aragon (approved by LO 5/2007 of 20 April) (BOE of 23 April 2007). The Autonomous Community of Aragon has exclusive competences in the following areas: "Consumption, which includes the regulation of the protection and defence of consumers and users; promotion of consumer associations, training and education for responsible consumption and the regulation of mediation bodies and procedures" (Article 71.26ª).

Many Autonomous Communities refer to mediation in their Consumer Statutes or autonomous laws on consumer protection. Law 1/2006 of March 7 on Defence of Consumers and Users (BOC 15 March 2006 and BOE of 31 March 2006), of the Autonomous Community of Cantabria, attributes to Municipal Offices for Consumer Informa-



tion the function “to serve, where appropriate, as a channel for voluntary dispute mediation between consumers or users and tradespersons or entrepreneurs” (Article 17.4.d).⁷

As for consumer mediation, according to Article 38.1 of Royal Decree 231/2008, this is attempted, unless the dispute falls within one of the causes of exclusion for arbitration stated in Article 2.2 of Royal Decree 231/2008. Mediation is not possible in conflicts that involve “poisoning, injury, death or those in which reasonable suspicion of crime exists, including liability for damages directly resulting from them, as provided in Article 57.1 of Royal Legislative Decree 1/2007 of 16 November, approving the revised text of the General Law for the Protection of Consumers and Users and other complementary laws”. Similarly, there can be no mediation if any of the parties involved is against it, or when there is a record of the fact that mediation has been tried without results (Article 38.1 and 25.1.II RDAC).⁸

The Consumer Arbitration Boards, according to Article 6f of RD 231/2008,⁹ are entrusted with the task of mediating between businesses and consumers, as was the case when Royal Decree 636/1993, of 3 May was in force, regulating the Consumer Arbitration System.

4. CONVENTIONAL MEDIATION (EXTRA-ARBITRATION) AND ARBITRATED MEDIATION (INTRA-ARBITRATION)

One of the issues raised, upon study of the regulation, is related to whether mediation is conceived as a stage prior to arbitration or forms part of arbitration. According to an important part of legal doctrine, among which the views of Manuel Jesús Marín López can be highlighted, Royal Decree 231/2008 clearly opts for the second interpretation:

“[...] This becomes clear not only from the content of Art. 38 (Mediation in Arbitration), but also from Articles 37.3 and 49.1.I of the RDAC (Royal Decree on the consumer arbitration system). The first because it requires the resolution starting the arbitration process to expressly state ‘the invitation to the parties to reach an agreement through mediation’. Therefore, mediation can occur, if it occurs at all, after the initiation of the arbitration process. And the second because, if previous mediation attempts are made, the deadline for announcing the findings (six months from the initiation of arbitral proceedings) must be delayed, though this period will not exceed one month from the agreement for the start of the arbitration procedure.”¹⁰

Mediation as part of the consumer arbitration procedure explains why the process can only be initiated at the request of the consumer, and this unidirectional functioning is an essential feature of the Consumer Arbitration System. Arbitration proceedings can start only on request by the consumer, not a company, shopkeeper or professional tradesperson, and consumer mediation can only be sought by those who feel their rights have been infringed on purchase of a product or contracting a service, therefore seeking compensation, damages or both.

However, this view of mediation in consumer matters means the full practical potential of the mediation tool is not exploited. By integrating mediation in the arbitration process, the opportunity is lost to offer autonomous consumer mediation, independently from arbitration, for cases in which one or both parties wish to refrain from seeking arbitration. This problem is avoided by distinguishing between conventional and arbitration mediation, or, in parallel with judicial mediation, intra-arbitral and extra-arbitral mediation.

Arbitration mediation could be applied to those forms of mediation that are understood to have been carried out once the parties involved agree to submit to arbitration and some kind of agreement is reached between the company and the consumer or user, thereby ending the dispute. Although there is agreement, submitting the case to arbitration necessarily implies that completion of the procedure requires a judgement by the Arbitration Panel to which the parties are subject.

In practice, the agreement reached by the disputing parties is reflected in a judgement by a single arbitrator who, normally, is one of the accredited arbitrators proposed by the public administration.¹¹

It is clear that, in these cases, the agreement reached through mediation can be considered approved by the arbitrator who gives the formal ruling, which is enforceable. Submission to arbitration is a procedural exception in that the finding does not become part of jurisdiction.¹²

It is possible that the company involved has not joined the consumer arbitration system and, moreover, is not willing to submit to arbitration. This company is, however, willing to make an offer to the user or accept some of the user’s claims. For these cases, the ideal solution would be to offer mediation by the Arbitration Board without having to present the case for an arbitration procedure. This means accepting conventional mediation independent from arbitration and opening a new door to out-of-court settlements. This mediation could be carried out by the Arbitration Board, always guaranteeing independence and impartiality of the mediator, and ensuring they never take on the role of arbitrator in later procedures for the same case.¹³

In the case of conventional mediation, there is no need for a legal ruling but finalisation through agreement (conciliatory ruling) can be sought. In our legal system such an agreement would have the effect of a transaction, insofar



as it is a composition of a case that can be classified under Article 1809 of the Civil Code, and the effect of *res judicata* in Article 1816 for extrajudicial transactions.¹⁴

In the case of a judicial transaction where judicial approval of the agreement exists via Article 517.2.3 of the LEC 1/2000, enforceable status will also be awarded. If there is no judicial approval, Article 517.2.4 of the LEC 1/2000¹⁵ offers the possibility of obtaining enforceable status on registration by a notary.

By making this distinction, it is possible to avoid or obviate the ambiguity as to whether mediation is a stage prior to arbitration proceedings or an actual stage in them. In some cases mediation will be integrated into the arbitration proceedings, and in others it could be offered autonomously, independently from arbitration, to resolve disputes between company and consumer.

5. CONCLUSIONS

The fact that mediation has, at last, been explicitly included in the field of consumer arbitration processes should be seen very positively as a commitment to the introduction of alternative dispute resolution techniques, which is also becoming more widespread in other areas (families, residential communities, at work, organisations, etc.). However, including mediation in the regulation of consumer arbitration can lead to some confusion about the concept and legal framework which should be clarified.

It is necessary to be aware of the fact that the regulation of consumer arbitration is not ideal for regulating mediation, but this new way to resolve consumer disputes should be welcomed. In addition, it makes it perfectly clear that the legal regulation of mediation is not going to be addressed. The explanatory memorandum mentions that this restraint is applied because of jurisdictional issues. Applying a different set of regulations for the legal framework of consumer mediation is something to be grateful for, as it avoids confusion between the two systems of conflict resolution. Any confusion between the two would hinder full development of consumer mediation in practice, undermining effectiveness in many cases in which no party wants to accept the outcome of arbitration. For this reason, this paper has distinguished between what has been called arbitration mediation and conventional mediation.

We can not ignore that the field of consumption is particularly suitable for the development of mediation, because, as experience has shown, the majority of claims made are the result of misunderstandings, limited information or even limited attention paid by the consumers themselves.

It is certainly good to promote the possibilities for the parties involved to resolve their dispute in accordance with their own interests, and not to have a solution imposed by a court of law or arbitration body. This contributes to voluntary compliance with the agreement and reduces strain on legal bodies. ■

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■ Endnotes

- 1 This is how MARÍN LÓPEZ (2007) puts it in "Consumidores y medios alternativos de resolución de conflictos" [...] it is not sufficient to 'grant' rights to the consumer. It is necessary to establish appropriate mechanisms to enable consumers to 'enforce' their rights. It is clear that they can exercise these rights through courts of law. However, this approach is unsatisfactory for the consumer, for several reasons. On the one hand, legal procedures are generally not suitable for resolving disputes for small claims. Consumers will not seek their rights through legal channels when they are certain that the costs involved are higher than the amount in dispute, with the inferior position of the consumer as compared to companies evident. Companies sign contracts en masse, being able to prepare in advance for any claim, usually advised by lawyers and able to include the cost of possible claims in the price of their end products. In contrast, for consumers the threat to their interests is unknown, requiring a prompt reaction and the need to seek advice from third parties. Overall, courts of law are slow and can cause financial costs to consumers".
- 2 As already noted, free choice is what distinguishes these methods of alternative dispute resolution from legal proceedings. Therefore, these methods can not be imposed on the parties, so preventing their right of access to courts of law.
- 3 <http://arbitrajedeconsumo.msc.es/webconsumo/memoria.html>
- 4 The European Commission recommends that all who have responsibility for out-of-court settlement of consumer disputes respect the following principles: independence, transparency, the adversarial principle, effectiveness, legality, liberty and representation.
 - a) *Independence*: The independence of the decision-making bodies must be ensured in order to guarantee the impartiality of their actions, maintaining a neutral position towards the conflicting parties. A measure to guarantee this independence is that the person appointed possesses the abilities, experience and competence, particularly in the field of law, required to carry out his function. When the decision is taken by a collegiate body, the independence of the body responsible for taking the decision must be ensured by giving equal representation to consumers and professionals.

b) *Transparency*: Awareness of the procedure and of the activities of the bodies responsible for resolving the disputes must be guaranteed and parties must have knowledge of how the procedure will develop. Therefore, parties must be informed of the kinds of lawsuits they can be involved in, procedure norms, the possible cost of the procedure for the parties, the type of rules serving as the basis for the body's decisions and the legal force of the decision taken.

The transparency principle also alludes to the need to inform the public of the results, as a way to strengthen confidence in the system. A requisite is the publication of an annual report setting out the decisions taken, enabling the results obtained to be assessed and the nature of the disputes referred to it to be identified.

c) *The adversarial principle*: This is a basic guarantee that the body's decision will represent a view that overcomes opposing positions after they have been clearly stated. The possibility to state the facts, put forward particular viewpoints on them and define legal consequences must be guaranteed, although this does not imply holding a hearing to comply with this requirement. Adversarial defence of the respective interests may be made in writing, without thereby violating the adversarial principle or constituting an impossibility to make use of the legal tools for the defence.

d) *Effectiveness*: Because these systems are an alternative to the judicial system and seek resolution of disputes by overcoming some of the problems with the civil procedures, they must be appropriate to the objectives they were meant to reach and effectively fulfil their function, overcoming the inconveniences of slowness, inflexibility and the cost of a legal procedure. The aim is to ensure effectiveness, while keeping it free of charge or setting moderate fees, setting short periods for resolution or eliminating the obligation to appear in court using legal representatives. In addition, the role of the decision-making body is strengthened, presenting a model of an active body and allowing it to take into account any factors conducive to resolving the dispute.

e) *Legality*: As the bodies for dispute resolution may base their decisions on grounds of fairness, and not necessarily on legal norms, guarantees must be made that the consumer is not offered less protection than that would be obtained by going to court, under EU law. Therefore, the consumer may not be deprived of the protection afforded by the mandatory provisions



of the law of the State in whose territory the body is established. In the case of cross-border disputes, the decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions under the law of the Member State in which he is normally resident in the instances provided for under Article 5 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations.

f) *Liberty*: The consumer may never be deprived of his right to bring an action before the courts for the settlement of the dispute, as it is an essential right to be able to turn to legal bodies to resolve disputes arising from his commercial activities. There has to be a conscious will, freely formed and expressed after the materialisation of the dispute to engage in an out-of-court procedure. Any commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute, is not valid.

g) *Representation*: The procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

- 5 a) *Impartiality*: Referring to the person or group of persons responsible for carrying out the procedure, and whose objective is for the parties to trust their work.

Impartiality should be guaranteed by ensuring that those responsible for the procedure are appointed for a fixed term and shall not be liable to be relieved from their duties without just cause.

Also, the third party, helping both sides to find solutions that are satisfactory and acceptable, may have no perceived or actual conflict of interest with either party. Impartiality must prevail in its action, not acting on behalf of any party and without seeking to impose any particular agreement.

b) *Transparency*: This principle highlights the need for information to be readily available to the parties so that they know about the functioning of the procedure: the types of disputes that can be dealt with by the body, preliminary requirements, languages in which the procedure will be conducted, procedural rules, effectiveness of the reached agreement, costs to be borne by the parties, etc.

c) *Effectiveness*: If the aim is to offer a true alternative to lawsuits, the inconveniences of lawsuits must be overcome. Therefore, the first thing that must be achieved is ease of use, recommending the possibility of use through electronic means, regardless of place of residence. This allows, in the case of cross-border disputes, alternative resolution to be an appropriate means to cover large distances, taking advantage of electronic communication.

In addition, the brevity of the resolution, the reduction of costs (it is recommended that it be free of charge for consumers, or that costs be moderate and in proportion to the value of litigation), representation not being required, and review of conduct of the parties, contribute to achieving efficiency of the system.

d) *Fairness*: The need to ensure fairness in the procedure not only requires a balance in the position of the parties, but is an expression of an ideal that is prevalent in the use of such al-

ternative methods. Therefore, the right to information on the voluntariness of the system and the possibility to abandon the procedure at any time are foreseen: ease in submitting of statements or presentation of evidence, information on the possibility of accepting or rejecting the proposed solution and warning about the status of the decision.

Being voluntary clearly distinguishes these methods from judicial proceedings. This means that the methods cannot be imposed on parties if they do not freely consent, and that parties may take back consent at any time. This principle of voluntary participation requires that consent is given freely and consciously, without the will of the individual parties having been forced or imposed. Moreover, the abandonment of the procedure or rejection of the proposed solution may not imply negative consequences if it is decided to turn to the judicial system.

Mention is also implicitly made of a principle of confidentiality, noting that the parties may submit arguments, information or evidence in their favour in a confidential manner, unless each party has agreed to pass such information to the other side. Discussions held during mediation to reach an agreement, must be confidential and can not be used later, unless otherwise agreed by the parties. This ensures greater freedom for the parties, and makes it possible to achieve better results. But this idea of confidentiality should not refer mainly to the withholding of information to the opponent, but rather to the private nature of the procedure, i.e. that the information exchanged is confidential. Thus, the information exchanged during the procedure should not be admitted as evidence in possible later lawsuits if the alternative method is not successful.

- 6 The aim of this Communication is to:

– Establish a high common level of consumer protection. It means harmonising, by whatever means is most appropriate (framework directive, standards, best practices), not just the safety of goods and services, but also those aspects of consumer economic interests that give consumers the confidence necessary to conduct transactions anywhere in the internal market. Under this objective, the chief actions will guarantee a monitoring of problems related to commercial practices addressed by the Green Paper on EU Consumer Protection and on the safety of services.

– Effective enforcement of consumer protection rules so that in practice they will have the same level of protection throughout the EU. The priority actions, under this objective are the development of an administrative cooperation framework between Member States and of redress mechanisms for consumers.

– Participation of consumer organisations in EU policymaking: in order for consumer protection policies to be effective, consumers themselves must have an opportunity to provide an input into the development of policies that affect them. Consumers and their representatives should have the capacity and the resources to promote their interests under the same conditions as the other parties involved. To achieve this objective, the main actions consist in the review of mechanisms for participation of consumer organisations in EU policymaking and in the setting up of education and capacity-building projects.



- 7 For further reading consult MARÍN LÓPEZ (2007). "Consumidores y medios alternativos de resolución de conflictos".
- 8 In literal accordance with Article 38.1 of Royal Decree 231/2008: "Where there are no grounds for rejection of the request for arbitration, mediation will be undertaken to enable parties to reach an agreement to end the conflict, except when any of the parties states explicit opposition, or when there is a record that mediation has been tried without effect."
"The entrepreneur who makes a public offer of adhesion to the Consumer Arbitration System may reject the possibility of mediation at this body, but silence is taken to imply consent" (Article 25.1.II RDAC, Royal Decree on the consumer arbitration system).
- 9 The Article states literally that "Consumer Arbitration Boards perform the following functions: f) Ensure the use of mediation prior to knowledge of the conflict at arbitration bodies, except when mediation does not apply as stated in Article 38."
- 10 MARÍN LÓPEZ (2008). "Análisis del Real Decreto 231/2008, de 15 de febrero, que regula el Sistema Arbitral de Consumo".
- 11 Article 19 of Royal Decree 231/2008 states with regard to Arbitration Panels that they may consist of one single member if parties so agree or if the head of the Arbitration Board decides, provided that the amount in question is less than 300 euros and the lack of complexity justifies it.
- 12 Article 48.2 of Royal Decree 231/2008 deals with this possibility, stating that "if during the arbitration proceedings the parties reach an agreement to end, in whole or in part, the conflict, the arbitration body will terminate the proceedings with respect to the points agreed, adding the reached agreement to the ruling, unless reasons for opposing have become clear."
- 13 On this point, Royal Decree 231/2008 states that the mediator should act with independence, impartiality and confidentiality in the same terms as arbitrators (Articles 38.3 and 41.2 RDAC). It also states that those who have acted as mediators cannot act as arbitrators in the same case or any other that is closely related to it (Article 22.1 RDAC).
We hope this supposition answers the question raised by Fidalgo López who wonders "whether it would be better to provide a single step of mediation as part of arbitration procedures" as he understands that "multiple routes generate an unnecessary delay in resolving arbitration" (FIDALGO LÓPEZ, 2009).
- 14 According to Article 1809 of the Civil Code, the transaction is a contract whereby each of the parties, giving, promising or withholding something, avoids the need for a lawsuit or put an end to already initiated procedures. Article 1816 states that, for the parties, the transaction has the status of res judicata, however, it will not follow final demand proceedings but compliance of a judicial transaction will be sought.
- 15 Through this rule, procedural law establishes that judicial findings will be enforceable if they endorse or approve judicial transactions and agreements reached in the process, and, if it is considered necessary to record the concrete details, accompanied by relevant evidence of the proceedings. Public deeds are enforceable, provided they are originals. In the case of second copies, issued under a warrant and a summons for the person affected, or the person responsible, or issued with the agreement of all parties.

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