

The Law of Consumer Redress in an Evolving Digital Market

Upgrading from Alternative to
Online Dispute Resolution

Pablo Cortés



CAMBRIDGE

This book advances the emerging of a new sub-field of study, the Law of Consumer Redress, which encompasses the various dispute resolution processes for consumers, their regulations, and best practices. The book argues that the institutionalisation of alternative dispute resolution (ADR) bodies are expanding their functions beyond dispute resolution, as they are increasingly providing a public service for consumers that complements, and often replaces, the role of the courts. Although the book focuses on ADR, it also analyses other redress methods, including public enforcement, court adjudication and business internal complaints systems. It proposes a more efficient rationalisation of certified redress bodies, which should be better co-ordinated and accessible through technological means. Accordingly, the book calls for greater integration amongst redress methods and offers recommendations to improve their process design to ensure that, inter alia, traders are encouraged to participate in redress schemes, settle early meritorious claims and comply with outcomes.

Pablo Cortés is Professor of Civil Justice at Leicester Law School. He has advised the European Commission during the drafting of legislation on consumer ODR and ADR, and has been invited to write reports and to participate in expert meetings, inter alia, by the UN Commission on International Trade Law, the European Commission and the European Parliament. He serves on the advisory board of the ODR Civil Justice Council and the International Mediation Institute, and he has worked as a consultant for a number of organisations. He is fellow of the European Law Institute, the National Centre for Technology and Dispute Resolution (UMass) and in 2012 he was a Gould Research Fellow at Stanford University.

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This book advances the emerging of a new sub-field of study, the Law of Consumer Redress, which encompasses the various dispute resolution processes for consumers, their regulations, and best practices. The book argues that the institutionalisation of alternative dispute resolution (ADR) bodies are expanding their functions beyond dispute resolution, as they are increasingly providing a public service for consumers that complements, and often replaces, the role of the courts. Although the book focuses on ADR, it also analyses other redress methods, including public enforcement, court adjudication and business internal complaints systems. It proposes a more efficient rationalisation of certified redress bodies, which should be better co-ordinated and accessible through technological means. Accordingly, the book calls for greater integration amongst redress methods and offers recommendations to improve their process design to ensure that, inter alia, traders are encouraged to participate in redress schemes, settle early meritorious claims and comply with outcomes.

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FOREWORD

This is an important and forward-thinking book which makes a significant contribution to scholarship on justice and redress for consumers by adopting an international and multidisciplinary approach. Consumer protection – whether achieved through law, regulation, standards or ethics- is crucial to the proper functioning of our society and to the economy. As this work identifies, there are perhaps two, inter-related aims: inspiring, embedding and enforcing good practice on the one hand and the provision of appropriate redress in cases of breach on the other. The ability of the wronged consumer to rely on and assert his or her rights and to obtain appropriate redress is an inherent feature of justice. Moreover, the ability to obtain redress plays an integral part in enforcing good practice. That said, justice does not always have to be dispensed in a courtroom.

Due to the many and varied consumer transactions that take place on a daily basis – from buying online goods to obtaining routine legal advice – the potential number of disputes that could result is great. Often, the disputes that arise are of low or modest value, such that it would be disproportionate to retain lawyers to litigate in the traditional manner. Proportionality aside, many consumers would, in any case, simply be unable to afford legal advice or representation.

Alternatives to traditional litigation which are able to provide meaningful redress are, therefore, of critical importance. This book ably reviews and analyses various alternative dispute resolution options (ADR) and, more importantly, the greater use of and move towards online dispute resolution (ODR). Whether industry- or platform-specific, ADR/ODR options can provide such meaningful redress. This work goes further, and considers international issues, harmonisation, and system design.

However, the rapid development of extra-judicial redress schemes does not mean that the courts will become redundant for such disputes, provided that the courts can provide a means of redress that is simple, proportionate, just and effective. In England and Wales,

wide-ranging reforms to the manner in which justice is delivered are under way. In particular, and as this work discusses, the creation of an “Online Court” – which, on current planning, will share many features of the ODR systems considered – will ensure that consumers can continue to access justice through the courts, but in a simpler, speedier and more user-friendly way.

I look forward to a future edition of this work, which details the developments in the law of consumer redress, any changes in the relationship between judicial and extra-judicial dispute resolution, and the role the Online Court has played in England and Wales. Until then, I warmly commend this first edition to anyone who wishes to understand this important subject and the potential for its development.

*The Rt Hon. The Lord Thomas of Cwmgiedd
Lord Chief Justice of England and Wales*

1 June 2017

ACKNOWLEDGEMENTS

As a cautionary note, I must admit that my analysis on consumer redress may be a bit biased as it has been influenced by my involvement in the drafting process of the Alternative Dispute Resolution (ADR) Directive and Online Dispute Resolution (ODR) Regulation, as well as by my participation in a number of ODR working groups – including the United Nations Commission for International Trade Law (UNCITRAL Working Group III), the Civil Justice Council, the National Center for Technology and Dispute Resolution and the International Mediation Institute. I have also served as a consultant for the European Commission and the European Parliament, and I have participated in the board of advisors of Youstice and NetNeutrals. My views have therefore been enriched and influenced deeply by these interactions. As a result I firmly believe that consumer redress, especially effective ADR techniques underpinned by ODR technology, can, and should, play an important role in the civil justice system, delivering greater access to justice to consumers. In addition, if properly designed, consumer redress can assist in increasing consumer trust, promoting market competition.

I am grateful to all the interviewees who kindly took the time to share their views with me. Their insights help me to have a much better understanding of the evolving nature of dispute resolution and technology. The writing of this book was possible due to the generous support of a grant from Nuffield Foundation, which is an endowed charitable trust that aims to improve social well-being in the widest sense. It funds research and innovation in education and social policy and also works to build capacity in education, science and social science research. The Nuffield Foundation has funded this project, but the views expressed are those of the author and not necessarily those of the Foundation.

I would like to express my deepest gratitude to the Lord Chief Justice for finding the time out of his busy schedule to read the manuscript and write the Foreword. I would also like to thank the academic mentors that helped me over the years. Especially, I would like to extend my sincere

gratitude to Professors Chris Hodges and Cosmo Graham. Their leadership and selfless support for younger colleagues are truly inspiring.

I would like to thank my wife Anne-Marie for her unwavering support and love, and to my children Tristan, Alice and Ruben for making sure I get up early every morning with a big hug.

I would like to dedicate this book to the foremost academic in the family, my sister Myriam, who is currently the *rectora* and president at Pontifical University of Salamanca. She was my first academic mentor and the springboard that enabled me to further my studies at University of Limerick. Without her assistance at this crucial time, I would not have pursued a career in academia and this book may never have been written.

INTERVIEWEES

1. Julia Hörnle, Queen Mary University of London
2. Amy Schmitz, Colorado University
3. Caroline Mitchell, Financial Ombudsman Service
4. Enrico Maria Cotugno, AGCOM Italy (CORECOM)
5. Darin Thompson, Attorney at Ministry of Attorney General BC
6. Graham Ross, Modria
7. Carlo Pilia, University of Cagliari
8. James Tallack, Civil Aviation Authority
9. Nick Mawhiney, Civil Aviation Authority
10. Roberta Regazzoni, ResolviOnline
11. Mark McLaren, Which?
12. Steven Gould, Ombudsman Association
13. David Pilling, Ombudsman Services
14. Valentina Filippini, Onfconsumatori
15. Fernando Esteban de la Rosa, Universidad de Granada
16. Colin Rule, Modria
17. Vikki Rodgers, Pace Law School
18. Giuseppe de Palo, ADR Center/UN ombudsman
19. Chris Gill, Queen Margaret University Edinburgh
20. Iñaki Paredes, European Consumer Center Spain
21. Roberto Liscia, Netcomm
22. Imma Barral, Universidad de Barcelona
23. Alberto Elisavetsky, ODR Latinoamerica
24. Stefaan Voet, Lueven University
25. Amada Arley, Universidad Nacional Autónoma de México
26. Zbynek Loebel, Youstice
27. Iveta Havlova, Youstice
28. Ethan Katsh, National Centre for Technology and Dispute Resolution
29. Leah Wing, National Centre for Technology and Dispute Resolution
30. Peter Causton, Pro Mediate

31. Juan Bueso, ECC-Ireland
32. Cosmo Graham, University of Leicester
33. Elisabetta Sciallis, ECC-UK
34. Christoph Decker, European Commission
35. Richard Kirkham, University of Sheffield
36. Jin Ho, HiiL
37. Maria Pisano, ECC-Italy
38. Margaret Doyle, UK Administrative Justice Institute
39. Vincent Tilman, bMediation
40. Christopher Hodges, CSLS Oxford University

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