

### 3 | The impact of the ADR Directive on article 7:904 par. 1 DCC explored

What is ‘unacceptable according to standards of reasonableness and fairness’ after the implementation of the Directive?

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#### 1 INTRODUCTION

‘Reasonableness and fairness’ can undoubtedly be reckoned among the ‘core concepts’ of the Dutch Civil Code (hereafter: ‘DCC’). The important role this concept plays within the law of obligations is made clear by art. 6:2 and art. 6:248 DCC.<sup>1</sup> Next to these more general provisions, the Dutch Civil Code contains several specific applications of the concept.<sup>2</sup> One of the provisions in which the concept of reasonableness and fairness is applied is art. 7:904 par. 1 DCC. This specific application forms the central theme of this contribution.

Art. 7:904 par. 1 DCC is part of the title on the contract of settlement. A species of the contract of settlement is the contract of binding advice. Binding advice is a method of Alternative Dispute Resolution (hereafter: ‘ADR’) in which an independent third party (one or more ‘binding advisor(s)’) gives a binding decision that resolves the dispute between the parties.<sup>3</sup> Especially in consumer disputes, this method of alternative dispute resolution is used very often. The Netherlands has a successful system of consumer dispute resolution through binding advice by e.g. Consumer Complaints Boards (‘Geschillencommissies’).<sup>4</sup> Binding advice resembles arbitration to some extent, but it differs from it in

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1 See also the contribution of Cartwright to this yearbook.

2 Cartwright gives an overview; see footnote 13 of his contribution.

3 Binding advice can also be used in situations where there is no legal dispute between the parties, but where the third party supplements or modifies the rules governing the juridical relationship between the parties; P.E. Ernste, *Bindend advies* (diss. Nijmegen), Deventer: Kluwer 2012, p. 1; B. van der Bend, M. Leijten & M. Ynzonides (eds.), *A guide to the NAI Arbitration Rules*, Alphen a/d Rijn: Kluwer Law International 2009, p. 46.

4 See on the Dutch consumer dispute resolution system further section 2.

that its procedure is much less regulated and a grant of execution ('*exequatur*') for the decision cannot be obtained. Since binding advice is based on a contract, the decision has the force of an agreement between the parties. A party can request performance before a court.<sup>5</sup> Although its name is somewhat ambiguous, binding advice is thus a *binding* form of ADR. From art. 7:902 DCC it follows that a decision taken to terminate an uncertainty or dispute in the field of the law of property, proprietary rights and interests is valid, notwithstanding that it proves to be in breach of mandatory law, unless it would also be in breach of good morals and public policy. The DCC holds very limited grounds on which a decision taken by binding advisors can be challenged. Art. 7:904 par. 1 DCC states:

'A decision of a party or third person may be annulled if it would be unacceptable to hold him<sup>6</sup> to it in connection with the content or manner of its establishment in the given circumstances, according to standards of reasonableness and fairness.'

Art. 7:904 par. 1 DCC introduces a marginal review of the decisions of binding advisors. Only if it is *unacceptable* to hold a party to it *according to standards of reasonableness and fairness*, may the decision be annulled.<sup>7</sup> The case law makes it clear that this can only be assumed in exceptional circumstances.<sup>8</sup>

However, it is questionable whether this limited possibility of review can be maintained with the implementation of Directive 2013/11/EU on consumer ADR (hereafter: ADR Directive) in tandem with Regulation (EU) 524/2013 on consumer ODR (hereafter: ODR Regulation; ODR stands for 'Online Dispute Resolution').<sup>9</sup> Directive 2013/11/EU aims to facilitate access for consumers to ADR procedures and establishes several quality requirements for ADR Proced-

5 Binding advice is a typical Dutch legal construct. For foreign structures that are to some extent comparable, see Ernste 2012, pp. 11-12. See on the construct of binding advice further section 2.

6 This translation of art. 7:904 par. 1 DCC suggests that it is the party or the third person who has taken the decision that may annul the decision. Obviously, it is the parties that are bound by the decision that have this authority. 'Him' refers to the parties that have brought their dispute to ADR, not to the binding advisor who has decided their case.

7 Toelichting Meijers, Vierde gedeelte, Boek 7, pp. 1146-1147; C. Hodges, I. Benöhr & N. Creutzfeldt-Banda, *Consumer ADR in Europe*, Oxford: Hart Publishing 2012, p. 142; Ernste 2012, p. 73; Dutch Supreme Court 15 June 2012, ECLI:NL:HR:2012:BW0727 (PWC/x), par. 3.5.2.

8 Dutch Supreme Court 18 June 1993, NJ 1993/615 (*Gruythuysen c.s./SCZ*), par. 4; Dutch Supreme Court 25 March 1994, NJ 1995/23 (*Midden Gelderland/Lukkien*), par. 3.3; Dutch Supreme Court 12 September 1997, NJ 1998/382, note M.M. Mendel (*Confood/Zürich*), par. 3.5; see also Ernste 2012, p. 73; Asser/Van Schaick 2012 (7-VIII\*), no. 163.

9 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; 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.

ures.<sup>10</sup> Member states need to ensure that disputes covered by the Directive can be submitted to an ADR entity which complies with these requirements.<sup>11</sup> The aim of the ODR Regulation is to create an online ADR platform, which should increase access for consumers and traders online to ADR procedures and make the online resolution of consumer disputes possible.<sup>12</sup>

This contribution examines the impact of the ADR Directive on the interpretation of the concept of reasonableness and fairness within the context of art. 7:904 par. 1 DCC. If a binding advice procedure does not comply with the quality requirements set out in the Directive, will this make it 'unacceptable according to standards of reasonableness and fairness' to hold a party to the decision? Does the ADR Directive require that the decision can be annulled in such a case? These questions will be addressed in this contribution (sections 6-7), after a further analysis of the Dutch system of resolving consumer disputes by means of binding advice is given (section 2) and the aims of the ADR Directive (section 3), its quality requirements (section 4) and the implementation in the Dutch legal system (section 5) are described. This contribution closes with suggestions for alternative ways to enhance the quality of consumer ADR (section 8).

## 2 RESOLVING CONSUMER DISPUTES THROUGH BINDING ADVICE IN THE NETHERLANDS

In the Netherlands, alternative resolution of consumer disputes is well developed. Different institutions that provide out-of-court resolution for consumer disputes co-exist. Characteristic of the Dutch Consumer Dispute Resolution system (hereafter: 'Dutch CDR system') is the triad of the Foundation for the Consumer Complaints Boards (the 'Stichting Geschillencommissies voor Consumentenzaken', hereafter: 'SGC'), the Financial Services Complaints Tribunal ('Klachteninstituut Financiële Dienstverlening', hereafter: 'Kifid') and the Health Insurance Complaints and Disputes Board ('Stichting Klachten en Geschillen Zorgverzekeringen', hereafter: 'SKGZ'). The SGC, Kifid and SKGZ use a variety of ADR procedures that range from an ombudsman scheme to mediation. However, central part of the dispute resolution scheme of almost all of these institutions is a binding advice procedure.<sup>13</sup>

Binding advice is an informal method of ADR. Binding advice is based on a contract between the parties. This contract is seen as a species of the contract

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10 See for example recital 7 of the ADR Directive.

11 See art. 5 ADR Directive.

12 See art. 1 ODR Regulation; recital 18 ODR Regulation.

13 See on the Dutch CDR system Hodges, Benöhr & Creutzfeldt-Banda 2012, pp. 129-165. By way of exception, arbitration is used instead of binding advice. This is the case at the Geschillencommissie Garantiewoningen.

of settlement ('vaststellingsovereenkomst'), governed by title 15 of book 7 of the Dutch Civil Code. By this contract, parties agree in advance to be bound by the decision given by one or more binding advisors. An important difference with arbitration is that the decision taken by binding advisors cannot acquire the force of *res judicata* and a grant of execution ('exequatur') cannot be obtained. However, the decision does have the force of an agreement between the parties. Non-compliance is seen as breach of contract and a party can request performance before a court.<sup>14</sup> In practice, enforcement is not problematic for the consumer when binding advice at the SGC is concerned. The Consumer Complaints Boards under the umbrella of the SGC are established after negotiations between trade associations and consumer association(s). The trade association guarantees payment of the claim if the trader fails to do so.<sup>15</sup>

There are limited grounds on which the validity of a decision taken by binding advisors can be challenged. A decision may be annulled on the basis of art. 7:904 par. 1 DCC if it would be unacceptable to hold a party to it according to standards of reasonableness and fairness. Art. 7:904 par. 1 DCC mentions two grounds for review. It may be unacceptable to hold a party to a decision either in connection with the *content* of the decision or in connection with the *manner of its establishment*. Art. 7:904 par. 1 DCC also makes it clear that the given circumstances should be taken into account while making the assessment.

When is it unacceptable according to standards of reasonableness and fairness to hold a party to a decision in connection with the content of this decision? Art. 7:904 par. 1 DCC should be read in conjunction with art. 7:902 DCC. This provision makes it clear that a decision is binding on the parties even if it is in breach of mandatory law. This is different when the decision is also in breach of good morals and public policy:

'A settlement to terminate an uncertainty or dispute in the field of the law of property, proprietary rights and interests is valid, notwithstanding that it proves to be in breach of mandatory law, unless it would also, as to content or necessary implication, be in breach of good morals and public policy.'

Art. 7:902 DCC has implications for art. 7:904 par. 1 DCC. Since art. 7:902 DCC makes it clear that a decision is even valid if it is in breach of mandatory law, it is not possible to annul a decision on the basis of art. 7:904 par. 1 DCC on

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14 See for English legal literature on binding advice Van der Bend, Leijten & Ynzonides 2009, pp. 46-47; J.M.J. Chorus, P.H.M. Gerver & E.H. Hondius (eds.), *Introduction to Dutch law*, Alphen a/d Rijn: Kluwer Law International 2006, pp. 239-240, p. 268; M. van Hooijdonk & P. Eijssvoogel, *Litigation in the Netherlands. Civil Procedure, Arbitration and Administrative Litigation*, Den Haag: Kluwer Law International 2012, pp. 149-150.

15 Hodges, Benöhr & Creutzfeldt-Banda 2012, p. 140, p. 144; Chorus, Gerver & Hondius 2006, pp. 240, 268.

the sole ground that it is in breach of mandatory law.<sup>16</sup> An error in the decision is not enough to challenge the decision.<sup>17</sup> Only serious defects in the decision will justify the conclusion that it is unacceptable to hold a party to it.<sup>18</sup>

Art. 7:902 DCC in combination with art. 7:904 par. 1 DCC thus makes it possible for the SGC to apply a different standard for deciding their cases than the rules of law. Instead, they decide the disputes submitted to them according to 'reasonableness and fairness, while taking into account the contract between the parties and the conditions included therein'.<sup>19</sup> These conditions are usually the conditions bilaterally agreed between trade associations and consumer association(s).<sup>20</sup> Research shows that these conditions play a role in a substantial number of decisions of the SGC.<sup>21</sup> The decisions by the SGC are therefore not necessarily in accordance with (mandatory) law.<sup>22</sup> Art. 7:902 DCC approves this possible deviation from the law, as long as good morals or public policy are not breached.

A decision may also be annulled on the basis of art. 7:904 par. 1 DCC in connection with the manner of its establishment. The manner of establishment of a decision may for example be contested when the principles of a fair trial have not been observed. However, the case law of the Dutch Supreme Court makes it clear that the principles of a fair trial are not applicable in full in every binding advice procedure. Binding advice can also be used in situations where there is no legal dispute between the parties, but where binding advisors supplement or modify the rules governing the juridical relationship between the parties.<sup>23</sup> For example, in case of a leasehold the parties may agree not to determine the amount of the ground rent payable by the leaseholder in the

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16 Asser/Van Schaick 2012 (7-VIII\*), no. 163; see Dutch Supreme Court 12 September 1997, NJ 1998/382, note M.M. Mendel (*Confood/Zürich*) and the opinion of Advocate General Bakels, no 3.26-3.29.

17 Dutch Supreme Court 18 June 1993, NJ 1993/615 (*Gruythuysen c.s./SCZ*), par. 4; Dutch Supreme Court 25 March 1994, NJ 1995/23 (*Midden Gelderland/Lukkien*), par. 3.3; Dutch Supreme Court 12 September 1997, NJ 1998/382, note M.M. Mendel (*Confood/Zürich*), par. 3.5.

18 Dutch Supreme Court 12 September 1997, NJ 1998/382, note M.M. Mendel (*Confood/Zürich*), par. 3.5; Dutch Supreme Court 15 June 2012, ECLI:NL:HR:2012:BW0727 (*PWC/x*), par. 3.5.2.

19 See for example the rules of procedure of the Geschillencommissie Afbouw, art. 16.1; Geschillencommissie Reizen, art. 15.1. See also Ernste 2012, pp. 61-63.

20 See on the process of negotiating conditions and establishing a Consumer Complaints Board Hodges, Benöhr & Creutzfeldt-Banda 2012, pp. 137-139.

21 J.M.P. Verstappen, W.H. van Boom, M.B.M. Loos & J.G.J. Rinkes, *Onderzoek naar de rol van algemene voorwaarden in de praktijk van de geschillencommissies SGC*, Ministerie van Economische Zaken 2007, in particular pp. 4, 16.

22 See also M.B.M. Loos, 'Verboden exoneraties in energieleveringsovereenkomsten en vernietiging van met de wet strijdige bindende adviezen', *Tijdschrift voor Consumentenrecht en handelspraktijken* 2006, pp. 3-6, in particular pp. 3-4.

23 See also footnote 3.

contract itself, but to leave the determination to binding advisors.<sup>24</sup> In such a case, laxer standards apply. By contrast, if the binding advice procedure comes closer to a judicial procedure, the principles of a fair trial become more important.<sup>25</sup> This contribution focuses on binding advice procedures in which consumer disputes are being resolved. Since these procedures resemble judicial procedures, the principles of a fair trial will play a more important role. However, even if the judge establishes that one of the principles of a fair trial was breached in a binding advice procedure, this will not necessarily mean that the decision may be annulled. The Supreme Court has held that if a procedural fault has been made in the establishment of a decision, one of the factors that should be considered in assessing whether the decision should be set aside is whether, and if so, to what extent, the procedural fault has disadvantaged the other party.<sup>26</sup> There are cases in which the principle of *audi alteram partem* was breached during the binding advice procedure, but where annulment was rejected on the basis of this ‘disadvantage criterion’.<sup>27</sup>

The standard set by art. 7:904 par 1 DCC for the annulment of decisions given by binding advisors is thus very strict. Annulment is only possible if it is *unacceptable* according to standards of reasonableness and fairness for a party to be held to the decision. There are good reasons for this strictness. With regard to arbitration procedures, the Dutch Supreme Court considers that an annulment procedure may not be used as a *de facto* appeal of the decision by arbitrators. The general interest of an effectively functioning arbitral procedure entails that the civil courts should only intervene in arbitral decisions in striking cases.<sup>28</sup> Similar reasons apply when binding advice procedures are concerned. Parties turn to binding advice to put an end to their conflict. This aim cannot be achieved if the decision taken by binding advisors can be challenged too easily. However, the question is whether this strict standard can still be maintained with the implementation of the ADR Directive in the Dutch judicial system.

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24 This was for example the case in Dutch Supreme Court 20 May 2005, *NJ* 2007/114, note H.J. Snijders under *NJ* 2007/115 (*Gem. Amsterdam/Honnebier*).

25 For example, the Dutch Supreme Court has considered that a decision should be better motivated as the binding advice procedure is more in the nature of a judicial procedure. See Dutch Supreme Court 20 May 2005, *NJ* 2007/114, note H.J. Snijders under *NJ* 2007/115 (*Gem. Amsterdam/Honnebier*), par. 3.4; Dutch Supreme Court 24 March 2006, *NJ* 2007/115, note H.J. Snijders (*Meurs/Newomij*), par. 3.4.2.

26 Dutch Supreme Court 20 May 2005, *NJ* 2007/114, note H.J. Snijders under *NJ* 2007/115 (*Gem. Amsterdam/Honnebier*), par. 3.3; Dutch Supreme Court 24 March 2006, *NJ* 2007/115, note H.J. Snijders (*Meurs/Newomij*), par. 3.4.4; Dutch Supreme Court 1 July 1988, *NJ* 1988/1034 (*Delta Lloyd/N.*), par. 3.2.

27 Dutch Supreme Court 24 March 2006, *NJ* 2007/115, note H.J. Snijders (*Meurs/Newomij*), par. 3.4.4; Dutch Supreme Court 1 July 1988, *NJ* 1988/1034 (*Delta Lloyd/N.*), par. 3.2.

28 Dutch Supreme Court 17 January 2003, *NJ* 2004/384, note HJS (*IMS/Modsaf c.s. I*), par. 3.3; Dutch Supreme Court 9 January 2004, *NJ* 2005/190, note HJS (*Nannini/SFT*), par. 3.5.2; Dutch Supreme Court 24 April 2009, *NJ* 2010/171, note H.J. Snijders (*IMS/Modsaf c.s. II*), par. 4.3.1.

## 3 THE ADR DIRECTIVE AND ODR REGULATION: AN INTRODUCTION

On 21 May 2013 the European legislator passed the ADR Directive and the ODR Regulation; both published in the Official Journal of the EU on 18 June 2013. The ADR Directive and ODR Regulation, two interlinked and complementary legislative instruments, promote and facilitate the simple, fast and *digital* (out-of-court) resolution of consumer disputes.<sup>29</sup>

The ADR Directive aims to assure that consumers can submit complaints against traders to ADR entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedures.<sup>30</sup> The ODR Regulation on the other hand establishes an ODR platform at Union level in the form of an interactive website, offering a single point of entry to consumers and traders seeking to resolve their dispute out of court.<sup>31</sup> The Regulation and the Directive are complementary in the sense that the EU framework of ADR entities and ADR procedures covered by the ADR Directive<sup>32</sup> will be linked to the ODR platform.<sup>33</sup> The availability of ADR entities and procedures across Europe qualified according to the ADR Directive is a precondition for the proper functioning of the ODR platform.<sup>34</sup> The ADR Directive should have been implemented in the Member States no later than 9 July 2015.<sup>35</sup> The ODR Regulation has gone into effect on 15 February 2016.<sup>36</sup>

As mentioned the ADR Directive aims to assure that consumers can submit complaints against traders to ADR entities offering ADR-procedures.<sup>37</sup> To qualify as an ADR entity under the Directive, an entity (regardless of its name or how it is referred to) should be established on a durable basis and offer dispute resolution by means of an ADR procedure.<sup>38</sup> Currently the ADR procedures and in a wider sense the ADR systems still differ a lot across the Union. However, the ADR Directive allows such diversity (even post-implementation) as it states that on a Member States level different forms of ADR procedures to resolve consumer disputes co-exist or that a combination of two or more ADR procedures are being used.<sup>39</sup> The ADR Directive builds on existing ADR proced-

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29 Recital 12, 15 ADR Directive.

30 Art. 1 ADR Directive.

31 Recital 18 ODR Regulation.

32 Which means that the ADR entity and the ADR procedure both comply with the (quality) requirements set out in the ADR Directive (recital 24 ADR Directive).

33 Recital 12 ADR Directive.

34 Recital 12 ADR Directive.

35 Art. 25 ADR Directive.

36 Art. 22 ODR Regulation, with the exceptions specified therein.

37 Art. 1 ADR Directive.

38 Art. 4 par. 1 sub (h) ADR Directive. The entity that qualifies as an ADR entity under the Directive shall be listed in accordance with art. 20 par. 2 ADR Directive.

39 Recital 21 ADR Directive.

ures in the Member States and respects their legal traditions.<sup>40</sup> The Directive therefore has a spacious scope, which also follows from art. 2 par. 1 ADR Directive:

‘This Directive shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts between a trader established in the Union and a consumer resident in the Union through the intervention of an ADR entity which proposes or imposes a solution or brings the parties together with the aim of facilitating an amicable solution.’

Hence the Directive is without prejudice to the form that ADR procedures take within the Member States and applies horizontally to all types of ADR procedures.<sup>41</sup> However, the scope of the ADR Directive is restricted by par. 2 of art. 2. The ADR Directive is most notably not applicable to procedures initiated by a trader against a consumer.<sup>42</sup> Dutch binding advice *imposes* a solution on the parties (sections 1 and 2) and, as the Dutch implementation legislation proves to be true, binding advice falls within the scope of ADR procedures covered by the ADR Directive.<sup>43</sup> Therefore, binding advice (as the ADR procedure chosen by the ADR entity under the scope of the ADR Directive) should comply with different requirements, i.e. access to and quality of ADR entities and ADR procedures, information and cooperation on national and EU level and enforcement.<sup>44</sup>

As this contribution addresses the question whether the breach of the quality requirements put forward in the ADR Directive makes it ‘unacceptable according to standards of reasonableness and fairness’ to hold a party to the decision taken by binding advisors, the next section will highlight the various quality requirements set out in the ADR Directive and, where applicable, of the ODR Regulation.

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40 Recital 15 and 24 ADR Directive. This means that if no ADR procedure is yet available in a Member State this Member State is free to choose the *form* of the ADR procedure preferred to comply with the ADR Directive.

41 Recitals 19 and 21 ADR Directive.

42 Art. 2 par. 2 ADR Directive.

43 Wet van 16 april 2015 tot implementatie van de Richtlijn 2013/11/EU van het Europees Parlement en de Raad van 21 mei 2013 betreffende alternatieve beslechting van consumentengeschillen en tot wijziging van Verordening (EG) nr. 2006/2004 en Richtlijn 2009/22/EG en uitvoering van de Verordening (EU) nr. 524/2013 van het Europees Parlement en de Raad van 21 mei 2013 betreffende onlinebeslechting van consumentengeschillen en tot wijziging van Verordening (EG) nr. 2006/2004 en Richtlijn 2009/22/EG (Implementatiewet buitengerechtelijke geschillenbeslechting consumenten), *Stb.* 2015, 160.

44 Chapters II, III, IV and V ADR Directive.



#### 4 QUALITY REQUIREMENTS SET OUT IN THE ADR DIRECTIVE

Chapter II of the ADR Directive (arts. 6-11) contains a set of quality requirements which ADR entities and ADR procedures must comply with to be accredited as ADR entities respectively ADR procedures under the Directive.<sup>45</sup> The applicability of certain quality principles to both ADR entities and ADR procedures is meant to strengthen consumers' and traders' confidence in such entities and procedures.<sup>46</sup> A designated ADR entity will be under the supervision of a competent authority to ensure that in practice the quality standards set out in the ADR Directive are met.<sup>47</sup> The development of the set of quality requirements laid down in the Directive took place in a couple of stages.<sup>48</sup> For example, certain quality principles of the Directive derive from soft legal measures taken at Union level in Recommendations 98/257/EC and 2001/310/EC.<sup>49</sup> By making some of these (soft legal) principles (e.g. effectiveness, liberty, transparency) *binding* in the ADR Directive, the Directive itself 'establishes a set of quality requirements which apply to all ADR procedures carried out by an ADR entity [...]'.<sup>50</sup> All ADR entities that wish to be accredited must comply with the following six quality requirements:

##### *I Expertise, independence and impartiality*

To enhance trust in out-of-court redress mechanisms for consumer complaints a minimum level of procedural safeguards is built into the Directive. Art. 6, par. 1 of the ADR Directive requires that 'the natural persons in charge of ADR possess the necessary expertise and are independent and impartial'. A third neutral party should thus be competent, which means it should possess the necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes, as well as a general understanding of the law.<sup>51</sup> Furthermore the persons in charge of ADR should be independent and impartial: they should have no conflict of interests and should be appointed for a term of office of sufficient duration to ensure independence.<sup>52</sup>

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45 Also recital 24 ADR Directive.

46 Recital 37 ADR Directive.

47 Art. 20 par. 2 ADR Directive and recital 55.

48 See for a broader description of these stages: N. Creutzfeldt, 'How Important is Procedural Justice for Consumer Dispute Resolution? A Case Study of an Ombudsman Model for European Consumers', *Journal of Consumer Policy*: Volume 37, Issue 4 (2014), p. 532.

49 Recommendation 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.

50 Recital 37 ADR Directive.

51 Art. 6 par. 1 (a) ADR Directive, recital 36 ADR Directive.

52 Art. 6 par. 1 (b), (c), (d) ADR Directive, recitals 32, 33, 34, 35.

## II Transparency

To build consumer trust in both ADR and ODR as means of dispute resolution, ADR schemes and ADR procedures must be transparent. In respect thereof art. 7 ADR Directive aims to ensure that information about the ADR entity, its procedures, and other data are easy to obtain by both parties via an up-to-date website or on a durable medium upon request.<sup>53</sup> The information provided by the ADR entity must be easy to understand in order to give parties the opportunity to deliberately engage in an ADR procedure.<sup>54</sup> Furthermore, ADR bodies make publicly available on their websites, or by any other means they consider appropriate, annual activity reports.<sup>55</sup> The principle of transparency laid down in the Directive contains elements of its prior non-binding predecessor expressed in art. II of Recommendation 98/257/EC. It can be seen as a point of reference to both parties in their quest for information about e.g. preliminary requirements they have to meet before initiating an ADR procedure in front of an ADR entity. The use of the term ‘transparency’ in the light of the ADR Directive is thus quite broad and obliges ADR entities to disclose ‘practical’ information or formal requirements such as cost of procedures and languages in which complaints can be submitted.<sup>56</sup> Therefore, the definition of transparency under the ADR Directive should not be confused with the use of the term in a mere procedural sense, e.g. under art. 6 ECHR (hearings being open to the public or the result of procedures being published).

## III Effectiveness

The quality requirement of effectiveness set out in art. 8 ADR Directive contains different compartments. First of all the ADR procedure must be available and easily accessible online and offline to both parties; irrespective of where the parties are. The online access to the ADR procedure is a precondition for resolving disputes that arise out of e-commerce transactions (ODR context). Furthermore effectiveness means: no obligation to retain a lawyer or legal advisor; the ADR procedure is free of charge or at moderate costs for consumers; and disputes are resolved within a short period of time (within 90 calendar days from the date on which the ADR entity has received the complete complaint file).<sup>57</sup>

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53 Art. 5 par. 2 ADR Directive.

54 Recital 39 ADR Directive.

55 Art. 7 par. 2 ADR Directive.

56 Art. 7 (1)(a),(h) and (l) ADR Directive.

57 In case of highly complex disputes the 90-calendar-day period may be extended by the ADR entity in charge (art. 8 (e) ADR Directive).

#### IV Fairness

According to art. 9 ADR Directive the ADR procedure to resolve a consumer dispute should be fair, which means that both parties are fully informed about their rights and the consequences of the decisions they make in the light of and during an ADR procedure.<sup>58</sup> Parties should also be granted the possibility to express their point of view and be provided by the ADR entity with the arguments and the evidence of the other party (adversarial process).

#### V Liberty

The principle of liberty is laid down in art. 10 ADR Directive. The first paragraph ensures that an agreement between a consumer and a trader to submit a complaint to an ADR entity is not binding on the consumer if this contractual agreement was concluded before the dispute arises and the agreement has the effect of depriving the consumer of his right to bring the dispute before the courts.<sup>59</sup> Paragraph 2 of art. 10 reads as follows: '(...) in ADR procedures which aim at resolving the dispute by imposing a solution, the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this.'

#### VI Legality

The quality requirement of legality, as set out in art. 11 ADR Directive, entails in short that in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer, the solution imposed should not result in the consumer being deprived of the protection guaranteed by mandatory law of the Member States where the consumer is habitually resident.<sup>60</sup>

The ADR Directive is a framework Directive which means minimum harmonization is intended by the EU legislator. The quality principles of arts. 6-11 ADR Directive are therefore *minimum* requirements. Recital 38 states that the Directive 'should not prevent Member States from adopting or maintaining rules that go beyond what is provided for in this Directive'. Thus, more stringent national legislative measures are possible.<sup>61</sup> In this respect the Directive does

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58 Recital 42 ADR Directive.

59 Recital 43 ADR Directive. Important fact: 'Agreements to go to arbitration must be carried out post-dispute' P. Cortes, A.R. Lodder, 'Consumer Dispute Resolution goes online: reflections on the evolution of European law for out-of-court redress', *Maastricht Journal of European and Comparative Law* 2014/1, p. 26.

60 See also recital 44 ADR Directive. Art 11 ADR Directive distinguishes between three different situations and is thus somewhat difficult to read. See on the corresponding categories in the Implementation Act *Kamerstukken II* 2014/15, 33 982, no. 3, pp. 21-22.

61 See also art. 2 par. 3 ADR Directive.

not specify how Member States should implement the quality principles in their national context. However, art. 20 ADR Directive clarifies that it is the task of the competent authority (art. 18 ADR Directive) to assess whether the dispute resolution entities accredited as ADR entity comply with the quality requirements.<sup>62</sup> If they do not, according to art. 20 par. 2 ADR Directive the competent authority shall ‘contact that dispute resolution entity, stating the requirements the dispute resolution entity fails to comply with and requesting it to ensure compliance immediately.’ If the dispute resolution does not fulfil the requirements after a period of three months, the competent authority shall remove the entity from the list of ADR entities notified to the Commission. However, sections 6 and 7 of this contribution examine whether the non-compliance of an ADR entity with the quality standards set out in the ADR Directive also makes the decision taken by binding advisors (in the Dutch scenario) unacceptable according to standards of reasonableness and fairness and subject to a possible annulment.

## 5 IMPLEMENTING THE ADR DIRECTIVE IN THE NETHERLANDS: A FRAMEWORK LAW

As put forward earlier the ADR Directive should have been implemented by the Member States no later than 9 July 2015.<sup>63</sup> The Dutch Implementation Act (hereafter: ‘Implementation Act’) to transpose the ADR Directive into Dutch law was published in the Bulletin of Acts and Decrees on 30 April 2015 and entered into force on 9 July 2015.<sup>64</sup> The Dutch government chose to implement the ADR Directive via a framework law instead of implementing the provisions of the Directive into different existing laws like the Civil Code, the Code of Civil Procedure and the Law on the Enforcement of Consumer Protection.<sup>65</sup> According to the Dutch government, most of the provisions laid down in the Implementation Act are of a *public-law nature*. The Implementation Act contains requirements which dispute resolution entities need to comply with in order to be designated as ADR entities under the Directive. These provisions by their nature would not fit in with the aforementioned existing laws.<sup>66</sup> Furthermore, the government is of the opinion that framework legislation is the designated solution for the Netherlands because the scope of the provisions of the ADR Directive (‘ADR/ODR for consumers’) is broad but not generally applicable.

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62 Creutzfeldt 2014, p. 532.

63 Art. 25 ADR Directive.

64 *Stb.* 2015, 160.

65 *Kamerstukken II*, 2014/15, 33 982, no. 3, p. 8.

66 *Kamerstukken II* 2013/14, 33 982, no. 3, p. 8; *Kamerstukken II* 2014/15, 33 982, no. 4, p. 4; *Kamerstukken II* 2014/15, 33 982, no. 6, p. 9. The Council of State (‘Raad van State’) was of a different opinion, see *Kamerstukken II* 2014/15, 33 982, no. 4, pp. 3-4.

Also, a framework law offers the benefits of accessibility, clarity and coherence.<sup>67</sup>

According to the Explanatory Memorandum, the SGC, Kifid and SKGZ wished to be accredited as ADR entities under the ADR Directive.<sup>68</sup> The status of accredited ADR entity under the Implementation Act has been granted to the SGC, Kifid and SKGZ by the designated Dutch competent authorities (the Minister of Security and Justice (SGC), the Minister of Finance (Kifid and SKGZ) and the Minister of Public Health, Welfare and Sport (SKGZ)).<sup>69</sup>

## 6 ANNULMENT OF A DECISION IN CONNECTION WITH THE MANNER OF ITS ESTABLISHMENT

As discussed in section 4, the ADR Directive formulates several procedural requirements which ADR procedures governed by the Directive should comply with.

What is the consequence if these procedural requirements are not met in a particular ADR procedure? If the ADR procedure was a binding advice procedure (as will be the case in the Netherlands most of the time), will the decision taken by binding advisors be subject to annulment on the basis of art. 7:904 par. 1 DCC in connection with the manner of establishment of the decision?

The Dutch government does not devote much attention to these possible *private-law* consequences of non-compliance with the quality requirements. As discussed before, the government holds the opinion that the act implementing the ADR Directive is largely of a *public-law* nature. The consequence of non-compliance with the procedural requirements is that the Minister will withdraw the accreditation as an ADR entity under the Directive.<sup>70</sup> It is questionable whether this conclusion is correct. The Dutch government itself does not entirely preclude a possible effect of the quality requirements set out in the ADR Directive on the private relationship between the parties. Asked by members of parliament what means parties have if they are of the opinion that the ADR entity did not follow the procedural rules, the government answers that the decision may be annulled if it would be unacceptable to hold parties to it according to standards of reasonableness and fairness.<sup>71</sup>

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67 *Kamerstukken II* 2013/14, 33 982, no. 3, p. 8.

68 *Kamerstukken II* 2013/14, 33 982, no. 3, p. 7 and *Kamerstukken II* 2013/14, 33 982, no. 6, pp. 3 and 6.

69 *Stcrt.* 2015, 45980 (SGC), *Stcrt.* 2015, 19487 (Kifid), *Stcrt.* 2015, 19094 and *Stcrt.* 2015, 19487 (SKGZ). The activities of the SKGZ fall within the scope of both the Ministry of Finance and the Ministry of Public Health, Welfare and Sport. Hence, the SKGZ has been designated as an ADR entity by two competent authorities.

70 See art. 17 par. 4-5 of the implementation Act.

71 *Kamerstukken II* 2014/15, 33 982, no. 6, p. 17.

The conclusion that non-compliance with the quality requirements *may* sometimes lead to annulment is not surprising. Under national law, it is clear that the fact that a binding advisor is subject to instructions from one of the parties (art. 6 par. 1 (c) of the ADR Directive) or the fact that the parties did not have the possibility of expressing their point of view (art. 9 par 1 (a) of the ADR Directive), may be a reason to conclude that it is unreasonable to hold a party to the decision according to standards of reasonableness and fairness.<sup>72</sup> In this respect, the inclusion of these procedural requirements in the ADR Directive adds nothing new. A much more interesting question is whether the ADR Directive implies that non-compliance with these requirements *should* make the decision non-binding on the parties. Although the Directive sees the procedural requirements as preconditions for the qualification as an ADR entity (see art. 20 par. 1-2 of the ADR Directive), it is not unthinkable that the ADR Directive requires more. The ADR Directive provides that Member States shall ‘ensure’ that the procedural requirements are met.<sup>73</sup> According to the case law of the European Court of Justice the obligation of Member States to implement a directive involves the adoption of all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues.<sup>74</sup> Have Member States done enough to ‘ensure’ the observance of the quality requirements of the ADR Directive, if their only sanction in case of non-compliance is the withdrawal of the accreditation as an ADR entity under the Directive?

This withdrawal does not in all cases seem a very effective means of enforcement. It will not be easy for the competent authorities to assess whether the ADR entities comply with the quality requirements. It will for example be difficult to determine whether an ADR entity in practice always gives parties the possibility to comment on the arguments, evidence, documents and facts put forward by the other party (see art. 9 par. 1 (a) of the ADR Directive). In this respect it is interesting to note that the provision implementing art. 9 par. 1 (a) only requires ADR entities to make sure that *their procedural rules* provide for the possibility of parties to comment on each other’s arguments et cetera. The wording of art. 9 par. 1 (a) of the ADR Directive suggests that parties should *in practice* be able to comment on each other’s arguments. This point aside, even if a competent authority succeeds in showing that an ADR entity does not comply with one of the quality requirements, the sanction – withdrawal of the accreditation as an ADR entity – seems rather severe, certainly when minor deficiencies are concerned. Since ADR entities will first be notified

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72 See for example Dutch Supreme Court 30 October 2009, ECLI:NL:HR:2009:BK1548, *JBPr* 2010/16 note P.E. Ernste; Dutch Supreme Court 20 May 2005, *NJ* 2007/114, note H.J. Snijders under *NJ* 2007/115 (*Gem. Amsterdam/Honnebier*).

73 See for example art. 6, art. 5 par. 2 and 5 and art. 7- 9 ADR Directive.

74 See ECJ 17 June 1999, C-336/97 (*Commission/Italy*), par. 19; ECJ 8 March 2001, C-97/00 (*Commission/France*), par. 9; ECJ 5 December 2002, C-324/01 (*Commission/Belgium*), par. 18.

and given a period of three months to fulfil the requirements (see art. 20 par. 2 of the ADR Directive and art. 17 par. 4 of the Implementation Act), it is questionable whether it will ever be imposed. Other, more subtle, enforcement mechanisms thus do seem desirable.

For some of the procedural requirements, it does not seem problematic if the ADR Directive implied that non-compliance makes the decision subject to annulment. One could for example argue that the fact that a binding advisor is remunerated in a way that is linked to the outcome of the procedure (art. 6 par. 1 (d) of the ADR Directive), constitutes such a grave deficiency in the procedure that the decision should be non-binding on the parties in all circumstances. The same can be said of the fact that the ADR entity did not provide the parties with the arguments, evidence, documents or facts put forward by the other party (art. 9 par. 1 (a) of the ADR Directive). The courts would thus need to deviate from the case law that even in case of breach of the principle of *audi alteram partem*, one of the factors that should be considered in assessing whether the decision should be set aside is whether and if so, to what extent, this fault has disadvantaged the other party (the 'disadvantage criterion').

For other quality requirements included in the ADR Directive, it seems more problematic to conclude that the mere breach would make the decision subject to annulment. Should the mere fact that a binding advisor was appointed for too short a term of office (art. 6 (d) of the ADR Directive), make all the decisions that he has taken during his appointment subject to annulment? Does the fact that parties were obliged by the ADR entity to retain a lawyer make it unacceptable for a party to be held to the decision taken by that entity (see art. 8 par. 1 (b) of the ADR Directive)? May a decision be annulled purely because a party shows that the ADR entity did not make publicly available on a website information on the natural persons in charge of ADR (art. 7 par. 1 (a) of the ADR Directive)? Problematic in these examples is that it is difficult to see in what way a party is affected by the deficiency. In what way is a party affected by the circumstance that a binding advisor was appointed for too short a term of office? Although the requirements mentioned are important to guarantee the quality of ADR procedures in general, it is more problematic to make the connection with the quality of a specific procedure. In these examples, it seems important for the other party to be able to invoke the fact that the party was not disadvantaged by the procedural fault.

However, if the 'disadvantage criterion' can still be relied on, there seems to be no effective remedy for the parties against breach of one of these requirements. It will be very difficult to show that a party has been disadvantaged by the fact that a binding advisor was appointed for too short a term of office or by the fact that the ADR entity did not make publicly available on a website information on the natural persons in charge of ADR. This conclusion is not much altered by the fact that it is likely that disadvantage should be presumed and that it is for the other party to show that the party was *not* disadvantaged

by a deficiency.<sup>75</sup> If a party provides no indication at all in what way it was disadvantaged, the other party may easily bear this burden.

Art. 7:904 par. 1 DCC does not seem to provide a very effective means to enforce the procedural requirements included in the ADR Directive when the 'disadvantage criterion' can still be relied on. Should the conclusion thus be that the ADR Directive implies that the 'disadvantage criterion' can no longer be applied when cases covered by the ADR Directive are concerned? Let's hope not. In our opinion this criterion is necessary to select those cases in which annulment is appropriate. To abandon the criterion would mean that decisions can be set aside too easily. This would, for example, make all the decisions of a binding advisor who, as it turns out, does not possess a 'general understanding of law' (6 par. 1 (a) of the ADR Directive), subject to annulment, even if this particular binding advisor is part of a collegial body and other members have more than enough knowledge to compensate for his deficiency. If parties could so easily challenge the validity of decisions taken in binding advice, the aim of providing them with a 'simple, efficient, fast and low-cost way' of resolving disputes will not be achieved.<sup>76</sup> The risk of having to follow a court procedure *after* the completion of the ADR track, will become very high. This risk may be especially high for the consumer. Since compliance with the procedural requirements is in the interest of *both* parties to the ADR procedure, not only the consumer, but also the trader has the possibility to invoke the fact one of these requirements was breached. It may be expected that the trader will make use of this possibility more often than the consumer, since the threshold of going to court will in many cases be lower for the trader. It is therefore likely that the consumer will more often be dragged into a court procedure after completing an ADR procedure which ended favourably for him than the trader. In our opinion, the 'disadvantage criterion' is therefore necessary to select those cases in which annulment is appropriate. However, we shall have to await the case law of the European Court of Justice on the ADR Directive to know for certain whether this criterion can still be relied on.

In conclusion, in our opinion breach of one of the quality requirements included in the ADR Directive should not automatically make the decision taken in a binding advice procedure subject to annulment. That does not mean that non-compliance with the quality requirements included in the ADR Directive is of no significance in the setting of art. 7:904 par. 1 DCC. The breach of these requirements is an important argument that it is unacceptable according to standards of reasonableness and fairness to hold a party to the decision in connection with the manner of its establishment. Therefore, the courts may sometimes come to a quicker annulment of the decision by binding advisors

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75 Snijders in his note for Dutch Supreme Court 20 May 2005, NJ 2007/114 (*Gem. Amsterdam/Honnebier*) and Dutch Supreme Court 24 March 2006, NJ 2007/115 (*Meurs/Newonij*), no. 2e; Ernste 2012, pp. 74-75; Asser/Van Schaick 2012 (7-VIII\*), no. 163.

76 Recital 4 ADR Directive.



than in the situation before implementation of the ADR Directive. For example, the mere fact that one of the parties was not provided by the ADR entity with the arguments, evidence, documents or facts put forward by the other party (art. 9 par. 1 (a) of the ADR Directive), may be sufficient reason to conclude that the decision should be annulled on the basis of art. 7:904 par. 1 DCC.

The fact that one of the procedural requirements included in the ADR Directive was breached might even be used as an argument when ADR procedures *not* covered by the Directive are concerned. Since the quality requirements mentioned in the ADR Directive are of a general nature, it is not excluded that they have an indirect effect in such cases. An indirect effect seems certainly likely in the situation in which a *trader* starts an ADR procedure against a consumer. Since such a procedure falls outside the scope of the ADR Directive and of the Implementation Act, the procedural requirements do not apply. However, it is not clear what can justify this lower level of protection offered to the consumer. It is thus quite defensible that in this situation, the fact that a procedural requirement mentioned in the ADR Directive was breached can be used as an argument that it is unacceptable according to standards of reasonableness and fairness to hold a party to the decision.

The procedural requirements of the ADR Directive and the law implementing them thus do influence the concept of 'reasonableness and fairness' in art. 7:904 par. 1 DCC. In ADR procedures covered by the ADR Directive, the mere fact that one of the procedural requirements is breached should not automatically make the decision of binding advisors subject to annulment on the basis of art. 7:904 par. 1 DCC. However, the non-compliance with these requirements is a very serious indication that it is unacceptable according to standards of reasonableness and fairness to hold a party to the decision in connection with the manner of its establishment. Outside the scope of application of the ADR Directive, the procedural requirements may have an indirect effect.

## 7 ANNULMENT OF A DECISION IN CONNECTION WITH ITS CONTENT

As was seen in the previous section, the procedural requirements mentioned in the ADR Directive may influence the standard for annulment of a decision in relation with its manner of establishment. Does the ADR Directive have an influence on the possibility of annulment of a decision in connection with its content as well?

As was pointed out before, art. 11 of the ADR Directive requires Member States to ensure that in ADR procedures which aim at resolving the dispute by imposing a solution on the consumer, the solution imposed shall not result in the consumer being deprived of the protection afforded to him by the

mandatory law of the Member State where the consumer is habitually resident.<sup>77</sup> This provision is implemented in Dutch law by means of art. 10 of the Implementation Act. Art. 10 par. 1 of the Implementation Act tries to ensure that the protection of mandatory law is afforded to the consumer by simply stating that the solution imposed on the consumer shall not deprive him of it. What are the consequences in the event a decision is taken that *does* deprive the consumer of the protection afforded to him by mandatory law? What happens, for example, when binding advisors have refused to annul a term in the general terms and conditions of the trader in a case where the trader gave these terms and conditions to the consumer *after* the time of entry into the contract (this in contradiction with art. 6:233(b) and 6:234 DCC)? Although the Implementation Act is not entirely clear on this point, the non-compliance with this quality requirement is probably a reason to withdraw from the entity that has taken the decision the accreditation as an ADR entity under the Directive (see art. 20 par. 2 of the ADR Directive and art. 17 par. 4 of the Implementation Act). However, it follows from art. 10 par. 2 of the Implementation Act that the non-compliance has consequences for the parties as well. This provision states that art. 7:902 DCC does not apply to ADR procedures governed by the Directive.<sup>78</sup>

As was seen in paragraph 2, it is not possible to annul a decision on the basis of art. 7:904 par. 1 DCC on the sole ground that it is in breach of mandatory law. The reason is that art. 7:902 DCC makes it clear that a decision to terminate an uncertainty or dispute in the field of the law of property, proprietary rights and interests is valid, notwithstanding that it proves to be in breach of mandatory law, unless it would also, as to content or necessary implication, be in breach of good morals and public policy.<sup>79</sup> Art. 10 par. 2 of the Implementation Act abolishes art. 7:902 DCC when ADR procedures covered by the Directive are concerned. A decision in breach of mandatory law will in those cases no longer be valid.

One could wonder whether the abolishment of art. 7:902 DCC was really necessary. First of all, it is questionable whether the Directive requires that breach of mandatory law has consequences for the validity of the decision taken by the ADR entity. It might be sufficient for a Member State to withdraw the accreditation as an ADR entity when this entity imposes solutions on consumers which are not in accordance with mandatory law. However, this method of enforcement appears to be rather ineffective. It will be very difficult for a competent authority within a Member State to verify whether the de-

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<sup>77</sup> See section 4.

<sup>78</sup> 'Op procedures tot buitengerechtelijke geschilbeslechting die beslecht worden door een vaststelling als bedoeld in artikel 7:900 van het Burgerlijk Wetboek is artikel 7:902 van het Burgerlijk Wetboek niet van toepassing.'

<sup>79</sup> Asser/Van Schaick 2012 (7-VIII\*), no. 163; see Dutch Supreme Court 12 September 1997, NJ 1998/382, note M.M. Mendel (*Confood/Zürich*) and the opinion of Advocate General Bakels, no. 3.26-3.29.

isions of an ADR entity are in accordance with mandatory law. Art. 20 par. 1 ADR Directive provides that a competent authority makes the assessment whether an entity complies with the quality requirements in particular on the basis of information it has received from the ADR entity itself in accordance with art. 19 ADR Directive. Art. 19 ADR contains a list of information that ADR entities need to notify to the competent authority, but information on the *content* of the decisions taken by the ADR entity is missing from this list. Since the ADR Directive requires minimum harmonization, the Dutch legislator can impose farther-reaching duties on ADR entities to provide information, but the legislator did not make use of this possibility (see art. 17 par. 1 and 18 Implementation Act). The competent authorities within the Netherlands will therefore not have the data necessary to verify effectively whether the decisions of an ADR entity are in accordance with mandatory law. Therefore, additional measures to ensure that the ADR entities apply the mandatory law correctly seem necessary.

One could also wonder whether decisions in breach of mandatory provisions for the protection of the consumer were not already invalid without the abolition of art. 7:902 DCC. It could be argued that such mandatory provisions for the protection of the consumer can be seen as rules of public policy which fall under the exception of art. 7:902 DCC.<sup>80</sup> However, although *some* mandatory rules for the protection of the consumer may indeed be qualified as rules of public policy, it is not likely that this is true for *all* the provisions covered by art. 11 ADR Directive. Art. 11 ADR Directive uses the words ‘provisions that cannot be derogated from by agreement’ (par. 1 (a) and (b)) and ‘mandatory rules’ (par. 1 (c)), by which reference is made to the Rome I Regulation respectively the Rome Convention.<sup>81</sup> As regards the Rome I Regulation, it is assumed that the words ‘provisions that cannot be derogated from by agreement’ in art. 6 par. 2 do not only cover rules that specifically aim to protect the consumer, but also more general private-law rules that may have the effect of offering protection to the consumer.<sup>82</sup> These words should be distinguished from the concept of ‘overriding mandatory provisions’ mentioned in art. 8 of the Rome I Regulation, which should be construed more restrictively.<sup>83</sup> It therefore does not seem likely that all the ‘provisions that cannot be de-

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80 Case law of the European Court of Justice may support this view; see ECJ 6 October 2009, C-40/08, NJ 2010/11, note M.R. Mok (*Asturcom/Rodríguez Noguiera*), par. 52-53, 59; ECJ 16 November 2010, C-76/10 (*Pohotovost’/Korèkovská*), par. 50-54. ECJ 1 June 1999, C-126/97, NJ 2000/339 (*Eco Swiss/Benetton*), par. 36-37.

81 See also *Kamerstukken II* 2013/14, 33 982, no. 3, pp. 21-22.

82 M. McParland, *The Rome I Regulation on the law applicable to contractual obligations*, Oxford: Oxford University Press 2015, no. 12.185, p. 551; F. Ragno, ‘The Law Applicable to Consumer Contracts under the Rome I Regulation’, in: F. Ferrari & S. Leible (eds.), *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, München: Sellier 2009, p. 152.

83 See recital 37 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). See also McParland 2015, no. 12.185. p. 551.

rogated from by agreement' in the sense of art. 11 ADR Directive can be qualified as rules of public policy. In order to make sure that the consumer is not bound by a decision in breach of mandatory law, the legislator could therefore not leave art. 7:902 DCC unamended.

As a consequence of the abolition of art. 7:902 DCC, decisions in breach of mandatory law taken in a procedure covered by the Implementation Act are no longer valid on the basis of art. 7:902 DCC. But if they are no longer valid, what regime does apply to them? Are the decisions null and void? Are they subject to annulment? The parliamentary papers accompanying the Implementation Act do not offer clarity. They only state that with the abolition of art. 7:902 DCC in these situations, there is no longer any room for departure from mandatory law.<sup>84</sup> Various theories may be developed. First of all, a decision in breach of mandatory law may simply be null and void. Legal literature points in this direction, since the same is assumed in other situations falling outside the scope of art. 7:902 DCC. For example, decisions in breach of mandatory law in disputes outside the field of the law of property, proprietary rights and interests (such as disputes in the field of family law) are seen as null and void. This would follow *a contrario* from art. 7:902 DCC.<sup>85</sup> The downside of a solution in which the decision is simply null and void, is that it also makes it possible for the *trader* to invoke the invalidity of the decision. Art. 11 ADR Directive, by contrast, seems written solely for the benefit of the consumer.

From the explanatory memorandum accompanying the preliminary draft of the Dutch Civil Code, another view may be deducted. Here it is stated that the normal rules apply to cases falling outside the scope of art. 7:902 DCC.<sup>86</sup> The question is obviously what these 'normal' rules are. Possibly, reference is made to art. 3:40 DCC, which offers a general arrangement for acts in breach of statutory provisions. Paragraph 3:40 par. 2 DCC states that a juridical act which violates a mandatory statutory provision becomes null and void; if, however, the provision is intended solely for the protection of one of the parties to a multilateral juridical act, the act may only be annulled; in both cases this applies to the extent that the provision does not otherwise provide.<sup>87</sup> Art. 3:40 par. 2 DCC thus makes it possible to take into account which party the mandatory law intends to protect. Therefore, the trader may not be able to invoke the invalidity of the decision because mandatory law protecting the

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84 *Kamerstukken II* 2014/15, 33 982, no. 3, p. 22.

85 According to Van Schaick, no obligations arise for the parties from the binding advice agreement in such circumstances. He does not make it clear why this is so. See Asser/Van Schaick 2012 (7-VIII\*), no. 153, no. 156. According to Ernste, if a decision is not only in breach of mandatory law, but also in breach of good morals and public policy, the decision is null and void. In her opinion, this follows *a contrario* from art. 7:902 DCC.

86 Toelichting Meijers, Vierde gedeelte, Boek 7, p. 1141.

87 See on art. 3:40 DCC A.S. Hartkamp, M.M.M. Tillema & A.E.B. ter Heide, *Contract Law in the Netherlands*, Alphen a/d Rijn: Kluwer Law International 2011, nos. 93-95, pp. 87-89.

consumer was breached. It is problematic, however, that art. 3:40 par. 2 DCC offers the possibility to take the purpose of the mandatory provision into account only in case of a *multilateral* juridical act. The decision by binding advisors is seen as a *unilateral* juridical act.<sup>88</sup> A *literal* interpretation of art. 3:40 par. 2 DCC would therefore mean that the decision in breach of mandatory law is simply null and void; the second sentence of art. 3:40 par. 2 DCC does not apply. Although a different interpretation of art. 3:40 par. 2 DCC is certainly defensible, the above shows that application of this provision is not entirely unproblematic in the specific situation of binding advice, in which the parties are bound by a juridical act performed by another party (the binding advisor(s)).

A last possibility is to assess decisions in breach of mandatory law on the basis of art. 7:904 par. 1 DCC. It could be argued that with the abolition of art. 7:902 DCC, the mere fact that mandatory law was breached *is* sufficient reason for annulment of the decision. The non-compliance with mandatory law makes it unacceptable according to standards of reasonableness and fairness for a party to be held to the decision in connection with its content. The advantage of this solution is that art. 7:904 DCC offers an arrangement specifically adapted to binding advice. The validity of decisions taken in binding advice will be covered exclusively by art. 7:904 DCC. Another advantage is that art. 7:904 par. 1 DCC makes the decision subject to annulment. One could therefore argue that only the *consumer* may invoke the invalidity of the decision if mandatory law protecting the consumer was breached. The trader would not be able to annul the decision in such circumstances.

In our opinion, this last option is preferable. Since art. 7:904 par. 1 DCC specifically deals with the situation of binding advice, this provision can be seen as a *lex specialis* to art. 3:40 par. 2 DCC. Even in this solution, the abolition of art. 7:902 DCC for ADR procedures covered by the Directive has far-reaching consequences. First of all, it means that it will be difficult for the SGC to use 'reasonableness and fairness' as a standard for deciding their cases instead of the rules of law, since the Complaints Boards will at least need to apply mandatory law. But even if an ADR entity uses the rules of law as a standard, its decisions are in danger of being subject to annulment. A decision by an ADR entity may easily be in breach of mandatory law. Large areas of consumer law are of a mandatory nature. Many disputes submitted to ADR will thus require the application of mandatory rules. Since these rules are not always clear, an ADR entity may easily give an incorrect interpretation of such a provision. Even if the ADR entity (as it later turns out) interprets the provision in the correct way, a party may be of a different opinion and contest this interpretation in court. The validity of many decisions taken in ADR is thus up for discussion. In this respect it is interesting to note that the explanatory

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88 Ernste 2012, pp. 59-60.

memorandum accompanying the preliminary draft of the Dutch Civil Code makes it clear that since decisions in a dispute not pertaining to the field of the law of property, proprietary rights and interests, can be examined unrestrictedly for compatibility with mandatory law, it will make little sense to submit such a dispute to binding advice.<sup>89</sup> Art. 10 par. 2 of the Implementation Act in connection with art. 11 of the ADR Directive thus seems to take away a great deal of the binding force of a decision taken in a binding advice procedure covered by the Directive. This would be the case even more so if not only the consumer, but also the trader could invoke the invalidity of a decision in breach of mandatory law protecting the consumer. A solution in which only the consumer can in those circumstances invoke this ground is preferable.

A disadvantage of the fact that art. 7:904 par. 1 DCC makes the decision subject to annulment may be that the consumer would actively need to annul the decision taken by binding advisors. If he does not, he remains bound by it.<sup>90</sup> It is questionable whether the law thus complies with art. 11 ADR Directive. If the consumer does not actively annul the decision, he *will* be deprived of the protection afforded to him by mandatory law. An interpretation in the light of the ADR Directive might lead to the conclusion that the court may annul the decision of its own motion in such cases.<sup>91</sup>

It is important to note that art. 10 par. 2 of the Implementation Act is not confined to mandatory law protecting the consumer, but abolishes art. 7:902 DCC altogether. If mandatory law that – in the particular circumstances of the case – protects the interests of the trader is breached, this will thus have consequences for the validity of the decision as well. By contrast, art. 11 of the ADR Directive is confined to mandatory law protecting the consumer. The binding force of decisions taken in binding advice is thus reduced further by the Implementation Act than was strictly necessary under the ADR Directive. As was observed before, it seems likely that the trader will more often make use of the possibility to set aside a decision unfavourable to him in court than the consumer.

Added to this is the fact that art. 11 of the ADR Directive and art. 10 par. 1 of the Implementation Act do not seem to be confined to *the breach* of mandatory law. They state that the solution imposed ‘shall not result in the consumer being deprived of the protection afforded to him’ by mandatory law. If binding advisors establish the facts in another way than a regular court would have done, this obviously can have consequences for the application of mandatory law. The difference in the established facts may for example result in the ADR

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<sup>89</sup> Toelichting Meijers, Vierde gedeelte, Boek 7, p. 1141.

<sup>90</sup> Hartkamp, Tillema & Ter Heide 2011, no. 100, pp. 92-93; Chorus, Gerver & Hondius 2006, p. 154.

<sup>91</sup> Cf. Dutch Supreme Court 13 September 2013, ECLI:NL:HR:2013:691, *NJ* 2014/274, note H.B. Krans (*Heesakkers/Voets*), par. 3.7.1-3.7.3.

entity concluding that a certain mandatory rule is not applicable, where a regular court would have applied that rule. In this situation, one could say that the consumer was 'deprived of the protection afforded to him' by mandatory law. Do art. 11 of the Directive and art. 10 of the Implementation Act thus imply that the decision should not be valid in such a situation? If this conclusion is correct, it would offer parties the opportunity to challenge the establishment of the facts by binding advisors at the regular court. The procedure on the validity of the decision at the regular courts will thus come very close to a full appeal.

Another point is worth mentioning in connection with art. 10 par. 2 of the Implementation Act. It is interesting to see that this provision only abolishes art. 7:902 DCC in binding advice procedures governed by the ADR Directive.<sup>92</sup> This choice implies that the decision taken in a procedure started by *the consumer against a trader* can be scrutinized for compatibility with mandatory law, whereas a decision taken in a procedure started by *the trader against a consumer*, cannot. In this latter situation, art. 7:902 DCC still applies and the decision is valid notwithstanding the fact that it is in breach of mandatory law protecting the consumer. This difference in the way the interests of the consumer are protected, depending on which party started the ADR procedure, is difficult to defend. In some instances, this difference might be avoided by the fact that the provision protecting the consumer can be seen as a rule of public policy, so that the exception of art. 7:902 DCC applies. In other instances, it might be possible to find a solution by making use of art. 7:904 par. 1 DCC. The fact that the decision was in breach of mandatory law protecting the consumer may be reason to conclude that it is unacceptable according to standards of reasonableness and fairness for the consumer to be held to the decision in connection with its content. In order to come to this conclusion, the courts would need to deviate from the case law that it is not possible to annul a decision on the basis of art. 7:904 par. 1 DCC on the sole ground that the decision is in breach of mandatory law. This deviation might be justified by the wish to avoid a different treatment of the consumer depending on which party started the ADR procedure. Whether courts are willing to take this approach remains to be seen. This approach would mean that art. 7:902 DCC is *de facto* of little meaning in those cases.

As has become clear in this section, art. 11 of the ADR Directive in combination with art. 10 of the Implementation Act has an influence on the binding force of decisions taken in binding advice. Here again, it is questionable whether the extensive powers of the court to scrutinize the decisions by binding advisors are desirable. Parties turn to ADR to put an end to their conflict. If decisions taken in binding advice can be challenged too easily, all that parties achieve by turning to ADR may be adding an extra stage to their

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92 See art. 2 of the Implementation Act.

proceedings. If the risk of having to follow a court procedure after the completion of the ADR procedure becomes too high, parties will turn away from ADR. This raises the question whether there are alternative ways in which the compatibility with mandatory law of decisions taken in binding advice can be enhanced.

#### 8 SAFEGUARDS TO ENHANCE COMPATIBILITY WITH MANDATORY LAW UNDER ART. 11 ADR DIRECTIVE

To enhance compatibility with mandatory law of decisions taken in binding advice, certain safeguards on both the national and the European level could be introduced. In this section two possible national safeguards and a European one will be touched upon.<sup>93</sup>

As mentioned in section 4, the ADR Directive is a framework Directive that allows Member States to introduce rules that go beyond those laid down by the Directive.<sup>94</sup> The Dutch legislator was given some policy latitude to decide whether the national ADR entities that use binding advice as an ADR procedure should comply with an extra information duty that goes a little beyond the list of requirements as set out in art. 19 par. 3 ADR Directive, laid down in art. 18 Implementation Act. One could add to art. 18 Implementation Act an extra duty for ADR entities to communicate data to the competent authority on cases where mandatory law has been applied in the dispute resolution process. Via the construction of a specific IT application, which e.g. recognizes provisions of mandatory law in the documents it screens, it should be possible for Dutch ADR entities to build a database of decisions taken in binding advice where mandatory law has been applied. The content of this database should be sent to the competent authority every two years.<sup>95</sup> However, this safeguard could result in extra costs in the sense that this IT application should be developed (by either the government or the ADR entities themselves) and integrated into the workflow systems of the appointed Dutch ADR entities. Furthermore, this extra information duty could increase the workload of the secretariat of the competent authority<sup>96</sup> as it should test if the mandatory law has been applied properly in the decisions given by binding advice. The Dutch legislator did not use the policy latitude given by the European legislator to include a more

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93 A more in-depth analysis of the illustrated safeguards is subject to further studies and goes beyond the scope of this contribution.

94 Art. 2 par. 3 ADR Directive.

95 Every two years the ADR entities are obliged to send information to the competent authority. See art. 19 par. 3 ADR Directive, art. 18 Implementation Act.

96 Art. 18 ADR Directive, art. 1, par. 1(i) in conjunction with art. 16 Implementation Act.



stringent information duty in art. 18 of the Implementation Act. However, this might be a future option when the ADR Directive is evaluated.<sup>97</sup>

Which leads to the illustration of a different national safeguard. Since 2012 it has been possible to address a prejudicial question to the Supreme Court at (one of the) parties' request or *ex officio* by the judge of first instance via articles 392-394 Code of Civil Procedure. The prejudicial question addressed to the Supreme Court could be a valuable option to check whether mandatory law is applied correctly in decisions taken in binding advice. Grounds for addressing a prejudicial question are a multiplicity of claims based on similar facts and/or questions of law.<sup>98</sup> Both are not unlikely to occur in consumer cases.<sup>99</sup> For the realization of this safeguard binding advisors should be granted the possibility to address a prejudicial question to the Supreme Court about how to apply mandatory law correctly.<sup>100</sup> This new competence of binding advisors could be a liaison between ADR and the courts, which might be an argument for the Supreme Court to allow the aforementioned questions addressed as an alternate safeguard.<sup>101</sup> This option too has a downside though, since addressing a prejudicial question would put the binding advice procedure on hold and the binding advisors therefore might struggle to reach a decision within the period of 90 calendar days from the date on which the ADR entity has received the complete complaint file (art. 8(e) ADR Directive). Further research on the feasibility of this safeguard is therefore necessary.

Last but not least, a safeguard at European level might be an option. Art. 16 ADR Directive emphasizes that Member States shall ensure that ADR entities cooperate and exchange best practices with regard to the settlement of disputes. In line with this European push to cooperate would be the establishment of a European judicial committee that monitors a selection of ADR decisions on legality and gives advice to ADR entities on how mandatory law could be applied best in the various European CDR models.

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97 By 9 July 2019, and every four years thereafter, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the ADR Directive, art. 26 ADR Directive.

98 Art. 392 par. 1(a), (b) Code of Civil Procedure.

99 See recital 30 ADR Directive and art. 19 par. 3 (e) ADR Directive.

100 Arbitrators are not permitted to address a prejudicial question to the Court of Justice of the European Union (See ECJ 23 March 1982, C-102/81, *NJ* 1983/149 (*Nordsee*)). The route to address a prejudicial question to the Supreme Court is therefore likely not to be open to binding advisors either.

101 The relation between the prejudicial question addressed to the Supreme Court and ADR is not clarified in literature and practice and thus the feasibility of this default option is subject to further studies.

## 9 CONCLUSION

In this contribution, we addressed the question whether the ADR Directive influences the interpretation of the core concept of ‘reasonableness and fairness’ within the context of art. 7:904 par. 1 DCC. If a binding advice procedure does not comply with the quality requirements set out in the Directive, does this make it ‘unacceptable according to standards of reasonableness and fairness’ for a party to be held to the decision taken by binding advisors? Can the decision therefore be annulled in such a case? It was argued that the ADR Directive to a certain extent does influence the interpretation of this concept.

When the manner of establishment of the decision is concerned, the fact that one of the procedural requirements of the ADR Directive was breached forms a very serious indication that it is unacceptable according to standards of reasonableness and fairness to hold a party to the decision. However, this contribution argued that the breach of one of these requirements should not automatically make the decision subject to annulment. If a party was not disadvantaged by the deficiency, the decision may, depending on the circumstances, be upheld. It would be undesirable if the ADR Directive implied otherwise. In binding advice procedures falling outside the scope of application of the ADR Directive, the procedural requirements may have an indirect effect, in the sense that the fact that one of the procedural requirements mentioned in the ADR Directive was breached, can be used as an argument that the decision should be annulled. Such an argument seems especially strong in cases in which a trader started an ADR procedure against a consumer.

With regard to the content of the decision it is clear that the ADR Directive (and the Implementation Act) has an influence on the standard of art. 7:904 par. 1 DCC, although it is not entirely certain in what way. Art. 10 par. 2 Implementation Act abolishes art. 7:902 DCC for ADR procedures covered by the ADR Directive, so that decisions in breach of mandatory law are no longer valid on the basis of this provision. However, it is not clear what regime does apply to them. This contribution argues that decisions in breach of mandatory law are subject to annulment on the basis of art. 7:904 par. 1 DCC. If a mandatory provision protecting the consumer is breached, it will be unacceptable for the consumer to be held to the decision according to standards of reasonableness and fairness. In this view, the trader will not be able to invoke the fact that a mandatory provision protecting the consumer was not applied. However, even in this view art. 10 par. 2 of the Implementation Act has far-reaching consequences. Consumer law is to a large extent mandatory by nature. A decision may easily entail a wrong interpretation of mandatory law and thus be subject to annulment. In cases in which a trader starts an ADR procedure against a consumer (and in which the ADR Directive thus does not apply), art. 7:902 DCC remains unaltered. However, the desire to afford the consumer the same protection in those cases as is given to him in situations

in which he himself turns to ADR may bring the court to a quicker annulment of the decision on the basis of art. 7:904 par. 1 DCC as well.

The ADR Directive in combination with the Implementation Act does seem to take away a great deal of the binding force of decisions taken in a binding advice procedure covered by the Directive. Since the ADR Directive opens such extensive possibilities for parties to challenge the decisions imposed on them, the risk of having to follow a court procedure after the completion of the ADR track will become high. Thus, the aim of the ADR Directive of providing parties with a 'simple, efficient, fast and low-cost way' of resolving disputes might not be achieved. Therefore, this contribution has examined alternative ways in which the quality of consumer ADR can be enhanced. Two national safeguards and a European one have been touched upon. In the Dutch CDR system one could think of a future extra information duty for ADR entities with regard to the legality requirement in art. 18 of the Implementation Act. Furthermore, binding advisors might be granted the opportunity to address a prejudicial question to the Supreme Court. Finally, at the European level a European judicial committee that monitors a selection of ADR decisions on legality might enhance compatibility with mandatory law in binding decisions throughout Europe.

