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PROCEDURE FOR
OUT-OF-COURT RESOLUTION OF CONSUMER DISPUTES
IN LIGHT OF THE ACT OF 23 SEPTEMBER 2016

The act of 23 September 2016 on extra-judicial resolution of consumer disputes¹ incorporates into the Polish legal order the following EU legislative acts: Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes,² and Directive 2013/524/EU of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes.³ The goal is to give consumers engaging in dispute resolution with business entities an option to apply to legal entities offering independent, impartial, transparent and effective methods of out-of-court dispute resolution, and to give economic operators a tool for avoiding lengthy and expensive judicial proceedings involving their consumers.⁴

This article seeks to outline the procedure used for extra-judicial resolution of consumer disputes. First, the core idea, and then the initiation, course and completion of out-of-court dispute procedure for consumer dispute resolution will be examined.

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¹ Journal of Laws of 2016, item 1823 [henceforth referred to as ADR].

² EU Official Journal of 2013, L 165 of 18 June 2013, pp. 63–79 [hereafter Directive 2013/11/EU].

³ EU Official Journal of 2009, L 165 of 18 June 2013, pp. 1–12 [hereafter Regulation 2013/524].

⁴ A. FIGURA, *Opinia do ustawy o pozasądowym rozwiązywaniu sporów konsumenckich* (3.10.2016), form no. 282.

1. THE IDEA AND TYPES OF OUT-OF-COURT PROCEEDINGS FOR CONSUMER DISPUTE RESOLUTION

The Polish ADR act provides rules for alternative consumer dispute resolution. A consumer dispute is defined as a dispute resulting from a contract concluded between a consumer and an entrepreneur (trader). If an entrepreneur, service provider or a warrantor refuses to recognise a consumer's warranty claim, and when the latter is convinced of his rights, then we deal with a consumer dispute (art. 2 para. 3 ADR). A domestic dispute means "a consumer dispute where a consumer, at the time he makes an offer to an entrepreneur or accepts an offer from an entrepreneur, is resident in the territory of the Republic of Poland" (art. 2 para. 4 ADR). A cross-border dispute means "a consumer dispute where a consumer, at the time of making an offer to an entrepreneur or accepting an offer from an entrepreneur, is residing in a Member State other than the Republic of Poland" (art. 2 para. 5 ADR).⁵ It should be noted, however, that the ADR act does not contain a legal definition of dispute, a fact of some relevance since the legislator has excluded some types of proceedings and disputes from the legislative regime, such as: complaint procedure, examination of consumer complaints by entrepreneurs, direct negotiations between an entrepreneur and a consumer (art. 5 para. 2 ADR).

In the broad sense, alternative methods of consumer dispute resolution encompass a range of various ADR facilities which involve the resolution or settlement of disputes by means of negotiation taking place between an entrepreneur and a consumer, various methods involving third parties, as well as settlements involving proceedings carried out before an arbitration court.⁶ The basic methods of extra-judicial dispute resolution are mediation and arbitration. In accordance with the Code of Civil Procedure⁷ (art. 183¹–183¹⁵), mediation is an amicable procedure. This

⁵ The application of these definitions referred to above is restricted to entrepreneurs having their registered office in the territory of Poland. The registered office of an entrepreneur is determined in accordance with the principles laid down in art. 4 paras. 1 and 2 ADR.

⁶ N. CREUTZFELDT, "Alternative Dispute Resolution for Consumers," in *The Role of Consumer ADR in the Administration of Justice*, edited by M. Stürmer, F. Gascón Inchausti, and R. Caponi (Munich: Sellier European Law Publisher GmbH, 2015), 3–4. Taking the views presented in literature on the subject into consideration, it seems that alternative methods of consumer dispute resolution will be all methods and types of proceedings which seek the resolution or settlement of a dispute achieved by the parties or with a third party involved, applicable beside civil procedure or in its context. See "Alternatywne metody rozwiązywania sporów w sprawach konsumenckich (cz. I)," *ADR. Arbitraż i mediacja* 2 (2008): 10–12.

⁷ Act of 17 November 1964 (Code of Civil Procedure), Journal of Laws of 2016, item 1822 as amended [henceforth referred to as CCP].

means that in each case the consent of both parties to a dispute is required as well as the rules of mediation and the mediator himself must be accepted. Its main goal is to “reach mutual understanding and a mutually acceptable, voluntary agreement.”⁸ Its voluntariness is reflected by the freedom of the parties to engage in mediation, conduct and continue such proceedings and decide on the conclusion and content of a settlement, if any.⁹ At any stage, the parties can withdraw from mediation. Mediation need not be public and the mediator must remain impartial throughout the mediation process. He is allowed neither to resolve the dispute subject to mediation nor to be on either party’s side. He conducts mediation using various methods aimed at an extra-judicial dispute resolution, such as helping the parties to formulate settlement proposals. Upon the parties’ joint request, he can propose methods of settlement but they will not be bound by them. Finally, a settlement reached before a mediator and approved by the court has the legal power of a settlement reached before the court. If such a settlement is enforceable, the court approves it by declaring it enforceable.

In art. 3 points 1–3, the ADR act defines three groups of out-of-court proceedings, the goal of which being to resolve a consumer dispute in compliance with the rules laid down in it. These are:

1) a proceeding enabling the parties to bring together their viewpoints, that is a mediation during which a competent authority is under no obligation to propose a solution. The mediator runs the mediation using various methods with a view to reaching an amicable settlement, his role being limited to assisting the parties in formulation of their settlement proposals;

2) presenting the parties with a proposed settlement of the dispute, that is mediation during which the mediator indicates ways of resolving the dispute. However, these are not binding on the parties;

⁸ Ch.W. MOORE, *Mediacje. Praktyczne strategie rozwiązywania sporów* (Warsaw: Wolters Kluwer, 2016), 49.

⁹ The principle of voluntary mediation has not been defined uniformly in doctrine. For example, in N.A. Welsh’s view, in accordance with the voluntariness principle, the parties “participate actively and directly in the process of resolving their dispute,” controlling the substantive norms guiding their discussion which guide them towards settlement; they seek mutual solutions, and finally they make a decision regarding the ultimate dispute resolution, i.e. either an agreement or not. N.A. WELSH, “The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization,” *Harvard Negotiation Law Review* 6 (2001): 16–17. This approach is shared by Ch. Moore, who does not rule out the so-called “permissible pressure” exerted on attempts at mediation, for example regulations providing for participation in mediation or even undertaking it as a result of the court’s decision. The starting of mediation under such circumstances does not mean that the dispute participants are forced to reach a settlement. MOORE, *Mediacje*, 49.

3) settlement of a dispute and the imposition of a solution on the parties, for example, an arbitration procedure which in some respects is similar to judicial proceedings. Its salient features are mainly: the primary role of willingness of the disputants, the auxiliary role of provisions of the substantive law, confidentiality, the speedy and deformed character of proceedings. The arbitrator settles the dispute arising between the parties and imposes a solution. A judgement is passed having the binding force of a judicial sentence after it has been declared enforceable by a common court. The parties are obliged to comply with this settlement.¹⁰ Therefore, the outcome of the procedure has a binding nature (art. 3 para. 3 ADR) unlike mediation proceedings, which are non-binding (at. 3 paras. 1–2 ADR).¹¹

2. THE INITIATION OF PROCEEDINGS RELATED TO CONSUMER MATTERS

The system of extra-judicial resolution of consumer disputes (the so-called mixed system) encompasses non-public sectoral entities composed of entrepreneurs operating in a particular trade, already functioning or newly established, and public sectoral entities established for or within the structures of public authorities. This group includes such entities as: President of the Office for Energy Regulation, President of the Office for Railway Transport, Financial Supervision Authority, Financial Ombudsman, President of the Office of Electronic Communications. Both public and non-public entities must be entered in the register maintained by the President of the Office of Competition and Consumer Protection to be able to obtain the status of an entity authorised to resolve consumer disputes out of court (art. 7 para. 1).

¹⁰ See M. ASŁANOWICZ, *Sąd polubowny (arbitrażowy). Komentarz (1154–1217 KPC)* (Warsaw: Wydawnictwo C.H. Beck, 2017).

¹¹ Incidentally, it should be noted that the procedural elements set forth in points 1 to 3 imply reasoning based on alternative (each of these solutions may involve separate extra-judicial proceedings) or conjunction (all three elements need to be fulfilled in out-of-court resolution of consumer disputes). It seems that both interpretations are worth considering, all the more so that the existing regulations specifying procedures for the settlement of such disputes allow proceedings which do not end with an administrative decision issued by a competent authority on the one hand, while on the other, a competent authority specifies an aspect of the settlement of a consumer dispute which is binding on the parties (see the provisions of the regulation of the President of the Council of Ministers of 17 May 2017 concerning the rules of organisation and operation of the Trade Inspection for out-of-court resolution of consumer disputes, Journal of Laws of 2017, item 1014; regulation of the Minister of Digital Affairs of 3 January 2017 on proceedings for out-of-court resolution of consumer disputes regarding telecommunication services conducted by the President of the Office of Electronic Communications, Journal of Laws of 2017, item 49).

A competent entity will conduct proceedings related to extra-judicial resolution of consumer disputes following a procedure which is used by this particular authorised entity, known as “the Rules” (art. 7 para. 2). Such rules are represented by provisions which are generally applicable and have an executive function with respect to relevant specific acts governing the legal status of authorised entities within the meaning of the ADR act (e.g. the act of 10 April 1997 (Energy Law¹²). Here, the *lex specialis derogat legi generali* principle is operative: general provisions governing mediation related to consumer matters find their application only if a specific law along with associated implementing provisions do not provide otherwise. For this reason, it is vital to formulate “a procedure governing out-of-court consumer dispute resolution” because specific acts impose various solutions, not infrequently radically at odds with one another. Such radically inconsistent solutions are the procedural solutions laid down by the act of 28 March 2003 on railway transport.¹³

The cardinal rule of conduct with regard to out-of-court resolution of consumer disputes is to initiate this procedure upon a consumer’s request. However, an ADR entity can provide in its rules the possibility of initiating ADR proceedings also when so requested by an entrepreneur (art. 33 para. 1 ADR). The provisions of ADR specify two kinds of petitions, depending on the scope of information to be used by the petitioner. The kind of submitted request determines the course of ADR procedure. Art. 33 para. 2 ADR specifies the essential elements to be included in a petition for ADR proceedings. In contrast, art. 33 para. 5 ADR provides that “the scope of information contained in a petition for proceedings regarding extra-judicial resolution of consumer disputes, other than information referred to in para. 2 and the required documents concerning the dispute, is determined by the rules.” Therefore, this second type of petition, apart from elements referred to in art. 33 para. 2, will include data required by the rules of the ADR authority to which the petition is being addressed (art. 33 para. 5 ADR). In contrast, in the case when a petition for an out-of-court settlement does not meet the essential requirements referred to in art. 33 para. 5 ADR, the authorised entity has a right to request the petitioner to supply the missing information within a prescribed time (art. 33 para. 6). The filing of a petition meeting the requirements of art. 33 paras. 2 and 5 as long as there are no grounds for refusing to examine the dispute, constitutes the basis for further action

¹² Journal of Laws of 2012, item 1059 as amended.

¹³ Journal of Laws of 2016, item 1727. What matters, then, are the provisions of the generally applicable law, not “internal procedures” represented by internal rules of conduct. For this reason, the law on extra-judicial resolution of consumer debates – in its unregulated scope – makes reference to laws and regulations, calling them “the Rules.”

in this respect. When the said petition is filed, time limits set forth in the provisions of the law will apply, for example the deadline for the submission of information about a refusal to examine the case (art. 35 ADR) and the finishing date for the ADR proceedings (art. 40 para. 1 ADR).

It should also be emphasised that ADR introduces a rule whereby the institution of ADR proceedings marks the time when the limitation period for the claim at hand is interrupted. This facility implements the principle expressed in art. 12 para. 1 of Directive 2013/11/EU whereby the Membership States are obliged to guarantee that the passage of the limitation period will not deprive the parties of the possibility of initiating judicial proceedings concerning the dispute at a later time. The idea is that ADR proceedings in which the resolution is not binding. For this reason – in line with art. 36 ADR – the interruption of the limitation period of the disputed claim occurs when out-of-court proceedings for dispute resolution are instituted, that is from the day when the ADR authority is served a petition containing the minimum required amount of data referred to in art. 33 para. 2 ADR. The authority conducting ADR proceedings is to immediately convey to the parties confirmations of the receipt of the petition (art. 33 para. 4 ADR).

Art. 34 ADR provides a list of grounds for a refusal to deal with a dispute. The ADR authority's rules may determine which circumstances specified by the list will justify such a refusal. In consequence, a competent authority can decide that all cases referred to in the law will constitute grounds for their refusal to deal with a particular dispute or select a specific case from the catalogue laid down in the law (art. 34 para. 2).¹⁴ Nevertheless, since the catalogue of conditions has an enumerative character, it rules out the possibility of refusing a petition on the basis of circumstances which fall outside the scope indicated by the law at hand.

3. THE COURSE AND COMPLETION OF ADR PROCEEDINGS

The ADR law does not regulate the mode of conduct in the case of extra-judicial resolution of consumer disputes. As mentioned before, a competent entity will conduct proceedings related to extra-judicial resolution of consumer disputes by implementing procedures which have been adopted by that particular competent entity and known as “the Rules” (art. 7 para. 2 ADR).

¹⁴ *Uzasadnienie do projektu ustawy o pozasądowym rozwiązywaniu sporów konsumenckich* (14.06.2016), form no. 630, p. 15.

Point 39 of the preamble for Directive 2013/11/EU highlights that “ADR procedures should be accessible and transparent. In order to ensure the transparency of ADR entities and of ADR procedures it is necessary that the parties receive the clear and accessible information they need in order to take an informed decision before engaging in an ADR procedure.” Undoubtedly, the current ADR procedure has a distributed character, which does not make it obviously transparent, and the latter aspect has relevance for petitioners who are interested in an extra-judicial settlement.

An ADR authority deals with both domestic and cross-border disputes, including those provided for by Regulation 2013/524 (art. 8 ADR). Pursuant to art. 37 para. 1 ADR, proceedings are carried out either on paper or electronically. This provision should be considered in conjunction with the disposition of art. 9 para. 1, point 1 ADR, whereby a competent entity “provides an Internet website offering easy access to information concerning the conduct of out-of-court proceedings to settle consumer disputes, and making it possible to file a petition for such proceedings and deliver documents which should be attached to this petition electronically.”¹⁵ The availability of alternative methods of proceedings cannot be made conditional upon the registered office or place of residence of parties, whereas the EU legislator lays emphasis on electronic proceedings (point 42 of Directive 2013/11/EU).¹⁶ At every stage of proceedings, parties have a right to use the help of third parties, including personnel providing professional legal assistance. However, parties are not required to have professional representation (art. 39 ADR). Simultaneously, it must be stressed that the rules of a particular type of proceedings may require personal appearance of parties or their representatives in exceptional cases (art. 37 para. 2 ADR). The regulations do not rule out the possibility of performing certain activities in the non-electronic form. These activities should be easy to implement notwithstanding the location of the registered office or place of residence of the parties.

While a dispute is being examined, the procedure has a deformed character and in practice depends on the nature of the dispute, the complexity of the matter, as well as the involvement of the parties. In accordance with the disposition of art. 38 para. 1, points 1–3 ADR, during out-of-court proceedings for consumer dispute resolution, the competent authority enables the parties to take part in the proceedings, state their positions, documents and evidence, and provides access to

¹⁵ Pursuant to art. 8a of Directive 2013/11/EU, ADR procedure is easily available to both parties, either online or otherwise, where the availability of proceedings should be construed as the readiness of a competent entity to accept a petition filed in a specific form and take other measures to resolve a particular dispute.

¹⁶ *Uzasadnienie do projektu ustawy*, 18–19.

the standpoints, documents and evidence supplied by the other party as well as expert opinions; finally, the parties are allowed to address expert opinions. Moreover, it informs the parties of their entitlement to use the assistance of third parties, such as professional representatives (art. 39 ADR). Using paper or another durable media, informs about the selected settlement and states the reasons for it.

In the case of proceedings for extra-judicial consumer dispute resolution where a competent authority presents the parties with a proposed settlement the person in charge of the proceedings, having regard for the character and all circumstances of the dispute as well as applicable provisions of the law, presents both parties with a proposal of settlement. Moreover, before the procedure commences, he informs the parties of their right to withdraw from the proceedings at any stage (art. 38 para. 2, point 1 ADR) and: (a) instructs the parties of their right to reject a settlement proposal and disobey it; (b) informs that their participation in the proceedings does not exclude the possibility of them enforcing their claims judicially; (c) informs that the submitted settlement proposal may be different from a decision potentially made by the court; (d) informs of the legal consequences of consenting to or complying with a proposed settlement; and (e) specifies a time frame in which the parties are to express their consent to a proposal or comply with it (art. 38 para. 2, points 2–4 ADR).

A settlement proposal is to be communicated to the parties within 90 days providing that the petitioner files a petition which meets the conditions set forth in art. 33 paras. 2 and 5 ADR. This action launches the period of limitation of the proceedings. The authority in charge of the ADR proceedings undertakes further activities after a period of time specified in the rules, which should enable the parties to work out their positions with respect to the submitted proposal. When the parties have expressed their consent to the proposal or when any of them has rejected it, or when no response has been received, a proceedings report is drawn immediately after the parties' positions have been communicated, containing at a minimum information about the outcome of the proceedings (art. 40 para. 3 ADR). When both parties have accepted the proposal, the outcome of the proceedings will be positive, that is the dispute will be resolved as part of extra-judicial procedure for resolving consumer disputes. If any of the parties does not accept the proposed settlement, this fact will be recorded in the report, thus rendering the outcome negative. The last step envisaged by ADR procedure is to convey the report to the parties. The day when a report is drawn is also the completion date of ADR proceedings (art. 40 para. 4 ADR).

Out-of-court procedure for the resolution of civil-law disputes is free of charge (art. 41 para. 1), which means primarily that no fee will be charged upon the filing of a petition. The principle of non-payment does not rule out the possibility of charging a consumer with the costs of activities related to ADR procedure carried

out upon his request (art. 41 para. 2). It should be noted that the invoked article permits the possibility of charging consumers but not entrepreneurs.

In summary, it should be emphasised that the legislator's introduction of provisions related to out-of-court resolution of consumer disputes should be viewed as positive. However, relations between ADR proceedings and civil proceedings problems can be problematic. This is so because the so-called mediation proceedings (non-binding) – intended to bring together the positions of different parties or to arrive at settlement proposals – are regulated only by provisions of the ADR law. Provisions of the Code of Civil Procedure are not applicable in this context.¹⁷ Non-statutory proceedings are not governed by the ADR law, either.

BIBLIOGRAPHY

SOURCES OF LAW

- Act of 17 November 1964 (Code of Civil Procedure), Journal of Laws of 2016, item 1822 as amended.
Act of 10 April 1997 (Energy Law), Journal of Laws of 2012, item 1059 as amended.
Act of 28 March 2003 (Labour Code), Journal of Laws of 2016, item 1727.
Act of 23 September 2016 on extra-judicial resolution of consumer disputes, Journal of Laws of 2017, item 1823.
Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, Official Journal of 2013, L 165 of 18 June 2013, pp. 63–79.
Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, Official Journal of 2013, L 165 of 18 June 2013, pp. 1–12.

LITERATURE

- ASŁANOWICZ, Marcin. *Sąd polubowny (arbitrażowy). Komentarz (1154–1217 KPC)*. Warsaw: Wydawnictwo C.H. Beck, 2017.
CREUTZFELDT, Naomi. "Alternative Dispute Resolution for Consumers." In *The Role of Consumer ADR in the Administration of Justice*, edited by Michael Stürner, Fernando Gascón Inchausti, and Remo Caponi, 3–10. Munich: Sellier European Law Publisher GmbH, 2015.
FIGURA, Aldona. *Opinia do ustawy o pozasądowym rozwiązywaniu sporów konsumenckich* (3.10.2016), form no. 282.

¹⁷ See M. RUDZKI, "Uwagi na tle regulacji postępowań ADR w sporach konsumenckich w świetle ustawy o pozasądowym rozwiązywaniu sporów konsumenckich," *ADR. Arbitraż i mediacja* 3 (2017): 63–73.

- GAJDA, Katarzyna. "Alternatywne metody rozwiązywania sporów w sprawach konsumenckich (cz. I)." *ADR. Arbitraż i mediacja* 2 (2008): 1–21.
- MOORE, Christopher. *Mediacje. Praktyczne strategie rozwiązywania sporów*. Warsaw: Wolters Kluwer, 2016.
- RUDZKI, Marcin. "Uwagi na tle regulacji postępowań ADR w sporach konsumenckich w świetle ustawy o pozasądowym rozwiązywaniu sporów konsumenckich." *ADR. Arbitraż i mediacja* 3 (2017): 63–73.
- WELSH, Nancy. "The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization." *Harvard Negotiation Law Review* 6 (2001): 1–96.

PROCEDURE FOR OUT-OF-COURT RESOLUTION OF CONSUMER DISPUTES
IN LIGHT OF THE ACT OF 23 SEPTEMBER 2016

S u m m a r y

The ADR Act of 23 September 2016 addressing consumer dispute resolution implements the EP and EC ADR Directive of 21 May 2013 regulating consumer dispute resolution, and EU and EP Regulation 524/2013 of 21 May 2013 on Online Dispute Resolution in Consumer Disputes. The aim is to give consumers who engage in dispute resolution with business entities an option to apply to legal entities that offer independent, impartial, transparent and effective facilities of amicable dispute resolution. The aim is also to equip entrepreneurs with a necessary tool to avoid costly and prolonged court proceedings against consumers. This article discusses how the Act regulates the substance, commencement, conduct and conclusion of the proceedings in out-of-court settlement of consumer disputes.

Key words: consumer alternative dispute resolution; consumer; consumer dispute; entrepreneur.

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