CONSUMER REDRESS SCHEMES: AN OUTLINE

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1. INTRODUCTION

Redress of consumer complaints is widely considered to be one of the major problems of consumer protection.[1] Reform of substantive consumer law will have little effect, if there is no effective control machinery. The enforcement of consumer rights may be undertaken by several means. The consumer him- or herself may take the initiative; he may be aided by a consumers' association; or an administrative agency may intervene. These are but the principal means of consumer redress. Other enforcement methods, in which the consumer will play a more limited role, include the enforcement of voluntary codes of practice by professional organisations and the enforcement of criminal law by the public prosecutor. These methods are more of a private or public penal nature. They can result in a reprimand or a fine for the supplier, but do not necessarily provide a remedy to the consumer.

During the last decades legislators all over the world have brought into existence an impressive array of statutory texts aimed at protecting consumers. Yet these texts will have little effect, if any at all, if there is no effective enforcement. How to provide a control machinery, which is inexpensive, informal and speedy? The question has been answered in various ways in the Member States of the European Union. This raises the question what Member States may learn from one another's experiences. Another question is whether Community action should be taken into consideration. The European Commission has recently published a Green Paper on this subject.

This issue of the *Consumer Law Journal* will deal only with consumer redress in which the consumer him or herself is the complainant or plaintiff. When no other way such as mediation or conciliation is open, the consumer will finally have to address a court in order to obtain relief. However, traditional civil procedure more often than not will refrain any but the most daring consumers from addressing a court. Courts are simply too expensive, time-consuming and awe-inspiring. Under heading 2, I analyse the drawbacks of court procedure from a consumer point of view in more detail. Various solutions have been discussed and sometimes been introduced to solve these problems. Under heading 3, I will present a short overview of such solutions as are introduced or debated in the present E.U. Member States.

The problem discussed in this issue is one of many which are often grouped together under the classification of Alternative Dispute Resolution (ADR). One of the questions usually dealt with is whether or not ADR is unconstitutional. Although that is an interesting question, this issue of the *Consumer Law Journal* will not address it. It is interesting though to notice that in Japanese legal writing the Western idea that courts should have a monopoly in the adjudication of disputes is not found.[2] Modern Western theory has come to the same conclusion: adjudication by the courts is the exception rather than the rule. In this sense, one may think of Western society being Japanised.[3]

2. DISADVANTAGES OF TRADITIONAL COURT PROCEDURES

For the private citizen, traditional court procedure has several drawbacks. These may be summarised as follows. First, going to court may be (1) expensive. There are (a) court fees to be paid; (b) the citizen has to bear his own costs: taking a day off to attend the process, travelling to court, etc.; (c) there are the costs of retaining counsel; (d) there is a risk of losing the case and having to pay the other party's (and one's own attorney's) costs; (e) there also are the costs of expert testimony or witnesses. This is aggravated by the fact that many consumer complaints are of minor financial importance. In such cases the risks involved do not warrant instituting proceedings.

Secondly, going to court is (2) time-consuming. This is due mainly to the (a) overload of courts; and (b) written procedures, which in many jurisdictions may drag on and on. The (c) possibility of appeal threatens to prolong the procedure still longer.

A third drawback of traditional court procedure is of (3) a psychological nature. Elements such as a court being also competent in criminal matters, sitting in robes and wigs, using archaic language and customs, may be brought together under this heading.

A fourth drawback is (4) the individual nature of civil

1 "The existence of adequate redress systems is generally considered crucial to the actual efficiency of the substantive consumer protection measures as laid down in legislation, codes of conduct, contract terms or other legal standards", Kjersti Graver, *Consumer Redress Systems in Seven European Countries* (The Hague (SWOKA) 1987), p. 2.

2 M. Kato, "The Role of Law and Lawyers" (1987) *Brigham Young University Law Review* 627–698.

3 See Z. Kitagawa, "Von der Japanisierung zur Entjapanisierung," in *Die Japanisierung des westlichen Rechts* (H. Coing *et al.* (eds.)) (Tübinger Symposium, Tübingen 1990), pp. 441–445.

procedure. Traditional procedure simply is not geared to the institution of mass procedures in case of mass disasters.

Finally, it is argued (5) that in the courts adjudication rather than mediation or conciliation is arrived at.

3. VARIOUS WAYS OF SOLVING THE PROBLEM

The demand for a solution of the problems just set out has been made from times immemorial.[4] In 1987, Blankenburg and Taniguchi came to the following conclusion in their General Report to the Eighth World Conference on Procedural Law: "Generally speaking, consumer protection is more efficiently achieved by out-of-court settlements through such mediators as complaints boards, ombudsmen and conciliatory commissions."[5] In the following article, however, I shall look at possibilities within the official court organisation. Various ways have been proposed or introduced to do so. First, with regard to expenses, a reduction of court fees has been proposed and sometimes been introduced (a). Taking a day off, to have one's day in court, no longer appears to be the great problem that it once was; the problem of having to travel has been solved in a number of jurisdictions by allowing the consumer to sue in the court of one's own domicile (for instance in the Netherlands) (b). A radical solution, borrowed from America, is the introduction of a contingent fee system of compensation for attorneys. Another is the provision of legal aid (which is often, however, not available for disputes under a certain amount) (c). The risk of losing may be diminished by the introduction of a rule that the losing party will not be ordered to pay the other party's costs (d). The installation of lay assessors, and providing free expert advice finally may lower the cost of expert testimony (e).

Time may be gained by making procedures more simple—doing away with traditional guarantees, such as hearing cases in several instances—first to decide questions of jurisdiction, then questions of law and finally of fact—the right to appeal, etc. Time may also be won by having the court set strict time limits.

The psychological elements mentioned above may be dealt with in a variety of ways. The adjudication may, for instance, take place in a separate court building; ceremonial garb and rites may be dispensed with; the use of plain language may be made compulsory, etc.

The massification of the production and supply of goods and services has been one of the major developments in our economy over the past centuries. The legal process has been slow to adapt to this development. Traditionally, civil procedure is geared to an individual conflict between two parties, not to one between a large corporation on the one hand and a loosely organised group of consumers. Providing private organisations or public representatives of the consumer interest, such as the Consumer Ombudsmen in the Nordic countries and the Director General of the Office of Fair Trading in the United Kingdom and his counterparts elsewhere in English speaking countries, with standing to sue may help to solve this point.

Conciliation or mediation are often thought of as better solutions than adjudication, even after a case has been brought to court. I do not adhere to this view. Having seen the performance of some referees in Australian Small Claims Tribunals, I nearly changed sides. But after giving the subject a second thought, for reasons to be set out below, I still maintain my preference for adjudication, once parties have opted for this procedure.[6] In my view the fact that courts do not concentrate on conciliation and mediation therefore is not a major problem of consumer litigation.

4. ANALYSIS OF NEW PROCEDURES

At a colloquium on consumer access to justice, organised in Ghent in 1982, the discussion of new procedures focused on a number of issues. This discussion has been the basis of a memorandum of the European Commission on "Consumer redress".[7] It is therefore worthwhile taking a closer look at the Ghent proceedings and the E.C. memorandum. In the following analysis, I will closely, although not completely, adhere to the Commission document.

The first issue concerns the nature of the proceedings: will they be of a civil, administrative or criminal nature? A civil procedure will have the effect that the individual consumer may get "his money back". An administrative procedure may lead to the revocation of a trader's licence. A criminal procedure finally may result in a fine or other sanction imposed on the trader. The distinction is not always so clear cut. Sometimes a criminal procedure may result in an obligation for the accused to pay damages to the consumer. And an injunction in a civil procedure may have the same effect as the revocation of a licence.

The distinction between civil, administrative and criminal procedures does not only refer to sanctions, but also to the norms applied. Thus, a civil tribunal will be more inclined to take the contract between the parties concerned as the paramount element, whereas a criminal court will attach more importance to questions of general or specific prevention.

A second issue relates to the structure of the court. Should the proceedings be public, *i.e.* organised by the State, or private, that is, organised by private organisations. Once again the distinction is sometimes less obvious than one might presume in the first place; the State may subsidise private conflict adjudication schemes or may force State-owned corporations to submit to such schemes. This brings us to the related question of

4 See for instance Margreth Barrett, "The Constitutional Right to Jury Trial: A Historical Exception for Small Monetary Claims" (1987) 39 *Hastings Law Journal* 125–163.

5 E. Blankenburg, Y. Taniguchi, "Informal Alternatives to and within Formal Procedures" in *Justice and Efficiency/General Reports and Discussions* (Deventer 1988), pp. 335, 354.

6 See my paper "Consumer Redress in Australia" in *Wege zum japanischen Recht/Festschrift für Zentaro Kitagawa* (Berlin, Duncker & Humblot, 1992), pp. 367–379.

7 "Consumer Redress/Commission Memorandum" to the Council transmitted on January 4, 1985, *Bulletin of the European Communities* Supplement 2/85.

whether or not the procedure should be voluntary or compulsory (for both sides). In case of a compulsory scheme, the question once again may arise whether this is constitutional: one of the parties may thereby be deprived of his/her right to a fair trial in a court.

The question whether or not the court should be public or private also influences the norms to be applied. Should a private tribunal apply the same criteria as the ordinary law courts? Or should a general principle of fairness be the overriding principle? In arbitration there is a classical division between adjudication according to the rule of law (*stricti juris*) or on the basis of equity (bona fide). Not only the substantive criteria may be classified in this way, the same applies to evidence. Often, Arbitration Tribunals or Small Claims Court are not bound by the ordinary rules of evidence and may apply equitable rules of evidence.

Other questions concerning the organisation of the procedure are whether or not the adjudicating body should be composed of a single legally trained officer or should include lay assessors, whether the court or court-like agency (hereafter: tribunal) should be centralised or decentralised, and whether or not procedure should be oral or written.

A further question concerns the competence of the tribunal. Should the tribunal only hear consumer complaints and no complaints from the other side. Should the tribunal also hear complaints from "professional consumers": enterprises which in the exercise of their trade or profession make use of the services of a bank, an insurance company, etc.[8] Should there be a lower threshold to refrain consumers from pursuing trivial complaints. Should there be a financial ceiling. Questions such as these will have to be resolved before a consumer tribunal or procedure can start.

Other points to be settled in advance are whether or not the complainant should be required to contact the supplier first, before addressing the tribunal. Should the complaint be in writing and if so, what should a tribunal do when during the handling of the complaint other complaints not mentioned in the statement of claim are presented? Should standard forms be available to facilitate lodging a written complaint? Should there be a fee for filing a complaint with the tribunal?

As far as the conduct of the case is concerned, it is of course important that there be guarantees that the procedure is simple and speedy. Should the registrar be empowered to offer consumers advice? And should the referee be interventionist? A highly debated issue is whether or not legal counsel should be allowed. Where counsel is allowed, the drawback of the costs involved may be somewhat diminished by not providing for a compulsory compensation of the costs of the winning party.

A major question to be settled is whether the referee or tribunal should seek a settlement or rather adjudicate the case. Some countries, such as Australia, have opted for the settlement approach. I doubt whether this is a commendable approach. I have two objections. First, I suggest that the endeavours to arrive at a settlement be undertaken at an earlier stage, for instance by a Neighbourhood Advice Center, a Consumers' Association or, at the latest, by the Registrar of the tribunal. Secondly, the two types of involvement should not be mixed: they involve different techniques and have different legal ramifications.[9] It now appears that some small claims procedures are stepping back from their previous emphasis on settlement. Thus, under section 18 of New Zealand's Disputes Tribunals Act, the referees shall assess whether it is appropriate for them to assist parties to negotiate an agreed settlement. This is far less compulsive language than the section's predecessor, section 156 of the Small Claims Tribunals Act, which claims the primary function of the tribunal was to attempt to bring the disputing parties to an agreed settlement. As a consequence, the number of agreed settlements has dropped considerably after the introduction of the new Act.[10]

A more technical legal question concerns the nature of the awards to be handed down by the tribunal. In most cases this will be just a consequence of the nature of the tribunal itself, which as we have seen also influences the kind of norms to be applied. A civil law court may award all kinds of civil sanctions such as damages, including punitive damages, specific performance, price reduction, avoidance of a contract or a contract term, an injunction for the future, etc. These are binding awards; in case of a private tribunal, the awards do sometimes only have a non-binding character. This is also the case in some of the private Ombudsman schemes.

Another question concerning the award is whether it should be handed down orally or in a written form, directly after the proceedings or reserved, with or without reasons (and whether in the first case only at the request of a party or as a matter of course). A question also concerns the enforcement: should this be left to the parties themselves or should the tribunal play a role in monitoring the enforcement. Finally, there is the question of to which body—if any—should lie appeal.

In several publications the access of traditional tribunals has been criticised: night shifts and weekend sessions have been proposed; informing citizens of their rights of access usually is not one of the strong features of ordinary courts.

Court decisions may serve at least two purposes. Apart from settling the dispute at issue, a decision may also contribute to law reform. The decision need not necessarily be in favour of the consumer to make this contribution. Cases lost by consumers may induce legislators to take up the issue and reform the law by statute. In order for a decision to exercise such influence, it is of the greatest importance that the decision be reported. This is a

8 See for a very broad definition of the concept of consumer in the E.C. Doorstep Selling Directive the conclusion of Advocate General Mischo in the *Di Pinto* case (C-361/89) of the European Court of Justice (rejected by the Court in its decision of March 14, 1991).

9 For a similar criticism see Richard Ingleby, "Court Sponsored Mediation: The Case Against Mandatory Participation" (1993) 56 *Modern Law Review* 441–451.

10 It dropped from one in five claims during the closing months of the Small Claims Tribunals to one in every eight now—Peter Spiller, "A review of the Disputes Tribunals of New Zealand" (1990) *New Zealand Law Journal* 109 at 111.

traditionally weak side of consumer disputes: decisions are rarely reported. The traditional law reports usually take little interest in consumer affairs; and specific consumer law reports only exist in a small number of countries or regions.[11] In the absence of law reports, providing for accessible documentation is a welcome alternative. The contribution of decisions to law reform is but one of a number of structural measures connected with deciding consumer disputes. Another, more controversial one is the drawing up of a black list of suppliers, products/services or trade practices which consistently lead to consumer complaints.

Then, finally, there is the question of funding. Should the redress mechanism be funded by government, by professional organisations, by consumers' associations, and/or by consumers through the payment of lodgement fees? Interesting as this question may be, it is more of a political nature and will therefore receive but limited attention in this issue. State funding is claimed by those who really think that the state has a monopoly of justice and therefore should fund those organisations which have taken up the state's charge. Those who are in favour of funding by professional organisations usually point out the advantages of self-policing to the professions concerned. Funding by consumer organisations may help establish bilateral redress systems. Payment of lodgement fees finally may make consumers more aware of the costs of litigation.

5. CONCLUSIONS

The problem of consumer redress is not one which a simple measure may remedy. Rather it is a complex collection of more or less important elements, most of which have to do with the failure of traditional court procedure, as it has developed over the years, to cope with modern consumer complaints.

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11 Belgium: *Droit de la Consommation/Consumentenrecht* (DCCR); Europe: *European Consumer Law Review*; Germany: *Verbraucher und Recht*; Netherlands: *Tijdschrift voor Consumentenrecht*; and of course in the Current Survey section of this Journal.