



SME access to Alternative Dispute Resolution systems

Final report

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1 Introduction

1.1 Background

It is a fact that many disputes between people and/or organisations do not lend themselves to authoritative yes-or-no decisions. Another fact to be taken into account is that disputants may be facing a series of problems, such as costs and delays when they decided to claim their rights in court. When bilateral negotiations are deadlocked and the resourcefulness of a third party is sought, disputants increasingly consider methods of settlement other than adjudication, particularly in areas such as construction, employment and family disputes.

Conciliation, mediation, arbitration, med-arb, fact finding, rent-a-judge and mini trial are all branches of the Alternative Dispute Resolution tree. These methods focus on ending a conflict by considering the parties' real interests and their future relationships, instead of focussing on the question of who is right and who is wrong.

Alternative Dispute Resolution systems have more advantages than judicial dispute resolution: they are more effective, timely and cheap¹.

Small and medium sized enterprises and business-to-business disputes

Small and medium sized enterprises (SMEs) can be involved in business-to-business disputes with customers, suppliers and/or partners. When these disputes cannot be solved by bilateral negotiations, the SMEs may consider judicial litigation. Unfortunately SMEs, and especially small enterprises, are deterred from starting legal action by the duration and cost of these procedures. In cases of cross-border disputes different languages and cultures are extra barriers discouraging SMEs from going to court. And, should the counterpart in a dispute be a large enterprise, this counterpart is likely to have more expensive and experienced legal assistance. Furthermore, judicial litigation often ruins relationships. Altogether, judicial litigation is often no real option for SMEs. Alternative Dispute Resolution might be an interesting alternative for SMEs for solving business-to-business disputes, since many of the disadvantages of judicial litigation do not apply, or apply to a lesser extent, in alternative dispute resolution.

Objective

The aim of the study is to make a useful contribution to the development of Alternative Dispute Resolution in Europe and, in particular, to promote this system of resolving disputes where Small and Medium-sized Enterprises are involved, especially small businesses. In order to achieve the aim of the study, the European Commission has formulated the following requirements:

- 1 The study will summarise the current situation of ADR in Europe.
- 2 The study will analyse, assess and classify disputes involving small businesses and estimate the economic costs of unresolved disputes, based on concrete cases.
- 3 The study will measure the cost and effectiveness of the main types of Alternative Dispute Resolution and identify best practices.
- 4 The study will identify performance indicators based on the business community's expectations of Alternative Dispute Resolution.

¹ Source: OECD (2002), Legal provisions related to business-to-consumer alternative dispute resolution in relation to privacy and consumer protection.

- 5 The study will identify the most effective measures for promoting Alternative Dispute Resolution among Small and Medium-sized Enterprises and draw up a draft communication plan.
- 6 The study will result in a final report and a 30-page, full-colour summary for distribution among the business community.

1.2 Approach to the study

The actual work is divided into 6 main tasks:

- 1 Describe the current situation of ADR in Europe
- 2 Compile a statistical database of SMEs' disputes and ADR cases
- 3 Analyse the needs of SMEs for ADR
- 4 Develop performance indicators
- 5 Prepare a programme for the promotion of ADR among enterprises
- 6 Draw up the final report

Each of these tasks consists of two or more steps; see table 1.

table 1 Overview of the tasks and steps to be performed during the project.

<i>Task</i>	<i>Steps</i>
1 Describe the current situation of ADR in Europe	Literature research Consult ENSR network Analyse and describe ADR situation
2 Compile a statistical database of SME disputes and ADR cases	SME survey (n = 1,200) Mediation centre survey (n = 100)
3 Analyse the needs of SMEs	Analyse and describe types of disputes Estimate economic cost of non-resolution and impact on European competitiveness
4 Develop performance indicators	Develop a consistent system of performance indicators Present practical examples of successful conciliation/mediation
5 Prepare a programme for the promotion of ADR among enterprises	Identify the most effective methods for promoting ADR among SMEs Identify and propose ways of implementing these methods Draw up a draft communication plan
6 Draw up the final report	Compose final report Compose a summary for the business community

EIM worked in close cooperation with the partners of the European Network for SME Research to collect information about various ADR 'regimes' in the 31 countries. The European Network for SME Research (ENSR) is a network of institutes specialised in policy oriented research, with a special focus on SMEs. The Network covers all countries of the European Economic Area. See: www.ensr-net.com

EIM established an expert group to ensure the high quality of the research. The following persons were members of the group:

- Prof. Alex Brenninkmeijer of Leiden University (the Netherlands) - ADR, also certified mediator;
- Prof. Fabien Gélinas of McGill University (Montreal, Canada) - Dispute resolution, also an active mediator;
- Dr. Arielle Feuillas of Citia (France) - Research and ADR.

The responsibility for the contents of this report, however, lies with EIM bv.

1.3 Definitions and scope of the research

1.3.1 *Small and medium-sized enterprises*

As far as possible this report will follow the EU-definition of small and medium-sized enterprises as laid down in the Commission Recommendation C (2003) 1422 final, of 6 May 2003. The core of this recommendation is that micro, small and medium-sized enterprises are any entities that are engaged in economic activities and employ fewer than 250 persons, have an annual turnover that does not exceed € 50 million and/or a balance sheet total of no more than € 43 million. Self-employed workers, partnerships and economically active associations are also included in this definition

However, it is not possible to comply with this definition in all circumstances. The reason is that directories of addresses for survey purposes do not include information on turnover and/or balance sheet totals. Therefore only the number of employees is used as the criterion for selecting and weighing the respondents for the survey. In the remainder of this document, micro, small and medium-sized enterprises will be referred to as 'SMEs'. Small enterprises are defined as enterprises with fewer than 50 employees and medium-sized enterprises as enterprises with 50 to 250 employees.

1.3.2 *Disputes and Dispute Resolution*

Disputes

The occasional dispute must be accepted as an unfortunate fact of business life. The Dutch Handbook Mediation gives the following description of a dispute: When two (or more) parties strive to achieve different goals, aspirations, needs or values that are incompatible¹. De Dreu offers another definition: Conflict is defined as a process that begins when an individual or group perceives differences and opposition between oneself and another individual or group about interests and resources, beliefs, values or practices that matter to them². John Crawley defines conflict as 'a manifestation of differences working against one another that have ingredients, combinations and conditions and the spark (what happens when their differences clash)'³.

SMEs can be involved in various types of disputes. For example an SME can have a dispute with suppliers or customers about a payment, or a dispute with the works council about the conditions of employment. The scope of this study will be business-to-business disputes in which SMEs are involved.

¹ A.F.M. Brenninkmeijer a.o. (eds), *Handboek Mediation*, the Hague: Sdu Uitgevers 2005, p. 39.

² C.K.W. de Dreu, *Bang voor conflict? De psychologie van conflicten in organisaties, (Afraid of conflicts? Conflict psychology in organisations)*, 2005.

³ H. Brown and A. Marriott, *ADR Principles and Practice*, London: Sweet & Maxwell 1999, p. 1.

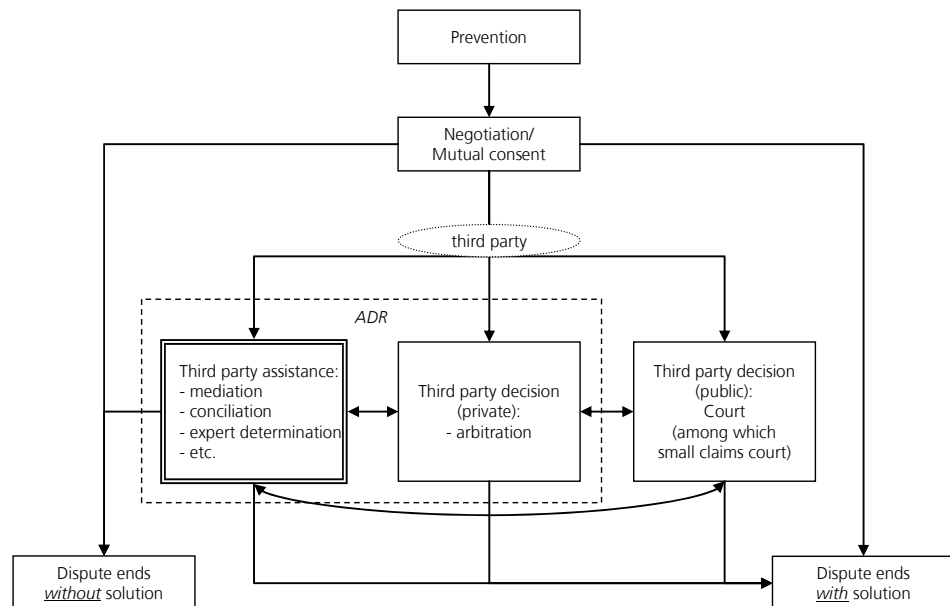
Ways to resolve business disputes

Not all disputes involving SMEs are serious, and some disputes can be ignored without any consequences. However, some are more serious. If they are not dealt with, they may deteriorate and require time and money to resolve.

Dispute Resolution is the term used to describe a variety of ways of dealing with disputes, including the option of going to court. SMEs become involved in many types of disputes. The variety of Dispute Resolution options available, allows them to choose the best method to deal with their particular situation.

It is usual within the field of conflict resolution to classify dispute processing options into categories such as negotiation, mediation, arbitration and litigation. Figure 1 shows a classification of dispute processing methods.

figure 1 Dispute Solving Diagram



Source: EIM, 2005.

Prevention

Similar to most other organisations, SMEs do not like disputes and so the first step is to reduce the risk of disputes. There are many ways of preventing disputes, for example:

- quality schemes
- checking references before starting a relation with another organisation
- contracts

Taking out insurance cover in advance (liability insurance, for example) is another way to deal with the consequences of disputes. This can be seen as dispute outsourcing.

Negotiation/mutual consent

Negotiation is by far the most common technique to resolve disputes. Parties that disagree can often get together to discuss the problem and reach a mutual agreement. When people sort out a problem themselves, they can work out a solution that best meets their own needs and interests. Solving disputes through negotiation is a part of everyday life. It is also important for maintaining good relations.

Third party assistance

The parties involved in a dispute can request an unbiased and impartial person, a mediator, to assist them in their negotiations. Where negotiation has not been successful, the mediator can often help to ease tension and encourage discussion between the parties. The mediator can help the parties themselves to find a solution that can often result in a 'win-win'-situation.

Third party assistance can vary from facilitation to making non-enforceable decisions.

Third party decisions

When the disputing parties are unable to resolve the dispute themselves, either through one-to-one negotiation or with the assistance of a mediator, they can agree to refer the matter to arbitration. In arbitration a neutral person or panel of people would hear the parties and make a decision.

Arbitration differs from litigation and tends to be less formal and quicker than going to court. The parties can agree on the ground rules for the arbitration in advance (as opposed to judicial procedures which are more rigid). Arbitration is usually voluntary in that both parties agree to submit the dispute to arbitration and the parties often agree on the selection of the arbitrator and the procedural rules¹. Generally, rules of evidence and procedure are more relaxed than those governing litigation. Arbitration can also be ordered by a court or be made obligatory by a statute. In such cases, the arbitrator may be appointed by a judge or government official.

Judicial litigation

Judicial litigation is the traditional way. The courts can resolve 'rights-based' disputes, i.e. disputes over alleged violations of rights and obligations under law or contract. The dispute is resolved by a judge or a jury, who should be informed about the background and context of the dispute and the business issues involved.

To conclude, and referring to the classification presented in Figure 1: if a dispute cannot be resolved by negotiations or mutual consent, and if parties do not wish to go to court, Alternative dispute resolution (ADR) is the proper way to solve the dispute. ADR comprises both 'third party assistance' and 'third party decisions'.

1.3.3 *Alternative Dispute Resolution*

Alternative dispute resolution (ADR) is an alternative for the usual judicial litigation of individual disputes. ADR involves an independent person (a neutral third party), who brings the parties together, facilitates negotiations, gives advice on how to end the dispute, or takes a binding decision. In its 'Green Paper on alternative dispute resolution in civil and commercial law'², the European Commission defines Alternative Dispute Resolution as an *extrajudicial dispute resolution process conducted by a neutral third party (excluding arbitration proper)*. This definition is adopted in this study. Alternative Dispute Resolution will be referred to as 'ADR' in the remainder of this document.

¹ Sometimes parties agree in advance (e.g. by contract) to ask for arbitration in case a dispute may arise. Some trade associations have set up their own arbitration procedures for their members.

² Commission of the European Communities, *Green Paper on alternative dispute resolution in civil and commercial law*, 196 final, Brussels, 19 April 2002.

There are various types of ADR. Well-known examples include arbitration and mediation. The 'Green Paper on alternative dispute resolution in civil and commercial law' distinguishes the following types of ADR:

A ADR IN THE CONTEXT OF JUDICIAL PROCEEDINGS (Court-annexed ADR)

- A1 conducted by the court
- A2 entrusted by the court to a third party

B CONVENTIONAL ADR (out-of-court)

- B1 third party makes a decision that is binding for one party
- B2 third party makes a recommendation to the parties that they are free to follow
- B3 third party does not formally adopt a position on the possible means of resolving the dispute but simply helps the parties to come to an agreement

Other sources¹ even name specific ADR methods. Although these methods are in principle *extrajudicial* methods, each of these methods can also be conducted by the court, under the aegis of a court or entrusted by a court to a third party. A swift glance through documentation on ADR results in the following overview:

- Arbitration (alternatives) (B1)
- Arbitration-mediation (Med-Arb) (B3 followed by B1 if necessary)
- Conciliation (B2/B3)
- Contractual adjudication (B1)
- Expert determination (B3)
- Fact finding (B2)
- Mediation (B2)
- Mini trial (B3)
- Neutral evaluation (B2)
- Ombudsman (B3)

Arbitration^{2 3}

Arbitration is in many ways an alternative form of court. The parties in a conflict present their case, after which a neutral third party makes a decision. In many countries, governments have formulated procedural rules for arbitration that govern issues such as the hearing of both sides, impartiality of the arbitrator, disclosure of documents and evidence. The main difference with a judicial procedure is that arbitration is private rather than public. Appeal procedures also differ.

In the definition used in this study arbitration proper is excluded: only alternative forms of arbitration are included. Arbitration alternatives are all other forms of (alternative) dispute resolution in proceedings in which arbitration is possible, for instance all types of friendly settlement reached during formal arbitral proceedings.

¹ For example: http://europe.eu.int/comm/justice_home/ejn/adr/adr_gen_en.htm

OECD (2002), Legal provisions related to business-to-consumer alternative dispute resolution in relation to privacy and consumer protection

<http://www.hollandhart.com/events/CSBS/ResolvingBusinessDisputes.pdf>

² Although 'arbitration proper' is, by definition, excluded from this study, alternative forms of arbitration may be of interest for this study. Therefore, arbitration will be discussed in brief.

³ Descriptions of the types of ADR based on (amongst others): David Prince, Options for resolving business disputes (<http://www.hollandhart.com/events/CSBS/ResolvingBusinessDisputes.pdf>); Ester van den Heuvel (2000), Online Dispute Resolution as a solution to cross-border e-disputes.

Mediation-arbitration (Med-arb)

Med-arb refers to 'mediation-arbitration' and is a composite of these two procedures. A neutral party is required to mediate, and if this fails, to go on to make a binding decision by way of arbitration. Often two different persons are involved, a mediator and an arbitrator. In some versions the parties are given the option of deciding whether or not to proceed to arbitration before its commencement; in others the arbitration is non-binding acting only as guidance for the parties.

Conciliation

Conciliation is similar to mediation (see below) but the third party (conciliator) takes a more interventionist role. The 2002 UNCITRAL Model Law on International Commercial Conciliation supports this view. However, there is a widespread usage which says exactly the opposite: that conciliation is mediation with no caucuses (separate meetings with each party), and therefore less interventionist. For this study we use the first definition.

Contractual adjudication

This is a procedure whereby a neutral adjudicator is empowered and required by contract to make summary binding decisions about disputes arising under that contract without following litigation or arbitration procedures. This specialised meaning, also called 'fast track adjudication' and 'interim adjudication', generally provides for the determination to be binding only until the parties have reached some further agreement on the issue or have taken it to litigation or arbitration.

Expert determination

A specialised form of contractual adjudication, expert determination is a procedure whereby a dispute, usually of a technical nature, is to be resolved by an expert who need not follow the rules of arbitration or litigation and whose decision is to be final and contractually binding for the parties.

Fact finding

Fact finding involves a neutral expert appointed to investigate facts and to form a legal or technical opinion either about certain specified issues or on all issues generally, and to make a non-binding report to the parties. The neutral third party may facilitate subsequent settlement discussions. The neutral third party's report may by agreement be submitted to the court in any subsequent proceedings, without precluding any party from submitting further evidence and expert reports.

Mediation

Mediation is the most common type of ADR. There is a great deal of literature about mediation. The essence of mediation is that a neutral and independent third party facilitates the process of negotiating a mutually acceptable outcome of the dispute. There are various schools of mediation. In the first school the mediator is restricted to facilitating the settlement process, whereas in the second school a mediator can make contributions by bringing in his (her) own expert knowledge and opinion. The latter type is also called evaluative mediation.

Mediation is increasingly being used in commercial, personal injury and clinical negligence cases. Mediation gives the parties in dispute the opportunity to reach a settlement with the help of an independent third party.

Mini-trial

A procedure in which the parties (or in the case of corporations, their senior executives), with the help of a neutral, observe an abbreviated form of non-binding trial, represented by their respective lawyers so that they may assess relative strengths and weaknesses, and then enter into settlement negotiations. The neutral helps to clarify the issues, assess the presentations, and evaluate the case. He may also assist the parties with their negotiations and/or provide a non-binding opinion. Thus the mini-trial may be a form of evaluative mediation. (Mini-trial is called an 'executive tribunal' by CEDR (Centre for Dispute Resolution))

Neutral evaluation

Neutral evaluation is where a neutral third party provides a non-binding assessment of the merits of the case. 'Early neutral evaluation' is the early intervention in a lawsuit by a judicially appointed evaluator to narrow down, eliminate and simplify issues and assist in case planning and management.

Ombudsman

An independent person who deals with complaints made by the public against administrative and organisational injustice and maladministration in certain specified areas, with the power to investigate, criticise, make issues public and sometimes with limited powers to award compensation.

The large variety of ADR mechanisms reflects a diversity of possible roles for the neutral third party (from facilitator to arbitrator) and the range in importance of the final decision (from a free-to-follow advice to a binding and enforceable decision). This variety is portrayed in figure 2. Obviously the overview is only a general picture. The positions can vary from country to country, depending on the availability of ADR services, preferences, local practice, formal procedures and implementation of ADR in legislation (e.g. Arbitration Law).

figure 2 Positioning of the various forms of ADR, according to the role of the neutral (vertical) and the status of the outcome of the ADR procedure (horizontal)

	Advice	Non-binding decision	Binding and enforceable decision
Neutral Facilitates	Mini trial	Mediation / Conciliation	Med-Arb
	Neutral evaluation	Fact-finding	Expert determination
			Contractual adjudication
Neutral Arbitrates		Ombudsman	Arbitration

Source: EIM, 2005

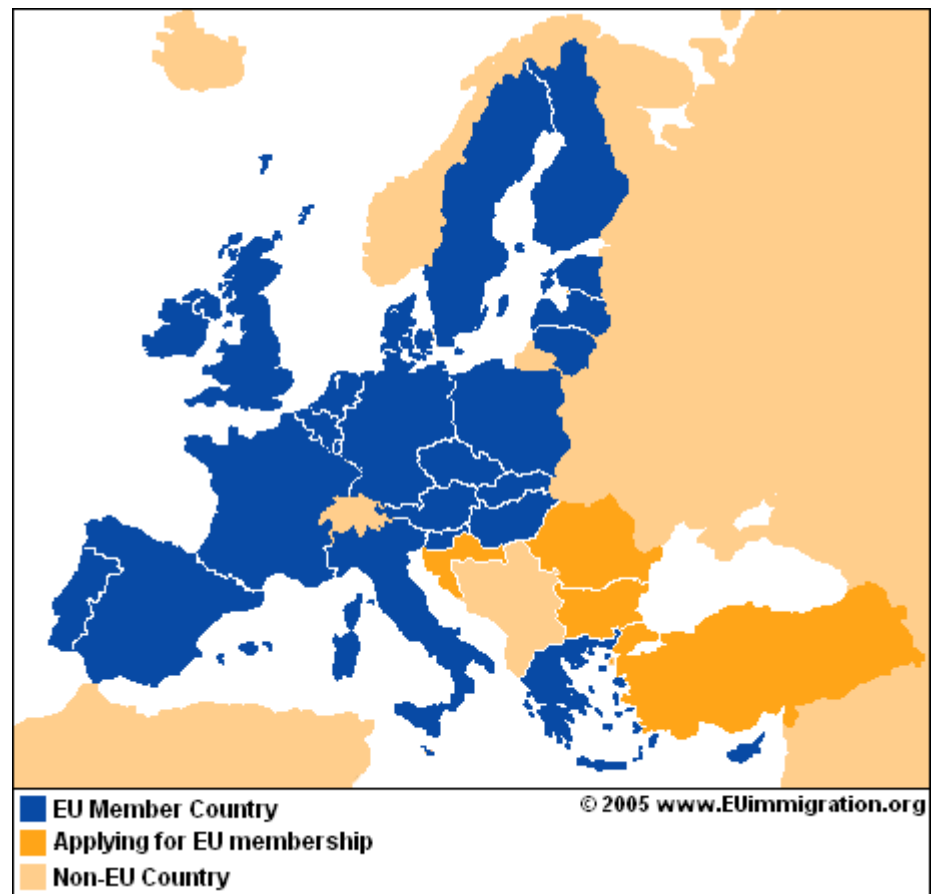
Note on Arbitration

This study deals in principle with third party assistance in solving business to business disputes. 'Pure arbitration' is not the subject of the study. Nevertheless, it was impossible to exclude pure arbitration entirely from the study. In the telephonic surveys among SMEs and ADR suppliers, for example, it was impossible to exclude pure arbitration, since, among other forms of ADR arbitration; it is an important way to solve disputes.

1.3.4 Geographic scope of the project

The project studies the access of SMEs to ADR in Europe. The study covers the following countries:

figure 3 The geographical scope of the study



Source: EIM, 2005

EU Member States

- 1 Austria
- 2 Belgium
- 3 Cyprus
- 4 Czech Republic
- 5 Denmark
- 6 Estonia
- 7 Finland
- 8 France
- 9 Germany
- 10 Greece
- 11 Hungary
- 12 Ireland
- 13 Italy
- 14 Latvia
- 15 Lithuania
- 16 Luxembourg
- 17 Malta

- 18 The Netherlands
- 19 Poland
- 20 Portugal
- 21 Slovak Republic
- 22 Slovenia
- 23 Spain
- 24 Sweden
- 25 United Kingdom

Candidate Countries

- 26 Bulgaria
- 27 Romania
- 28 Turkey

EEA-countries

- 29 Iceland
- 30 Liechtenstein
- 31 Norway

Note: the United Kingdom

The United Kingdom has three different legal systems: one for England and Wales one for Scotland and one for Northern Ireland. Each system has its own characteristics. It was not always been possible to draw conclusions for the United Kingdom as a whole in this study. Often such conclusions are limited to England. The text of this report indicates clearly whether the analysis applies to England only or whether it applies to the entire UK.

Extra information about Scotland was collected from the Scottish Mediation Network. This information is presented in chapter 3 and in Annex II (country characteristics).

1.3.5 Country clusters

Since the number of respondents among SMEs per country of the survey was very small, the countries were grouped into clusters to allow proper analyses of the results. Grouping the countries improved the statistical validity and reliability. Two ways of clustering were chosen for this study

Clustering 1

Clustering 1 was based on the geographic position of the countries. For the seven largest countries (France, Germany, Italy, Poland, Spain, Turkey, United Kingdom) the number of respondents was large enough to present results by country. The smaller countries were combined in the following clusters:

- Remaining North and Central Europe (Austria, Belgium, Denmark, Finland, Ireland, Iceland, Liechtenstein, Luxembourg, Netherlands, Norway, Sweden),
- Remaining South Europe (Cyprus, Greece, Malta, Portugal),
- Remaining East Europe (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovak Republic, Slovenia).

Clustering 2

Three criteria were used for clustering 2:

- whether the countries have a common law or civil law tradition;
- the extent to which arbitration and ADR have been introduced
- the litigation culture.

Chapter 3 describes the way we decided on this clustering.

Cluster 1 = Latin Group

Long tradition of formal types of ADR (e.g. arbitration, conciliation and mediation):
Austria, Belgium, France, Italy, the Netherlands, Portugal, and Spain

Cluster 2 = Scandinavian Group

Long tradition of 'consensus'-ADR (e.g. complaint boards)
Denmark, Finland, Norway and Sweden

Cluster 3 = Anglo-Germanic Group

Strong litigation culture with low barriers to starting a judicial procedure.
Cyprus, Germany, Ireland, Malta and United Kingdom

Cluster 4 = Newcomers Group

Countries for which ADR and/or the private SME-sector are new phenomena.
Bulgaria, Czech Republic, Estonia, Greece, Hungary Latvia, Liechtenstein, Lithuania,
Luxembourg, Poland, Romania, Slovak Republic, Slovenia, Iceland, Turkey

1.4 Contents of this report

Chapter 2 describes the current situation of business-to-business disputes involving SMEs in Europe. The chapter presents the experience of SMEs with disputes, the number of disputes, the characteristics of the disputes, the subject of the disputes, etc. Furthermore the economic costs of unresolved disputes are described and estimated.

Chapter 3 presents the current situation of ADR in the 31 European countries covered by this study. This chapter shows the practice of ADR, the types of ADR the countries use, the relation between litigation and ADR and the role of the government. It also features how the types of ADR are used and how they are institutionalised. The differences and similarities between the countries are analysed.

Chapter 4 analyses the potential for the use of ADR to solve business-to-business disputes involving SMEs. Therefore the needs of SMEs with respect to dispute resolution and the use of ADR by SMEs are described. A set of performance indicators are presented for the further development of ADR in solving business-to-business disputes involving SMEs

Chapter 5 presents methods to promote ADR among SMEs.

Examples of *good practice* are presented in boxes on various pages of this report.

2 Business-to-business disputes involving SMEs

2.1 Introduction

SME business-to-business relations can be disturbed by disputes. As shown in the previous chapter most SMEs will first try to prevent disputes from arising. However, when they do occur SMEs will try to resolve them by negotiations and mutual consent. If no solution is achieved the SMEs can choose to go to court, look for the assistance of a third party or leave the dispute unsolved. This chapter deals with business-to-business disputes involving SMEs. Section 2.2 shows the experience of SMEs with disputes, the number of disputes, the characteristics of the disputes, the subject matter of the disputes, etc. Section 2.3 features the economic cost of unresolved disputes. The content of this chapter is based on the results of the telephone survey among SMEs in 31 countries.

In this chapter two ways of clustering countries will be used to analyze the data:

- clustering 1 (only the smaller countries are clustered):
 - France
 - Germany
 - Italy
 - Poland
 - Spain
 - Turkey
 - United Kingdom
 - Remaining North and Central Europe (Austria, Belgium, Denmark, Finland, Ireland, Iceland, Liechtenstein, Luxemburg, Netherlands, Norway, Sweden)
 - Remaining South Europe (Cyprus, Greece, Malta, Portugal)
 - Remaining East Europe (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovak Republic, Slovenia)
- clustering 2 (based on common law versus civil law tradition, ADR history and litigation culture):
 - Latin Group
 - Scandinavian Group
 - Anglo-Germanic Group
 - Newcomers Group

2.2 Current disputes involving small and medium-sized enterprises

2.2.1 *SMEs with experiences with disputes*

SMEs involved in b-to-b disputes

Approximately 28% of the European SMEs were involved in disputes with other businesses during the last three years (see table 2). Looking at the size classes it is evident that medium-sized enterprises are more involved in business-to-business disputes. This is not surprising since in general medium-sized enterprises have (more) relations with (more) businesses than small enterprises. Furthermore, table 2 shows that more SMEs in manufacturing/construction were involved in disputes than SMEs in trade and in services.

table 2 Percentage of SMEs involved in disputes with other businesses during the last three years, by sector and size class

<i>Sector</i>	<i>Size class</i>		<i>Total SMEs</i>
	<i>Small</i>	<i>Medium</i>	
Manufacturing/construction	37	58	37
Trade	27	43	27
Services	23	52	23
Total	27	53	28

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

There are some differences between the countries (and clusters) (see table 3). In Germany, Poland and remaining East Europe in particular, relatively more SMEs seemed to be involved in b-to-b disputes. On the other hand in the United Kingdom only 17% of the SMEs were involved in b-to-b disputes in the last three years. The SMEs in the Latin Group were least involved in b-to-b disputes and the Newcomers Group most involved.

table 3 Percentage of SMEs involved in disputes with other businesses during the last three years, by country (cluster)

<i>Country(cluster)</i>	<i>SMEs</i>
<i>Clustering 1</i>	
France	26
Germany	38
Italy	23
Poland	35
Spain	22
Turkey	26
United Kingdom	17
Remaining North and Central Europe	26
Remaining South Europe	28
Remaining East Europe	39
<i>Clustering 2</i>	
Latin Group	24
Scandinavian Group	27
Anglo-Germanic Group	29
Newcomers Group	34
Total of European SMEs	28

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

A successful ADR case in Liechtenstein

Two SMEs from the metal industry were in negotiation about a merger. A business consultant assisted in the negotiations. The companies had a conflict of interest concerning the further pursuit of the company strategy. One company persisted on its company's philosophy of high quality standards in its products. In contrast to this, the other company opted for a slim and profit-able production process. Because of the pressure the consultant suffered from both parties, he decided to initiate a mediation, which was accepted by both parties. The mediation helped to reach a positive outcome of the situation.

The merger could be settled. It was agreed to change the production process by buying a new machine, which could maintain the high quality standard. As the machine was very productive, costs could be cut and the production would be more profitable.

Number of disputes

SMEs that were involved in disputes during the last three years dealt, on average, with 6 disputes (see table 4). At first glance this seems to be a lot. It should, however, be taken into account that the vast majority (71%) of all disputes are disputes about payment. This is shown in table 14. Approximately 50% of the SMEs involved in disputes in the last three years had to deal with only 1 or 2 disputes. Looking at all SMEs (i.e. including SMEs without disputes) the average number of disputes is 1.6. The average number of disputes involving medium-sized enterprises (10) is much higher than the average number involving small enterprises (1.5). This might be explained by the fact that larger enterprises have more business-to-business, and possibly more complex, relations than smaller enterprises. Looking at the sectors it can be seen that on an average there appear to be slightly more disputes in the trade sector.

table 4 Average number of disputes in which SMEs are involved in disputes with other businesses and for all SMEs during the last three years, by size class and sector

<i>Size class</i>	<i>Only SMEs involved in disputes</i>	<i>All SMEs</i>
<i>Size class</i>		
- Small	5.5	1.5
- Medium	18.9	10.0
<i>Sector</i>		
- Manufacturing/construction	4.1	1.5
- Trade	8.1	2.2
- Services	5.2	1.2
Total	5.7	1.6

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

There seem to be differences in the average number of disputes between the countries and clusters (see table 5). In the smaller eastern European countries (remaining East Europe) and the Newcomers Group the average number of disputes in the last three years is relatively high. This might be explained by the fast economic development and changing business dynamics in those countries. On the other hand the average number in Italy, Spain and Scandinavia is relatively low.

table 5 Average number of disputes involving SMEs in disputes with other businesses and for all SMEs during the last three years by country (cluster)

<i>Country(cluster)</i>	<i>Only SMEs involved in disputes</i>	<i>All SMEs</i>
Clustering 1		
France	4.0	1.0
Germany	5.5	2.1
Italy	2.6	0.6
Poland	4.6	1.6
Spain	2.9	0.6
Turkey	4.2	1.1
United Kingdom	10.4	1.8
Remaining North and Central Europe	5.2	1.4
Remaining South Europe	4.8	1.3
Remaining East Europe	12.3	4.8
Clustering 2		
Latin Group	3.8	0.9
Scandinavian Group	2.8	0.8
Anglo-Germanic Group	6.7	1.9
Newcomers Group	8.1	2.8
Total of European SMEs	5.7	1.6

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Unsolved disputes

Not all disputes are resolved. As stated in the previous chapter SMEs can decide to leave disputes unresolved and not to ask for the assistance of a third party (ADR) or go to court. About a quarter (26%) of the disputes remain unresolved and 74% of the disputes are resolved in one way or another (see table 6). Medium-sized enterprises are involved in more disputes than small enterprises, but the same percentage is resolved. In the manufacturing/construction sector relatively more disputes remain unresolved.

table 6 Average number of disputes and unsolved disputes for all SMEs during the last three years, by size class and sector

	<i>Average number of disputes</i>	<i>Average number of unsolved disputes</i>	<i>% unsolved disputes</i>
<i>Size class</i>			
- Small	1.5	0.4	26
- Medium	10.0	2.7	27
<i>Sector</i>			
- Manufacturing/construction	1.5	0.5	36
- Trade	2.2	0.5	22
- Services	1.2	0.3	23
Total	1.6	0.4	26

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

In table 7 the average number of unresolved disputes and the percentage of unresolved disputes by country (cluster) are shown. The average number of unresolved disputes varies from 0.2 in Remaining North and Central Europe to 0.8 in Poland. The percentage of unresolved disputes varies from 14 in Remaining East Europe (with the highest average number of disputes) and Germany to 67 in Italy (with the lowest average number of disputes). The cluster with a strong litigation culture and thus low barriers for starting a legal procedure (Anglo-Germanic Group) has the lowest percentage of unresolved disputes. Apparently, a low litigation threshold is very effective in solving disputes. On the other hand the clusters with the longest ADR tradition (Latin Group and Scandinavian Group) have the highest percentage of unsolved disputes. Although these countries have a long general ADR tradition, the use of b-to-b ADR is still limited and fragmented; consequently ADR is not yet a powerful alternative for litigation in these countries. Of course, lowering the barriers for starting legal procedures might lower the percentage of unsolved disputes in these countries. On the other hand using the considerable experience of ADR to develop the use of ADR in business to business disputes might have the same effect of reducing the percentage of unsolved disputes. Ending disputes is discussed later in this section. The only country cluster in which ADR plays a role in ending business-to-business disputes is the Scandinavian Group (see table 17). And since the Scandinavian Group has a lower percentage of unsolved disputes than the Latin Group, this might be an indication that ADR could be effective. But there seems to be room for further developments in b-to-b ADR.

table 7 Average number of disputes involving SMEs in disputes with other businesses and for all SMEs during the last three years by country (cluster)

<i>Country(cluster)</i>	<i>Average number of disputes</i>	<i>Average number of unsolved disputes</i>	<i>% unsolved disputes</i>
Clustering 1			
France	1.0	0.4	43
Germany	2.1	0.3	14
Italy	0.6	0.4	67
Poland	1.6	0.8	52
Spain	0.6	0.3	43
Turkey	1.1	0.3	27
United Kingdom	1.8	0.3	17
Remaining North and Central Europe	1.4	0.2	16
Remaining South Europe	1.3	0.6	43
Remaining East Europe	4.8	0.7	14
Clustering 2			
Latin Group	0.9	0.4	40
Scandinavian Group	0.8	0.2	26
Anglo-Germanic Group	1.9	0.3	16
Newcomers group	2.8	0.7	23
Total of European SMEs	1.6	0.4	26

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

2.2.2 Characteristics of the disputes

Counterpart in the disputes

Customers are the most important counterpart in b-to-b disputes involving SMEs. 71% of SMEs involved in b-to-b disputes had disputes with customers, 29% with suppliers and 18% with partners (see table 8). This ranking according to the importance of counterparts in the disputes (customer, supplier, and partner) holds for small as well as medium-sized enterprises, although medium-sized enterprises have relatively more disputes with suppliers and customers than small enterprises. SMEs in the service sector have relatively fewer disputes with suppliers and more with customers. This is not surprising because enterprises in the service sector are less dependent on suppliers than enterprises in the manufacturing/construction and trade sector.

table 8 Percentage of SMEs involved in disputes having disputes with certain kinds of other businesses during the last three years, by size class and sector¹

	<i>Dispute with</i>		
	<i>Supplier</i>	<i>Customer</i>	<i>Partner</i>
<i>Size class</i>			
- Small	29	71	18
- Medium	41	83	20
<i>Sector</i>			
- Manufacturing/construction	31	64	17
- Trade	34	70	13
- Services	24	78	22
Total	29	71	18

1 Various answers possible.

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

In all countries (and clusters) customers are the main counterpart in b-to-b disputes, ranging from 45% in the Remaining North and Central Europe to 92% in the Remaining South Europe (see table 9). This varies from 8% in Italy to 75% in the United Kingdom for disputes with suppliers. Disputes with partners¹ appear in the United Kingdom, the Remaining East Europe, France and the Remaining North and Central Europe in particular

¹ In the telephone survey 'partners' might be wrongly interpreted by respondents in some countries (namely as regular supplier of customer).

table 9 Percentage of SMEs involved in disputes having disputes with certain kinds of other businesses during the last three years, by country (cluster)¹

<i>Country(cluster)</i>	<i>Dispute with</i>		
	<i>Supplier</i>	<i>Customer</i>	<i>Partner</i>
<i>Clustering 1</i>			
France	29	50	29
Germany	38	71	16
Italy	8	65	7
Poland	31	82	0
Spain	23	85	0
Turkey	48	71	4
United Kingdom	75	69	43
Remaining North and Central Europe	41	45	25
Remaining South Europe	12	92	8
Remaining East Europe	19	65	40
<i>Clustering 2</i>			
Latin Group	22	74	12
Scandinavian Group	38	37	34
Anglo-Germanic Group	47	70	23
Newcomers Group	25	73	21
Total of European SMEs	29	71	18

1 Various answers possible.

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

In table 8 and 9 counterparts of SMEs in disputes during the last three years were taken into account. The distribution of counterparts in the most recent disputes involving SMEs is presented in tables 10 and 11. In both size classes and in the three sectors customers are still most often the counterpart in disputes. In South Europe customers are more often the counterpart in disputes and in the Scandinavian Group suppliers are relatively often the counterpart.

table 10 Counterpart in the most recent disputes (percentage of SMEs involved in disputes), by size class and by sector (%)

	<i>Dispute with</i>			<i>Total</i>
	<i>Supplier</i>	<i>Customer</i>	<i>Partner</i>	
<i>Size class</i>				
- Small	18	68	14	100
- Medium	24	59	17	100
<i>Sector</i>				
- Manufacturing/construction	27	61	12	100
- Trade	16	75	9	100
- Services	14	67	19	100
Total	19	67	14	100

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

table 11 Counterpart in the most recent disputes (percentage of SMEs involved in disputes), by country (cluster) (%)

<i>Country(cluster)</i>	<i>Dispute with</i>			<i>Total</i>
	<i>Supplier</i>	<i>Customer</i>	<i>Partner</i>	
<i>Clustering 1</i>				
North and Central Europe	26	57	17	100
South Europe	7	88	5	100
East Europe	23	56	21	100
<i>Clustering 2</i>				
Latin Group	12	74	14	100
Scandinavian Group	43	38	19	100
Anglo-Germanic Group	22	70	8	100
Newcomers Group	22	61	17	100
Total of European SMEs	19	67	14	100

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Domestic versus international disputes

In most of the disputes in which SMEs are involved the counterpart is located in the same country: 91% of the disputes are domestic and 9% international (see table 12). Medium-sized enterprises have relatively more international disputes (19%). Looking at the breakdown by sectors it appears that SMEs in services have fewer international disputes with other enterprises than SMEs in manufacturing/construction and trade. This is not surprising because manufacturing/construction and trade are more international than services.

table 12 Geographic orientation of the most recent disputes (percentage of SMEs involved in disputes), by size class and by sector (%)

	<i>Geographic orientation</i>		
	<i>national</i>	<i>international</i>	<i>total</i>
<i>Size class</i>			
- Small	91	9	100
- Medium	81	19	100
<i>Sector</i>			
- Manufacturing/construction	90	10	100
- Trade	88	12	100
- Services	94	6	100
Total	91	9	100

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Looking at the countries (and clusters) it appears that especially SMEs in the 'Scandinavian Group' have a relatively higher proportion of international disputes (21%) followed by the 'Newcomers Group' (12%).

table 13 Geographic orientation of the most recent disputes (percentage of SMEs involved in disputes), by country (cluster) (%)

<i>Country(cluster)</i>	<i>Geographic orientation</i>		
	<i>national</i>	<i>international</i>	<i>total</i>
<i>Clustering 1</i>			
North and Central Europe	90	10	100
South Europe	93	7	100
East Europe	91	9	100
<i>Clustering 2</i>			
Latin Group	93	7	100
Scandinavian Group	79	21	100
Anglo-Germanic Group	94	6	100
Newcomers group	88	12	100
Total of European SMEs	91	9	100

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Subject of the disputes

Payments are the most common subject of business-to-business disputes (see table 14). 71% of the disputes involving small enterprises and 44% of the disputes involving medium-sized enterprises have to do with payment. The major share of the disputes with customers concerns payment. Medium-sized enterprises have more disputes about quality, delivery and agreements than small enterprises. The main difference between sectors is that SMEs in manufacturing/construction have more disputes about quality than SMEs in trade and services.

A successful ADR case in Bulgaria

The case was handled by the 'Mediator' Association in Sofia. An international wholesale company with a representative office in Bulgaria was a supplier to almost 200 local distributors (SMEs). When 12 cases of non-payments occurred the supplier consulted its lawyer as he wanted to bring an action against the distributors who were in default. The lawyer, who was a member of the 'Mediator' Association and had followed a special training, offered mediation to the potential plaintiff instead of court proceedings. The wholesale company agreed and the lawyer made contacts with all 12 defaulting distributors (6 in Sofia and 6 in the countryside) and offered them mediation. None of the entrepreneurs had heard about mediation before. All of them were however convinced of the benefits of the mediation, mostly because it offered them the opportunity of preserving their relations with the supplier. All 12 cases were resolved, although the outcome was different for each case.

table 14 Subject of the most recent disputes (percentage of SMEs involved in disputes), by size class and by sector (%)

	<i>Subject</i>						<i>total</i>
	<i>payment</i>	<i>invoice</i>	<i>quality</i>	<i>delivery</i>	<i>agree-ments</i>	<i>other</i>	
<i>Size class</i>							
- Small	71	3	10	2	3	11	100
- Medium	44	1	20	9	9	17	100
<i>Sector</i>							
- Manufactur- ing/construction	66	4	17	1	4	8	100
- Trade	75	1	9	3	4	8	100
- Services	71	3	6	0	3	17	100
Total	71	3	10	2	3	11	100

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

In all countries (clusters) payment is the main subject of business-to-business disputes (see table 15), with the highest score in Italy. In the northern and central countries quality is often a subject of disputes and in Turkey it is delivery.

table 15 Subject of the most recent disputes (percentage of SMEs involved in disputes), by country (cluster) (%)

<i>Country(cluster)</i>	<i>Subject</i>						<i>total</i>
	<i>Payment</i>	<i>invoice</i>	<i>quality</i>	<i>delivery</i>	<i>agree-ments</i>	<i>other</i>	
<i>Clustering 1</i>							
North and Central Europe	58	1	20	1	1	19	100
South Europe	84	3	1	3	6	3	100
East Europe	75	5	6	0	4	10	100
<i>Clustering 2</i>							
Latin Group	77	3	8	0	3	8	100
Scandinavian Group	35	0	19	0	12	34	100
Anglo-Germanic Group	62	0	20	2	0	16	100
Newcomers Group	73	4	8	3	5	9	100
Total of European SMEs	71	3	10	2	3	11	100

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Ending disputes

Disputes can be ended in various ways. In practice the most common ways to end and resolve business-to-business disputes in which SMEs are involved are informal negotiation and judicial decisions (see table 16). ADR is used only in a minority of cases. Disputes involving small enterprises are slightly more often solved in court and those involving medium-sized enterprises slightly more often through negotiation. The category 'other' includes disputes that ended without a solution because the enterprise gave up, and disputes that were still pending. 5% of the disputes were ended by a collection agency. A collection agency is not considered as ADR. Making use of a collection agency is a one-sided action by the claimant to end a dispute about late payment. Given the fact that late payments are a frequent subject of disputes the role of collection agencies to end disputes is not surprising. In the trade sector slightly more disputes are solved by judicial means than in other sectors.

table 16 Way of ending the most recent disputes (percentage of SMEs involved in disputes), by size class (%)

	<i>Way</i>					<i>total</i>
	<i>informal negotia- tion</i>	<i>ADR</i>	<i>court</i>	<i>collecting agency</i>	<i>other (such as pending or no solution)</i>	
<i>Size class</i>						
- Small	35	2	45	5	13	100
- Medium	42	3	36	4	15	100
<i>Sector</i>						
- Manufactur- ing/construction	35	0	41	7	17	100
- Trade	31	2	54	7	6	100
- Services	38	2	41	3	16	100
Total	35	2	45	5	13	100

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

The way of solving b-to-b disputes differs between the countries (and clusters) (see table 17). In the 'Newcomers group' and the 'Latin group' going to court is the most common way of ending disputes. Only in the Scandinavian Group does ADR seem to play a role in solving b-to-b disputes. In the other clusters ADR is rarely used.

table 17 Way of ending the most recent disputes (percentage of SMEs involved in disputes), by country (cluster) (%)

Country(cluster)	Way					total
	informal negotia- tion	ADR	court	collecting agency	other (such as pending or no solution)	
Clustering 1						
North and Central Europe	36	3	41	2	18	100
South Europe	33	0	46	11	10	100
East Europe	37	1	50	3	9	100
Clustering 2						
Latin Group	34	1	48	7	10	100
Scandinavian Group	31	15	21	0	33	100
Anglo-Germanic Group	41	1	38	2	18	100
Newcomers Group	33	0	48	7	11	100
Total of European SMEs	35	2	45	5	13	100

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Satisfaction with the dispute resolution procedure

SMEs are more satisfied when disputes are resolved through informal negotiation rather than through the courts. Of disputes that were solved by informal negotiation 75% of the SMEs were satisfied with the procedure (see table 18). When the resolution involved legal proceedings only 47% of the SMEs were satisfied. These differences can be explained by the fact that, in the case of informal negotiation the relationship between the parties involved is not threatened, while relationships may suffer greatly from disputes settled in by court or by collection agencies. The number of respondents is too small to draw conclusions as to the level of satisfaction with ADR and collection agencies.

table 18 Satisfaction with the procedure that was followed to end the most recent dispute (percentage of SMEs involved in disputes), by procedure¹ (%)

	<i>Procedure</i>			
	<i>informal negotiation</i>	<i>ADR</i>	<i>court</i>	<i>collecting agency</i>
very satisfied	16	(2)	13	(9)
Satisfied	59	(75)	34	(39)
not satisfied, not unsatisfied	5	(1)	8	(10)
Unsatisfied	16	(22)	26	(42)
very unsatisfied	4	(0)	19	(0)
Total	100	100	100	100

1 Since ADR and collection agencies are used in a small number of cases only, the number of respondents for these categories is too small to draw reliable conclusions.

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

A successful ADR case in Germany

Two companies in the paper recycling sector, A and B, both had very substantial production capacities. They were in fierce competition. Company A dominated the market, whereas company B was near to insolvency. Company B contacted its political network and threatened to initiate an important press campaign, if the subsidies (that it received from the community) were cut. Company A wanted to avoid this campaign as its market domination originated from its low costs, and had as consequence a production process that did not comply with the latest environmental regulations. If this was to become public, company A would face an important drop in sales and be subject to a penalty. Thus, company A proposed mediation to which B agreed. A positive outcome was achieved after 5 mediation sessions: A and B entered a symbiotic business relation; A adopted the production process of B; A, assisted by B, extended its activity overseas; B received a certain amount of recovered paper from A to allow it to make better use of its capacity. The confidentiality of mediation ensured that the conflict was not made public.

Satisfaction with the dispute resolution outcome

Quite predictably, most SMEs are satisfied with the outcome when a dispute is resolved by informal negotiation (see table 19). When disputes are ended by a court judgement respondents are less satisfied. Apparently ending disputes by court often leaves at least one party disappointed and tends to jeopardize business relationships. The number of respondents is too small to draw conclusions as to satisfaction with ADR and collection agencies.

table 19 Satisfaction with the outcome of the procedure that was followed to end the most recent disputes (percentage of SMEs involved in disputes), by procedure¹ (%)

	<i>Procedure</i>			
	<i>informal negotiation</i>	<i>ADR</i>	<i>court</i>	<i>collecting agency</i>
very satisfied	16	(1)	14	(8)
Satisfied	67	(28)	43	(73)
not satisfied, not unsatisfied	5	(19)	12	(0)
Unsatisfied	9	(30)	16	(19)
very unsatisfied	3	(22)	15	(0)
Total	100	100	100	100

¹ Since ADR and collection agencies are used in a small number of cases only, the number of respondents for these categories is too low to have reliable results.

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

2.3 The economic costs of unresolved disputes

2.3.1 Type of costs of unresolved disputes

Type of costs

Unresolved disputes are accompanied by costs for SMEs. The main cost of unresolved disputes is straightforward and very direct, namely unpaid accounts (see table 20). The second type of cost is loss of market, which is a more diffuse and long-term cost. For small enterprises unpaid accounts are the most important cost of unsolved disputes and this also applies to medium-sized enterprises. But the loss of market and loss of supply are more important costs for medium-sized enterprises than for small enterprises. Other costs were mentioned by 28% and included lawyer's fees, time and court expenses.

table 20 Main cost of unresolved disputes of SMEs (% of SMEs with disputes in the last three years), by size class (%)¹

Type of cost	Size class			Total SMEs
	Small	Medium		
Poor image	9	12		10
Unpaid accounts	63	50		63
Loss of a market; loss of a client	25	33		26
Loss of a source of supply	8	18		9
Interest	19	17		19
Other (such as lawyer's fees and court expenses)	28	29		28

1 Various answers possible.

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

The various types of costs accompanying unsolved disputes differ little between the sectors. Only the loss of a source of supply seems to be relatively unimportant for trading companies.

table 21 Main cost of disputes of SMEs (% of SMEs with disputes in the last three years), by sector (%)¹

Type of cost	Sector			Total SMEs
	Manufacturing/ construction	Trade	Services	
Poor image	9	10	9	10
Unpaid accounts	60	69	61	63
Loss of a market; loss of a client	29	26	22	26
Loss of a supply source	13	2	10	9
Interest	21	21	16	19
Other (such as lawyer's fees and court expenses)	26	27	30	28

1 Various answers possible.

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

In nearly all countries (and clusters) the main cost of unsolved disputes is unpaid accounts (see table 22). Only in Remaining North and Central Europe are the main costs to be found in the category 'other', which includes lawyer's fees, time and court expenses.

table 22 Main cost of disputes of SMEs (% of SMEs with disputes in the last three years), by country (cluster) (%)¹

Country (cluster)	Type of cost					Other (such as lawyer's fees and court ex- penses)
	Poor image	Unpaid accounts	Loss of a market; loss of a client	Loss of a source of supply	Interest	
Clustering 1						
France	6	65	33	0	11	44
Germany	9	62	47	17	42	21
Italy	11	49	23	14	18	18
Poland	18	73	12	0	24	17
Spain	15	84	27	7	14	16
Turkey	16	64	21	0	0	69
United Kingdom	0	68	1	6	6	25
Remaining North and Central Europe	3	22	19	6	5	55
Remaining South Europe	14	85	56	8	48	31
Remaining East Europe	7	77	7	9	8	18
Clustering 2						
Latin Group	9	60	27	8	12	32
Scandinavian Group	4	17	17	11	9	49
Anglo-Germanic Group	7	63	35	15	33	23
Newcomers group	13	74	17	4	20	24
Total of European SMEs	10	63	26	9	19	28

¹ Various answers possible.

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Impact on market position, etc.

Half of the SMEs involved in disputes do not suffer from unresolved disputes with regard to market position, competitiveness, profitability or growth. (For medium-sized enterprises this is as high as 61% of the enterprises.) For the other half of these enterprises some or all unresolved disputes have a negative effect on (long term) aspects of the enterprise (see table 23). There are no major differences between the sectors.

table 23 Negative effect of unsolved disputes on market position, competitiveness, profitability or growth (% of SMEs involved in disputes with other businesses during the last three years), by size class and sector

	<i>Number of disputes with effect from</i>		
	<i>all disputes</i>	<i>some disputes</i>	<i>non of the disputes</i>
<i>Size class</i>			
- Small	23	27	50
- Medium	11	28	61
<i>Sector</i>			
- Manufacturing/construction	20	26	54
- Trade	22	28	49
- Services	25	26	48
Total SMEs	23	48	50

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

The negative effect of unsolved disputes on market position, competitiveness, profitability or growth differs considerably between countries (clusters). Especially in Turkey and Remaining East Europe disputes seem to have negative effects on long term aspects of enterprises (see table 24).

A successful ADR case in the Netherlands

As part of an extensive construction project a manufacturer is working on a wooden ornamental edge. A coating and painting processing company, was awarded the contract for pre-treating the woodwork. But the manufacturer is not satisfied with the work of the painting company and decides to place a new ornamental edge. The manufacturer holds the painting company responsible for the loss and tries to pass on the cost of the new ornamental edge to the painting company. The painting company admits that they made mistakes, but they are not willing to pay the full cost of a complete new ornamental edge.

Both parties consult a lawyer. The lawyers' attempts to reach a solution are unsuccessful. The matter reaches an impasse and the relation between the companies seems to be at its end, once and for all, when the manufacturer decides to go to court. The judge suggests remitting the case to a mediator. Both parties agree.

During the first meeting both parties are given homework to do before the next meeting: they have to reflect on three possible solutions:

- 1 to push the conflict to extremes
- 2 to reach a reasonable distribution of the cost
- 3 to take legal action

During the second meeting both parties settle for the second option. It is apparent that they both have an important interest in future mutual cooperation. Creative and economic solutions are found for dividing the costs and continuing cooperation in the future. The solution is set down in an agreement. In two meetings, under the guidance of a mediator, the conflict is solved to the satisfaction of both parties and future cooperation is secured.

table 24 Negative effect of unsolved disputes on market position, competitiveness, profitability or growth (% of SMEs in dispute with other businesses during the last three years), by country (cluster)

<i>Country(cluster)</i>	<i>Number of disputes with effect from</i>		
	<i>all disputes</i>	<i>some disputes</i>	<i>non of the disputes</i>
Clustering 1			
France	33	28	39
Germany	16	20	64
Italy	8	33	59
Poland	21	18	60
Spain	24	34	42
Turkey	59	15	26
United Kingdom	28	47	25
Remaining North and Central Europe	15	17	68
Remaining South Europe	2	36	62
Remaining East Europe	42	27	31
Clustering 2			
Latin Group	16	33	51
Scandinavian Group	22	23	55
Anglo-Germanic Group	20	26	54
Newcomers group	34	20	46
Total of European SMEs	23	27	50

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

2.3.2 Estimate of cost of unresolved disputes

The cost of unsolved disputes is considerable. SMEs involved in disputes estimate that unsolved disputes lead to direct and indirect costs amounting to 2.8% of their turnover. This is somewhat higher for small enterprises in trade and services (see table 25).

table 25 Estimated average cost of unsolved disputes as percentage of turnover for SMEs with disputes with other businesses during the last three years, by sector and size class

<i>Sector</i>	<i>Size class</i>		
	<i>Small</i>	<i>Medium</i>	<i>Total SMEs</i>
Manufacturing/construction	1.9	1.9	1.9
Trade	3.0	1.9	3.0
Services	3.3	1.9	3.3
Total	2.8	1.9	2.8

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Taking into account that 28% of SMEs were involved in disputes in the last three years the total cost of unsolved business-to-business disputes can be calculated for all SMEs (where SMEs with no disputes have zero costs). The cost of unsolved disputes can thus be estimated at approximately 0.7% of the total SME-turnover (see table 26).

table 26 Estimated average cost of unsolved disputes as percentage of turnover of SMEs, by sector and size class

<i>Sector</i>	<i>Size class</i>		
	<i>Small</i>	<i>Medium</i>	<i>Total SMEs</i>
Manufacturing/construction	0.7	1.1	0.7
Trade	0.8	0.7	0.8
Services	0.8	0.9	0.8
Total	0.7	1.0	0.7

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

2.4 Summary

Overall

In this chapter the field of business-to-business disputes of SMEs has been described. In the last three years, 28% of SMEs were involved in such disputes. On average SMEs were involved in 1.6 disputes during that period. About a quarter (26%) of these disputes remained unsolved. In two third of the b-to-b disputes the customer was the counterpart. In other disputes suppliers and partners were the counterpart. Only 9% of the disputes were cross border disputes. Disputes mainly involved payment problems (71%), followed by quality (10%). Most disputes were ended in court (45%) or by informal negotiation (35%). ADR is still seldom used to end disputes. Unsolved disputes are accompanied by significant costs for SMEs in terms of unpaid accounts, loss of market, interest, etc. The cost of unsolved disputes is estimated to be 0.7% of SMEs' turnover.

Size classes

Medium-sized enterprises are more involved in b-to-b disputes (53%) and had more disputes in the last three years than small ones (on average 10). The greater involvement in b-to-b disputes of medium-sized enterprises is not surprising since they have more b-to-b relations than small enterprises. The percentage of unsolved disputes is equal for small and medium-sized enterprises. Medium-sized enterprises have more often cross border disputes than do small enterprises. Regarding the subject of the disputes, medium-sized enterprises have relatively fewer disputes about payments and more about quality than do small enterprises. There are no large differences between small and medium sized enterprises concerning the cost of unsolved disputes.

Sectors

Relatively more enterprises in manufacturing/construction were involved in b-t-b disputes than in trade and services, but the average number of disputes in manufacturing/construction is not higher. In manufacturing/construction relatively more disputes remain unsolved than in trade and services. There are relatively more disputes in manufacturing/construction with suppliers and relatively more disputes about quality. This is

not surprising since enterprises in manufacturing/construction are more often dependent on the quality of materials and goods supplied for their own production processes. There are no major differences in the cost of unsolved disputes between enterprises in the different sectors.

Country (clusters)

The involvement of SMEs in b-to-b disputes varies among the countries from 17% in the UK to 39% in the Remaining East Europe (East Europe exclusive of Poland). Also the average number of disputes differs by country cluster and is especially high in the Remaining East Europe or the Newcomers Group. The percentage of unsolved disputes varies from 14 in Germany to 67 in Italy. In the Scandinavian Group SMEs have more cross border disputes, followed by the Newcomers Group. Differences in the way of ending disputes are not very significant. Only in the Scandinavian Group does ADR play a role in ending b-to-b disputes involving SMEs.

3 The practice of ADR in business-to-business disputes in Europe

3.1 Introduction

In the following sections the current ADR situation in the 31 countries covered by this study is discussed. The highlights are presented in the main report. The appendices of this report contain the individual country descriptions.

Section 3.2 presents the practice of ADR in Europe, the types of ADR the countries are using, the relation between judicial dispute resolution and ADR, and the role of the government. Section 3.3 features a survey of how the mediation process and some other ADR methods are used and how they are institutionalized. In addition, the differences and similarities between the countries in mediating business-to-business disputes are analyzed.

The reader should bear in mind that, due to an increasing interest in ADR, many countries have taken initiatives to regulate ADR processes. Therefore, the current description is a picture only of the status quo.

The content of this chapter is based on the results of the literature research and the consultation of the ENSR¹ network.

3.2 The current situation of ADR in Europe

The tradition of ADR in Europe

In the last few years there have been developments in 'alternative' means of settling or resolving disputes within Member States, even though it is generally agreed that they are very old. The specific advantages of these forms of private justice and the crisis affecting the effectiveness of justice have led to renewed interest in these methods of dispute resolution, which are more consensual than recourse to the courts or arbitration².

ADR has a long tradition in the Roman Civil Law-countries (France, Belgium, Spain and Italy) in particular. As early as in 1791, France formalised this tradition by setting up a system of *Bureaux de Paix et de Conciliation*. The Scandinavian Civil Law-countries also have a long tradition of ADR. Conciliation boards were set up simultaneously in the former twin kingdoms of Denmark and Norway about 200 years ago. The boards still exist in Norway, but in Denmark the system was changed 50 years ago when the boards were wound up and conciliation proceedings were no longer compulsory. In Sweden, ADR has been integrated with Judicial Litigation³.

¹ The European Network for SME Research (ENSR) is a network of institutes specialised in policy oriented research, with a special focus on SMEs. The Network covers all countries of the European Economic Area. See: www.ensr-net.com

² Green Paper on alternative dispute resolution in civil and commercial law - Commission of the European Communities, 196 final, Brussels, 19 April 2002

³ Roo, A. de, and R. Jagtenberg (2003), *De praktijk van mediation in de ons omringende landen; Een vergelijkend onderzoek verricht in opdracht van het Ministerie van Justitie*, [Mediation practice in neighbouring countries; a comparable study commissioned by the Dutch Ministry of Justice], Erasmus University Rotterdam.

The tradition of using ADR differs throughout Europe. Some schemes are used more often in some parts of Europe than in others. Mediation techniques have a long tradition in many common law countries due to the substantial cost of traditional litigation and arbitration. In many civil law countries litigation before the courts is less expensive; hence mediation techniques have not been developed to a similar extent.¹

An overview of the tradition of ADR in Europe is presented in table 27. This relates not only to ADR for business-to-business disputes, but also to other kinds of disputes. A distinction is made between countries with a longer tradition and countries with a more recent or no tradition. Countries with a longer tradition used ADR from before 1990.

table 27 Overview of the tradition of ADR in Europe

Long tradition (before 1990)	Austria, Belgium, Cyprus, Denmark, England, Finland, France, Germany, Ireland, Italy, the Netherlands, Norway, Spain, Sweden, ² Portugal, ³ Malta.
Short tradition (1990-2000)	Bulgaria, ⁴ Czech Republic, ⁵ Estonia, ⁶ Greece, Hungary, ⁷ Latvia, ⁸ Lithuania, ⁹ Poland, ¹⁰ Romania, ¹¹ Slovenia, Slovakia ¹²
No tradition (after 2000)	Iceland, Liechtenstein ¹³ , Luxembourg ¹⁴ , Turkey

Source: EIM, 2005 / ENSR network, 2005.

The different ADR mechanisms in Europe

Although ADR is as old as the hills, it remained unregulated for a long time (and in general it still is). Since ADR has often been left to private initiative, many different ADR systems exist throughout Europe and these have all been adapted to national legal systems, to the needs and habits of local (business) communities or to the needs of indi-

¹ A study on alternative dispute resolution and cross-border complaints in Europe, Nordic Council of Ministers Copenhagen 2002

² A. de Roo and R. Jagtenberg, *Europese mediationpraktijken, [European mediation practice]*, the Hague: Boom Juridische Uitgevers, p. 13-76

³ <http://www.internationaladr.com/portugal.htm>

⁴ http://www.partnersglobal.org/centers/centers_bulgaria.html

⁵ http://www.partnersglobal.org/centers/centers_czechrepublic.html

⁶ http://www.partnersglobal.org/centers/centers_lithuania.html

⁷ J. Revesz, *Mediation without Trust: Critique of the Hungarian Mediation Law*, May 2005, <http://www.mediate.com/articles/revesz11.cfm>

⁸ http://www.partnersglobal.org/centers/centers_lithuania.html

⁹ http://www.partnersglobal.org/centers/centers_lithuania.html

¹⁰ http://www.partnersglobal.org/centers/centers_poland.html

¹¹ http://www.partnersglobal.org/centers/centers_romania.html

¹² http://www.partnersglobal.org/centers/centers_slovakia.html

¹³ http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/Liechtenstein.asp

¹⁴ <http://www.centre-mediation.lu/>

vidual disputants in a specific conflict. This has resulted in a wide range of ADR systems throughout Europe. Only in the last decades has ADR attracted the attention of policy makers. This has recently resulted in the incorporation of ADR into the legal system of some European countries.

Although there are many different forms of ADR, these systems do have characteristics in common¹. If the most common technique to resolve a dispute (negotiating) is not feasible, parties need to solve the problem in another way. The dominant way of dispute resolution in such cases is litigation in court and ADR can be an alternative to taking the matter to court. The word 'alternative' in ADR refers to the fact that ADR uses systems to resolve disputes in another fashion than in court. However, in some countries judges may remit cases to ADR, prior to - or *instead of* - reaching a verdict themselves.

A second discerning principle is that ADR systems make use of the neutrality of an independent third party to bring, and to keep, the conflicting parties 'on speaking terms'. This third party should be trusted by both conflicting parties and is, therefore, usually an independent lawyer, expert or mediator.

A third precondition is that successful ADR requires the voluntary cooperation of the conflicting parties to settle their dispute. Since ADR aims to reach an outcome that satisfies both parties, the process of reaching that goal requires give and take from both parties. Some forms of ADR resemble a negotiation procedure where parties negotiate a mutually satisfactory outcome, which is then ratified by their signatures at the end of the process. Parties cannot be forced to do so: ADR requires voluntary co-operation. Finally, it is generally acknowledged that an ADR agreement is not based on legal rights, but on the parties' own interests. ADR settles conflicts, taking into account *both* parties' interests (win-win), whereas in a court of law a judge decides who is right and who is wrong according to civil, commercial or administrative law (win-lose).

In all the survey countries, with the exception of Iceland, one or more types of ADR are available for the purpose *solving business-to-business disputes in which SMEs are involved*, although in none of the countries are all ADR mechanisms available. Table 28 shows that mediation is the most popular type of ADR. In all the countries, with the exception of Iceland, Malta and Turkey, *mediation/conciliation* procedures are offered for solving business disputes.

In only a few countries are forms of ADR other than mediation and arbitration used in business cases. In four countries contractual adjudication is available, in nine countries there is expert determination, and just one country (Cyprus) has fact-finding. Med-arb and the ombudsman are available in 7 countries and mini-trial and neutral evaluation are offered in 6 countries.

¹ Brown, H.J., A.L. Marriott, ADR Principles and Practice, London: Sweet & Maxwell 1999

Brenninkmeijer, A.F.M., H.J. Bonenkamp, J. van Bruggen, P. Walters (eds.) (2004) Handboek Mediation, SDU-Publishers, The Hague.

table 28 Overview of the types of ADR that are available for b-to-b disputes per country

	Arbitration	Contractual adjudication	Expert determination	Fact-finding	Med-arb	Mediation/ Conciliation	Mini-trial	Neutral evaluation	Ombudsman	Other...
Austria						X				
Belgium	X		X			X	X			
Bulgaria	X					X				
Cyprus		X	X	X		X		X		X
Czech Republic						X				
Denmark						X				
Estonia	X					X			X	
Finland						X				
France			X		X	X		X	X	
Germany	X					X				
Greece						X				
Hungary						X				
Iceland										
Ireland			X		X	X				
Italy					X	X				
Latvia			X			X	X	X	X	X
Liechtenstein						X				
Lithuania		X	X			X	X			
Luxembourg						X				
Malta			X		X			X	X	
The Netherlands	X					X	X		X	
Norway						X				
Poland		X	X			X		X		
Portugal					X	X				
Romania					X	X	X			
England ¹		X	X		X	X	X	X	X	X
Scotland	X	X	X	X	X	X	X	X		
Slovakia						X				
Slovenia						X			X	
Spain						X				
Sweden						X				
Turkey	X									

¹ The United Kingdom has various legal systems, each with its own characteristics. In this table a distinction is made between England and Scotland.

Source: EIM, 2005.

The use of ADR in business-to-business disputes

Mediation is the most commonly used type of ADR. In 15 of the 31 countries more than 90% of all the ADR cases applied mediation. And in eight countries more than 50% of the ADR cases involved mediation.

In Bulgaria, Latvia, Liechtenstein, Luxembourg and Poland mediation is a relatively new type of ADR with which there is as yet little experience.

Arbitration is among the most widespread ADR methods. Many European countries have adopted an Arbitration Law or have incorporated arbitration procedures in their Civil Code, Civil Procedure or other codes. In the definition used in this study *arbitration proper* is excluded: only *alternative forms of arbitration* are included. (This is in line with the European Commission’s Green Paper on alternative dispute resolution in civil and commercial law, published in 2002.) In practice almost only *pure arbitration* is applied and therefore this is the reason why only a few countries (Belgium, Bulgaria, Estonia, Germany, the Netherlands, Scotland and Turkey) have reported that they have arbitration.

The relation between judicial dispute resolution and ADR

In most of the survey countries ADR is less important for business-to-business disputes than judicial adjudication (see table 29). In 22 of the 31 countries surveyed the ratio of ADR/judicial adjudication is less than 5%. So, ADR is still a rarely used instrument for resolving business-to-business disputes. In only 3 countries (Finland, Norway and Poland) is the ratio higher than 10%.

table 29 The importance of ADR in relation to judicial adjudication in b-to-b disputes

<i>The importance of ADR</i>	<i>Number of countries</i>	<i>Countries</i>
less than 1%	9	Czech Republic, Estonia, France, Greece, Iceland, Luxembourg, Slovak Republic, Sweden, Turkey
1 - 5%	13	Austria, Bulgaria, Denmark, Germany, Hungary, Ireland, Italy, Liechtenstein, the Netherlands, Portugal, Romania, Slovenia, England/Scotland
6- 10%	6	Belgium, Cyprus, Latvia, Lithuania, Malta, Spain
more than 10%	3	Finland, Norway, Poland

Source: EIM, 2005.

One question included in the survey asked: ‘Are the providers of ADR services and court litigation seen as complementary in your country, or are they seen as competing means to resolve disputes?’ In almost all the survey countries ADR services and judicial litigation are considered to be *complementary* means of resolving disputes. In most of the countries ADR is still a rarely used instrument for resolving business-to-business disputes, it is not perceived as an important competitor.

In this respect it is, however, necessary to distinguish between the various ADR mechanisms. Arbitration, for instance, is clearly seen as a *competitive* means to resolve disputes, in the sense that the decisions resulting from arbitration are legally enforceable and have the same effect as a judicial decision, but might often be less costly in terms of time and money. However, when ADR mechanisms other than arbitration are used (e.g. mediation), the outcomes are not necessarily binding and are rarely enforceable,

so here judicial litigation is seen as a *complementary* means whenever an agreement between parties has not been reached.

ADR services have a *complementary* role (not only an alternative) since they often are more suitable for the kind of disputes at hand and, moreover, because they enable the parties to set up a dialogue (that otherwise would not be possible) and to consider (on their own) the possibility of going to court or not. This consensual approach allows the parties, once their dispute has been solved, to maintain their business relationship.

The main cultural and other obstacles for the application of ADR methods

The application of ADR methods in business-to-business disputes is not widespread. The main obstacles are:

- *Lack of awareness of ADR*: The majority of SMEs is not aware of the possibilities of ADR to resolve conflicts. ADR is still rather new, and therefore, not widely implemented.
- *Strong tendency to 'have a day in court'*. In Ireland, Luxembourg, Romania, Slovenia, Spain there is a certain cultural tradition to 'go to court', or at least to believe in those mechanisms that imply a certain 'obligation' for disputing parties. In Greece there is a tendency for business people to leave their case to their lawyer. Ireland has an engrained litigation culture and the 'day in court' mentality stifles the development of ADR.
- *Courts are perceived as being more trustworthy*. SMEs consider judicial procedures more trustworthy than any other procedures.
- *Cultural obstacles*: French people tend not to have a culture of 'compromise'. Hungarians, but also people from the Czech Republic, tend to turn to institutional power to resolve disputes, hence tend to litigate. In the Netherlands some people think that mediation is 'soft'. The Scots have a 'peculiarly wordy and disputatious culture' (see: <http://www.institute-of-governance.org/onlinepub/mccrone/RSEIlecture29Oct2001.html>)
- *Lack of knowledge on the part of lawyers*. In some countries lawyers and the judiciary are not ready to use ADR for SMEs because of judicial conservatism, a corporatist attitude and lack of familiarity with ADR.
- *Conflicting interests among professionals*. In some countries lawyers prefer judicial litigation because of the higher fees
- *Efficient judicial system*. In Denmark legal cases are not as expensive as in the United States for example. In Finland the pressure on the judicial system is not so high so that SMEs are not 'forced to use ADR'. Germany has a good working system with a high number of judges and 90% of the Germans have insurance to cover legal costs.

ADR legislation

No less than 20¹ of the 31 countries have (general) ADR legislation or specific provisions dealing with ADR issues. About 10-12 countries have a Mediation Act or mediation provisions in their Code of Civil Procedure. In Belgium, Finland, Norway and Romania there is a bill on mediation procedures or new legislation is being prepared. The Netherlands, Spain and Sweden do not have a Mediation Act; they only have an Arbitration Act.

¹ Namely: Austria, Belgium, Bulgaria, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Liechtenstein, Malta, the Netherlands, Norway, Poland, Romania, Slovakia, Spain, Sweden and England/Scotland

The developments in mediation legislation in most of the survey countries took place during the last 5 years. For example, in Bulgaria the Parliament adopted the Mediation Act in December 2004. The concept of ADR (Conciliation/Mediation) was introduced into the Greek legal system by Law 2479/1997, and came into force in September 2000. In Hungary the Mediation Act was adopted in 2002. Ireland saw in 2004 the introduction of mediation schemes under the Residential Tenancies Act 2004 and the Civil Liability Act 2004. In Liechtenstein the Act on Mediation in Civil Code Cases became effective as of January 2005.

The use of ADR clauses in business-to-business contracts

In 14¹ of the 31 countries involved in this study it is usual to incorporate an ADR clause in business-to-business contracts. There is an increasing trend to include a clause in the contracts that provides for resorting to arbitration mechanisms in order to solve disputes and therefore to avoid traditional judicial litigation. The inclusion of other possible ADR tools in contract clauses is very rare; there is sometimes a mediation clause. In the Czech Republic and the Slovak Republic arbitration is mentioned as a way to solve possible disputes only in larger contracts.

The role of the government in promoting ADR

An important reason why governments facilitate ADR is to relieve the courts of their fast growing workload. A second reason is that, contrary to litigation or arbitration, mediation and conciliation provide *solutions* that are accepted by both parties, rather than judicially-imposed *decisions* as to how the dispute must be ended. For some of the new Member States, accession to the European Union was the prime incentive to develop an ADR policy. Reasons for not facilitating mediation are the desire to minimise the public sector role in the economy and the view that other types of resolution (the Irish *Small Claims Courts*, for example) are sufficient.

Government involvement takes various forms in the survey countries. It ranges from providing ADR services, providing information, regulating ADR and facilitating ADR, to no support at all.

- **Policy research:** In *Austria* the Federal Ministry for Economic Affairs and Labour commissioned a study concerning '*Business mediation for SMEs in Austria*'. This study was recently published. The results might be seen as a stimulus for further policy action. The *Dutch* government has initiated several projects to explore and promote the application of ADR. Those projects were evaluated in a comprehensive study, which was accompanied by an international literature study on mediation. The actual use of arbitration and binding advice in relation to litigation has also been studied. Those studies laid the foundation for policymaking on ADR in the *Netherlands*.
- **Information:** The *French* government promotes mediation in general as a mean to resolve civil disputes. The government provides information about ombudsmen, but this information is geared to consumers rather than specifically to SMEs. Chambers of commerce and professional bodies of lawyers organise information sessions, seminars etc.
In *Poland*, the Chamber of Commerce announced a contest for the best MS thesis on the subject of conciliation and mediation. The goal of this contest was to spread

¹ Namely: Belgium, Czech Republic, Finland, Ireland, Italy, Lithuania, Malta, the Netherlands, Norway, Poland, Slovakia, Spain and England

the idea of ADR.

In the *Slovak Republic* the Ministry of Justice ran several international projects during the period of the Mediation Act preparation. It included conferences and awareness raising campaigns in the media. Currently there is a pilot project organised by the Ministry of Justice.

- **Regulation:** The *Belgian* Minister of Justice introduced a bill to introduce a system of judge-mediators in courts.

The *Bulgarian* government incorporated the development of ADR as one of the goals of its Judicial Reform Strategy. Short-term priorities are: to develop and adopt ADR legislation, to develop training programmes for mediators, to introduce the institute of the ombudsman, and to increase the number of arbitration courts. Middle-term priorities are: to train mediators in alternative dispute resolution methods, to develop a code of ethics for mediators and to develop a register of mediators under the Ministry of Justice. Long-term priorities are: to develop an integral system for ADR.

In *Cyprus* draft legislation is being considered.

The government of the *Czech Republic* has the intention to create a legislative framework for mediation and favourable conditions for its broader utilization.

The *Italian* government promotes the use of reconciliation for disputes related to subcontracting in productive activities.

In *Romania* the government has established a legal and institutional framework for developing some forms of ADR.

The most important public development in this field in *Spain* is the recent approval of a new Law on Arbitration. This new law is intended to establish a stable and well defined legal framework that can help with the definitive development of ADR mechanisms in Spain.

- **(Financial) facilitation:** In *Ireland* the government supports the ICMA (Irish Commercial Mediation Association) with public funds to promote commercial mediation.

In *Latvia* the Ministry of Justice is currently working on a project with the aim to find parties interested in ADR and inviting them to put together a promotion plan.

In *Malta* the government has set up an arbitration centre for both domestic and foreign disputes.

In the *Slovak Republic* there are incentives in the form of greatly reduced court charges if parties choose ADR in the course of the litigation.

In *England* the government has introduced several subsidised schemes. Parties involved in litigation are encouraged to use ADR procedures and, in certain circumstances, a judge can recommend such action. The court can also impose cost sanctions if one of the parties has been unreasonable in refusing to attempt ADR. The Scottish Executive (devolved government in Scotland) is committed to 'encouraging' the use of ADR where it is appropriate. It presently funds a mediation service in Edinburgh Sheriff's Court available for Small Claims (under £750). It is also about to set up two new mediation pilots in Aberdeen and Glasgow Sheriff's Courts for all levels of dispute¹.

- **No involvement:** The government of *Denmark* does not promote and stimulate ADR specifically for SMEs. The government promotes ADR in general by allowing it to become an alternative to litigation.

The government in *Finland* facilitates ADR more in consumer cases than in business-to-business cases.

¹ <http://www.scotland.gov.uk/Topics/Government/SPD/17424/incourtmediationpilot>

In *Germany, Greece, Hungary, Liechtenstein, Lithuania, Luxembourg, Portugal, Slovenia, and Turkey* no special efforts are geared towards promoting ADR for SMEs.

3.3 Country clusters

Section 3.2 shows that ADR is developing in the various countries of Europe. However, some countries are more advanced than others. The differences in scale (large versus small countries) and the differences in the character of the legal culture and social life are reflected in these developments. The former communist countries (e.g. Bulgaria, the Czech Republic, Estonia, Slovenia etc.) have only a short tradition of civil law based upon individual property. Small countries (e.g. Liechtenstein, Luxembourg) have only a small potential for the differentiation of dispute resolution instruments. In some countries (Ireland, Romania, Spain) 'the day in court' is more or less sacred, in other countries the courts are viewed with some suspicion.

In addition the civil law tradition (France, Belgium, Norway, and Sweden) and the common law tradition (England, Ireland) are quite different from each other. It is possible to distinguish the Roman civil law countries (France, Belgium, the Netherlands, Spain and Italy) where the most important basis for the development of the legal system was Roman law. Then there are the Germanic civil law countries (Germany and Austria) where the emphasis lies on the sciences of law and a more systematic approach. The Scandinavian civil law countries (Norway, Denmark, Sweden and Finland) can be characterized by their strong interconnection with politics and culture: their legal system is based on old-Germanic law. Finally there are the European common law countries (England and Ireland) where systematic codifications are lacking and where judges make fundamental contributions to the development of the legal system.¹

For the further analyses in this study the group of the 31 countries in the geographic research area are clustered into groups of countries with comparable characteristics.

Grouping the countries is based on three criteria:

- whether they are part of the common law or the civil law tradition;
- the extent to which ADR has been introduced;
- the litigation culture.

Common law versus Civil law

Civil or civilian law is a legal tradition on which the law is based in the majority of countries in the world, especially in continental Europe. Civil law is primarily in contrast with common law, which is the legal system developed in Anglo-American jurisdiction. The original difference is that, historically, common law developed from custom, originating before there were any written laws and continuing as judge-made law even after written laws became prominent, whereas civil law developed from Roman law, in particular from Justinian's *Corpus Juris Civilis*.

¹ A. de Roo and R. Jagtenberg, *Europese mediationpraktijken, [European mediation practice]*, the Hague: Boon Juridische Uitgevers 2004, p. 13-76

table 30 Country classification based on the legal system

<i>Legal system</i>	<i>Countries</i>
Civil Law	Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and Turkey.
Common law	Cyprus, Ireland, Malta, England

Source: EIM, 2005.

The extent to which ADR has been introduced

Some countries do have a long tradition of ADR like France, Belgium, Norway and Denmark. For other countries the use of ADR for business-to-business disputes is relatively new. The extent to which ADR is being used also differs among the countries. In Poland, Finland and Norway its use is very high, in Turkey and Iceland it is very low. Table 31 shows a classification of the 31 countries using these two dimensions. The information in this table is based on table 28 and the information in the fact sheets from the partners in the ENSR-network.

table 31 Classification of the extent to which ADR has been introduced

	<i>Longer tradition</i> (before 1990)	<i>Short tradition</i> (after 1990)
High use (more than 5% of the disputes)	Belgium, Cyprus, Finland, Norway, Malta, Spain	Latvia, Lithuania, Poland
Low use (less than 5% of the disputes)	Austria, Denmark, France, Germany, Ireland, Italy, the Netherlands, Portugal, Sweden, England	Bulgaria, Czech Republic, Estonia, Greece, Hungary, Liechtenstein, Luxembourg, Romania, Slovak Republic, Slovenia, Iceland, Turkey

Source: EIM, 2005.

The litigation culture

England¹, Ireland and Germany² have a strong litigation culture with low barriers to start a judicial procedure. Also in Luxembourg, Romania, Slovenia, and Spain there is a certain cultural tradition of 'going to court', or at least, to believe in those mechanisms that imply a certain 'obligation' for disputing parties.

¹ De Roo en Jagtenberg, p. 63

² De Roo en Jagtenberg, p. 38

These three criteria are used to cluster the countries in the following groups:

Cluster 1 = Latin Group

Long tradition of formal types of ADR (e.g. arbitration, conciliation and mediation): Austria, Belgium, France, Italy, the Netherlands, Portugal, and Spain

Cluster 2 = Scandinavian Group

Long tradition of 'consensus'-ADR (e.g. complaint boards) Denmark, Finland, Norway and Sweden

Cluster 3 = Anglo-Germanic Group

Strong litigation culture with low barriers for starting a judicial procedure. Cyprus, Germany, Ireland, Malta and England

Cluster 4 = Newcomers Group

Countries for which ADR and/or the private SME-sector are new phenomena. Bulgaria, Czech Republic, Estonia, Greece, Hungary Latvia, Liechtenstein, Lithuania, Luxembourg, Poland, Romania Slovak Republic, Slovenia, Iceland, Turkey

3.4 The use and regulation of specific types of ADR

3.4.1 *Mediation in business-to-business disputes*

Mediation is used to resolve business-to-business disputes¹ by 28 of the 31 countries involved in this survey. Mediation is therefore the most frequently used method of the ADR spectrum in this group of countries. This section will feature an overview of how the mediation process is used and how it is institutionalized. In addition, the differences and similarities between the countries in mediating business-to-business disputes will be analyzed. Most of the countries have identified only one specific mediation method. Three countries, however, have distinguished sector specific varieties of the mediation process².

Institutional level of mediation

On the institutional and organizational level the following picture can be seen: most of the countries that use mediation in business-to-business disputes have multiple institutions and organizations that provide mediation services. In ten of the countries the chambers of commerce play an important role as a provider of mediation services³. Another important contribution to the institutionalization of mediation in business-to-business disputes is being made by arbitration providers in five of the countries⁴. In two countries mediation is provided through the frameworks set up by Ministries of Justice and in one country by the Ministry of Culture⁵.

¹ Namely: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and England.

² Namely: Cyprus has distinguished two, Estonia two and Slovenia seven mediation varieties in the field of business-to-business disputes.

³ Namely in Cyprus, France, Germany, Greece, Ireland, Italy, Norway, Romania, Slovenia and Sweden.

⁴ Namely in: Belgium, Lithuania, Poland, Romania and Spain.

⁵ Respectively: Denmark, Hungary and Estonia.

On average however, most of the organizations that provide mediation are business associations in different industries, mediation centres (commercial and non-profit), courts, bar associations, individual lawyers, independent arbitrators and independent mediators. On the institutional level in most of the countries there is a mixture of commercial institutions, public institutions and legal institutions that provide mediation in business-to-business disputes.

The role of the mediator

The results show that in 20 countries the role of the neutral third party in mediating business-to-business disputes is purely facilitative. This means that the mediator helps the parties to reach an agreement but does not formally adopt a position as to the possible means for resolving the dispute. In six countries the mediator uses the method of recommending a certain solution in addition to merely facilitating the mediation process¹. The recommendation in these cases, however, is not binding on the parties involved. In two countries the mediator has the possibility to make a decision that is binding for the conflicting parties². This survey shows that the mediator usually has a mere facilitative role and making binding decisions is somewhat exceptional.

Quantitative use of mediation

The numbers vary as to the quantitative use of mediation in business-to-business disputes but show that the use of mediation in this category of disputes has not yet been institutionalized in most of the countries. Twenty countries claim that using mediation in business-to-business disputes is very rare to unusual. Numerous reasons are given for this limited use, the most important being that: mediation is not traditional, there is a strong need for more intense information policies, there is a lack of government support in the implementation of mediation and there is a lack of regulation. Five countries though, do see a (rapidly) growing interest in mediation in this field³. In only three countries can mediation in business-to-business disputes be described well-established⁴. The main reasons given for resorting to mediation is that the process is confidential as well as relatively time- and cost-effective. The element of confidentiality however, imposes severe constraints on any effort at quantification.

Types of disputes

In 19 countries SMEs seem to use mediation mostly in disputes that involve suppliers and customers. However it is noted that in three of these countries mediation in customer disputes is more common than in disputes⁵ with suppliers. Three countries claim that mediation is usually only used for internal conflicts within business organizations or for disputes among partners and management staff⁶. Three other countries claim that mediation can also be used in a much wider range of business disputes involving for

¹ Namely: Belgium, Hungary, Norway, Poland, Romania and Slovenia.

² Namely: Estonia and Latvia.

³ Namely: Denmark, France, Germany, the Netherlands and Spain.

⁴ Namely: Poland, Slovenia and the England.

⁵ Namely: Bulgaria, Cyprus and Slovenia.

⁶ Namely: Austria, Germany and Spain.

instance shareholders, banks, insurance companies and competitors¹. The most common subjects of disputes are payment problems, quality standards and poor delivery. It should be noted that a relatively large number of countries² was unable to provide any information on the subject matter of the disputes. Mediation is available in 25 countries.

Requirements, limitations, costs and enforceability

The countries gave many different answers to the question about the requirements or limitations that apply to mediation. The elements that appeared most often are: all parties concerned need to be aware of the possibilities of mediation and secondly that they should be willing and therefore motivated to participate in the process. The other important requirement is that mediation is voluntary. Furthermore, as previously stated the role of the mediator should be fulfilled by a neutral and impartial person. In some countries the use of time limits is common, meaning that there is only a short period of time available to conduct the mediation process³. In a small number of countries the value of the dispute reflects on the fees and cost of mediation. In the analysis of the limitations of the mediation process a number of countries noted that technical limitations are not as important as the cultural and psychological barriers to using mediation. A significant portion of the countries claimed that there are no legal or technical limitations⁴.

As far as the cost of mediation in business-to-business disputes is concerned the survey shows that in the majority of countries the mediators receive a fee for their services⁵. The fees vary within the countries because of the diversity of mediation centres and organizations that usually set their own fees. In some countries the fee is a percentage of the total value of the dispute⁶. In most countries the cost is divided equally amongst the parties unless other arrangements have been made.

It was difficult to get a clear picture of enforceability because the definitions of 'enforceable' and 'binding' vary greatly between countries. The survey shows that 14 countries claimed that the outcome is enforceable under law in the sense that it is similar to any other civil law contract⁷. Other interviewees stated that the outcome is enforceable only when it is signed before a notary. This means that the outcome is enforceable under law, in the sense that a judicial judgement is enforceable, only after the intervention of courts or notaries. Because the outcome seems to be unenforceable autonomously 11 countries claimed that the outcome is not a binding decision between

¹ Namely: France, Slovenia and England.

² Namely: 11

³ Varying from two days to three months.

⁴ Namely: Bulgaria, Denmark, Finland, Hungary, Ireland, Lithuania, the Netherlands, Norway, Slovakia, Slovenia, Spain, Sweden and England.

⁵ Varying from 20-50 euros per hour in the Czech Republic to 200-350 euros per hour in Liechtenstein.

⁶ Namely: Czech Republic, Greece, Italy and Luxembourg

⁷ Namely: Austria, Bulgaria, Czech Republic, France, Germany, Greece, Latvia, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Norway, Slovakia and England.

parties¹. When the answers to the enforceability question are compared, the main conclusion is that the outcome can usually be enforced in the same way as a regular civil law contract but only with the help of some other legal proceedings².

A successful ADR case in England

Court of law referred the Parties to a Mediator

PM versus CM Initial Time Estimate: 2 Hours

Nature of Dispute: commercial dispute. PM supplied a car engine to CM but received no payment. CM counter-claiming for fault to car.

Amount of Claim: £2,165.96 Counter-claim: £1,731.67

The judge speaks to both parties and sends them to the mediator. The mediator explains that he is a solicitor but he is not here to apply his legal knowledge but to see whether there is any middle ground. He asks each party to present their case in a few words. He then separates the parties and asks the claimant to wait outside in the corridor.

The mediator focuses on whether the parties wish to do business in the future. He says that reports and witnesses are going to be expensive if the case goes to court. He again emphasises the point that the parties may wish to do business again. The mediator moves between the parties - one in the corridor and one in the mediation room.

It is clear that the parties are not sure of the role of the mediator despite this being explained by the judge and the mediator himself. At one point during the negotiations the claimant asks the mediator - what would you do? The mediator states that it is not in his remit to say what he would do. The claimant replies - Yes but you are a judge!

The mediator replies, No I am not a judge. I am a mediator and should be impartial.

It is noticeable that the on-going business relationship is especially important to the claimant. The parties settle. The nature of the settlement is that the defendant will pay the claimant £2000 and in return the claimant will sell the defendant a new Ford vehicle at cost price. Both parties shake hands.

Both parties were familiar with the legal system as they had been involved in previous disputes. Yet there was definitely confusion as to the role of the mediator in the dispute.

Codes, policies, regulations and required qualifications

As far as self-regulation is concerned it seems that about half of the countries claim that there is some sort of self-regulation involved. Usually this self-regulation is in the form of Codes of Practice and Codes of Ethics adopted by the mediation centres individually. Therefore, these rules do not apply across the entire jurisdiction. The other countries claim that there is no self-regulation for this same reason. They state that although some of the mediation providers have their own Codes of Conduct this does not mean that there is effective self-regulation active in the market. Some countries do have more uniform standards for mediation but these are outnumbered by those that do not.

¹ Namely: Belgium, Cyprus, Estonia, Finland, Hungary, Italy, Poland, Romania, Slovenia, Spain and Sweden.

² In some civil law countries, a settlement agreement is a special kind of contract which, subject to certain formalities, is enforceable like a court judgement. In other jurisdictions, a settlement agreement is an ordinary contract which is binding but requires litigation (or arbitration) to become enforceable.

Only eight countries have some sort of general mediation policy that applies to certain economic sectors. These vary from merely determining that there is a commitment to use mediation to a legislative provision giving certain benefits to the users of mediation¹.

There seems to be little promotion for the use of mediation in business-to-business disputes specifically, although there is often a more general promotion of ADR in the survey countries. The promotion of mediation in business-to-business disputes seems to be in the hands of mediation service providers themselves together with some Chambers of Commerce. In very few instances are courts or governmental bodies involved.

The qualifications required by mediators seem to be quite strict in some countries compared to the countries where there are no policies on this at all. It is unclear, however, to what extent the stricter requirements are mere guidelines or standards. The most common requirements are that the mediator has followed special training and is impartial and neutral.

A successful ADR case in Hungary

Involved parties: a large insurance company and a car-owner (SME)

Nature of the dispute: car insurance.

A car owner, whose mandatory third party insurance policy was issued by the insurance company, caused a traffic accident in which SME's car, that was as good as new, driven by an employee, was seriously damaged. Pursuant to police inquiries the private car owner proved to be exclusively liable for the accident, accordingly SMEs' loss should have been covered by the insurance company based upon the car owner's third party insurance policy. SME requested full compensation, including the cost of renting a car, amounting to some € 20,000. The insurance company deemed this claim too high. It then had 2 options: (i) take the case to court (as had been the practice for decades in such cases) or (ii) try to resolve the issue quickly via mediation. It chose the second option and suggested to the SME that they should sit down with a neutral third party and try to reach a quick agreement. The entire procedure, including preparatory activities, took about 2 weeks and the disputing parties agreed that (i) the insurer would pay € 14,500 to the SME immediately and (ii) cover the fees of the neutral third party. The agreed amount was transferred to the SME within 3 banking days, satisfying both parties. Had this case been taken to court in Budapest, it could easily have taken 3-4 years to obtain a final and enforceable decision. The SME's manager recognized that receiving the money quickly and easily was preferable to spending considerable sums on a lawyer, the expense of attending court hearings, etc. On the other hand, this solution proved satisfactory for the insurance company too, because it allowed the case to be closed (one of the tens of thousands of similar cases!) with a relatively good cost/benefit ratio.

Level of success

On a micro level it seems that mediation is successful to very successful in resolving disputes in business-to-business cases². Looking at the macro level however, mediation is not yet a success, as (very) few cases have been mediated in this area so far. The crucial success factors seem to be that the mediation process results in a less time-consuming,

¹ Namely: Czech Republic, Ireland, Italy, Latvia, the Netherlands, Romania, Sweden and England

² With success rates from 60 to 90%

cheaper solution with full confidentiality. The answers show that mediation is a serious alternative to litigation but that there is a lack of information, education and promotion for SMEs. When mediation is used in business-to-business disputes the figures show that a solution, with attractive benefits, is very often found. Some countries do see a growth in the use of mediation in b-to-b cases and in general and have explained that it simply took some time to become familiar with the mediation process¹.

3.4.2 *Other types of ADR in business-to-business disputes*

In the countries under survey, mediation is not the only method used to resolve disputes without traditional litigation. In the following section the other ADR methods most commonly used will be described. Not every method that was mentioned can be described; therefore a selection was made, based on the extent to which the methods are used in the different countries.

Alternative forms of arbitration and med-arb

In 13 of the countries surveyed alternative forms of arbitration and med-arb are used as means to resolve disputes in the business-to-business area². Med-arb is the process in which mediation and arbitration are combined. Med-arb starts with a mediation phase during which the parties are assisted by a mediator in their attempt to resolve their differences themselves. If the differences cannot be overcome by mediation, parties can choose an arbitrator to give a binding decision on the matter. Here alternative forms of arbitration are understood to be final offer arbitration which is also known as pendulum arbitration in the industrial field in England. Under the conditions of this process each party makes a final settlement offer indicating what the decision should be and the arbitrator is required to choose the one considered most reasonable. Another alternative form of arbitration is 'documents only' arbitration i.e. the arbitrator decides only from the documents³. In the United States 'bracketed arbitration' is known as an alternative implying that the loss awarded is limited within a pre-defined range where both a floor and ceiling have been agreed upon. In this manner, awards that are higher than the maximum are reduced to the ceiling and conversely those that are lower than the floor, are increased⁴.

At institutional level we see that most countries have multiple associations and organizations providing alternative forms of arbitration. These organizations are a mixture of chambers of commerce, trade associations, professional organizations and non-profit organizations. In five countries, the chambers of commerce and trade play a very important role in distributing, regulating and providing alternative forms of arbitration⁵. The decision made by the arbitrator is binding for the parties involved in six countries⁶. In the other two countries the arbitrator is characterized as a mere facilitator of the

¹ Spain and England

² Namely in: Belgium, Bulgaria, Estonia, England, France, Germany, Ireland, Italy, Malta, the Netherlands, Romania, Spain and Turkey.

³ Both alternatives come from: H. Brown and A. Marriott, *ADR Principles and Practice*, London: Sweet and Maxwell, 1999, pg. 63-64.

⁴ http://www.ishc.com/adr/index.cfm?fuseaction=rules_arbitration

⁵ Namely in: Germany, Italy, Romania, Spain and Turkey.

⁶ Namely in: Belgium, Ireland, Italy, Malta, the Netherlands and Romania.

process¹. In these countries the arbitrator does not make recommendations to the parties let alone give binding decisions. Therefore his role can be viewed as being quite similar to that of the mediator and the term arbitrator can be interpreted as somewhat misleading.

How often alternative forms of arbitration are used in business-to-business disputes varies among the countries. The only country in which alternative forms of arbitration are used very often is Poland². The other countries claim that the alternative forms of arbitration are used very rarely or almost never³. Four countries, however, were not able to provide any quantitative information on the use of alternative forms of arbitration⁴. The most important areas in which alternative forms of arbitration are used seem to be financial, commercial and industrial conflicts. On average most of the disputes arise from problematic payment, delivery and disappointing quality of goods and services. In some countries, however, certain sectors seem to have embraced alternative forms of arbitration to resolve their conflicts more than others⁵. Various forms of contractual arbitration are widely used in the construction industry.

As far as requirements and limitations are concerned, the countries tend to show a similar picture. It seems that the infrastructure for alternative forms of arbitration is flexible and informal, meaning that it can be modelled to a certain extent according to the specific wishes of the parties involved. In most countries a consensual agreement to 'arbitrate' needs to be signed before the process can begin. The size of the panel can vary between one and three or even more members if so desired. According to the countries, the designated 'arbitrator' should play an independent and impartial role in the matter. The reason for this is that a mediator who has used caucuses will have heard arguments to which the other party has had no opportunity to reply. The alternative forms of arbitration procedure seem to be reserved for conflicts in the area of unfair competition so have a much more limited scope than the other procedures featured in the survey⁶.

On the matter of self-regulation the survey again shows that the chambers of commerce and trade play a significant role. The chambers are also an important actor in promoting and stimulating the use of arbitration⁷. In some countries they even have a monitoring function. In two countries governmental bodies are also involved in promoting the use of arbitration⁸. In general, private organizations are the main promoters of alternative forms of arbitration.

¹ Namely in: Germany and Turkey.

² In Malta the number of arbitrations today (around twenty percent of all disputes) is not very high but substantial growth in the usage of arbitration is evident

³ Namely in: Italy, Malta, the Netherlands and Turkey.

⁴ Namely in: Belgium, Germany, Ireland and Romania.

⁵ Namely in the construction sector in Italy and the Netherlands.

⁶ For more details see the German Law against Unfair Competition.

⁷ Namely in: Belgium and Italy.

⁸ In Belgium the government facilitates the users of arbitration as well as promoting it in general and in Romania self-regulation originated from governmental bodies.

The cost of arbitration is usually based on the time needed to come to a resolution of the dispute. Other factors such as the complexity of the matter and the value of the dispute are also taken into account. When using med-arb the cost is significantly higher than when using either the single process of mediation or arbitration.

Most countries consider alternative forms of arbitration as successful processes that offer a more economic solution in a short period of time¹. The aspects of arbitration such as its confidentiality and informal nature are other key reasons for its success. Alternative forms of arbitration are viewed as flexible processes that benefit from the specific professional knowledge of the arbitrator(s). Another appealing aspect of these processes is that they resemble adjudication². This means that parties view alternative forms of arbitration as a reliable form of ADR³. Although the alternative forms of arbitration are viewed as a success, this success is not yet evident at macro level.

Expert determination

In nine countries expert determination is used to resolve business-to-business disputes⁴. On the institutional level it seems that expert determination is provided almost wholly by the private market through professionals and expert organizations. The experts who are used tend to have a substantial specific knowledge of the subject-matters in dispute. The experts are usually active in the fields of technology and construction. The role of the expert differs among the countries, meaning that in some countries the experts merely facilitate the search for a solution and in other countries give their binding opinion on the matter on hand⁵. In Ireland the role of the expert is a matter of party autonomy so they can decide in each case separately what that specific role will be. In most countries expert determination is not used very often, except for Malta in which it is the most common ADR method. It seems that expert determination is accessible for most subjects and sectors, but is mostly used in the construction and engineering industry. Subjects mentioned most frequently are problematic payment, problematic delivery and the disappointing quality of goods. Expert determination is characterized as a flexible process in most of the countries with not many requirements or limitations. In Cyprus the situation is very different, as expert determination is subject to formal requirements. Disputes can be referred to experts by the courts.

The government stimulates and facilitates the use of expert determination through regulations and a monitoring system. The majority of countries in this survey perceive expert determination as a success⁶. Other countries have little information about the success rate because the number of cases is too small. Key reasons for the success are the highly qualified experts, the economic use of time and cost-effectiveness.

¹ The states in which arbitration is not considered to be a successful method are: Romania and Turkey.

² In Spain a new law on mediation came into force and resulted in a firm legal framework that makes alternative arbitration the most important and relevant ADR method in Spain.

³ Alternative arbitration however is not enforceable in some states, e.g. in Turkey.

⁴ Namely in: Belgium, Cyprus (which distinguishes two different types), France, Ireland, Latvia, Lithuania, Malta, Poland and England.

⁵ Facilitation in: Cyprus (some cases), Lithuania (some cases) and Poland. Recommendations in: Lithuania (some cases). Binding in: Cyprus (some cases), Malta and England.

⁶ Namely in: Cyprus, Ireland, Poland and England.

Neutral evaluation

The ADR method of neutral evaluation is used in six countries on a relatively small scale¹.

The number of organizations that provide (early) neutral evaluation is also limited in the different countries. These are usually private organizations of lawyers and other professionals. The countries that could provide information about the use of neutral evaluation stated that the role of the neutral is that of making certain recommendations to the parties that they are free to either follow or set aside². Only in Poland does there seem to be a more binding form of neutral evaluation. In all the countries that use neutral evaluation, it is clearly not the most common ADR method. The success rate is somewhat low meaning that all the countries have responded in a somewhat negative manner³. The cases in which neutral evaluation is used are mostly about problematic quality, delivery, payment and lack of services. In Poland the process is commonly used in cases of a breach of contract. In England neutral evaluation takes place before a formal judicial ruling. The Commercial Court plays a significant role in the facilitation and promotion of neutral evaluation in England. The Commercial Court has its own neutral evaluation scheme whereby a judge offers a non-binding assessment of the parties' prospects. One explanation for the low usage rates in the countries could be that there is little awareness of the possibility of neutral evaluation⁴.

Ombudsman

The last ADR method to be discussed in this section is the ombudsman. The Ombudsman is a well-known phenomenon in seven countries featured in this survey⁵. In business-to-business disputes, however, the use of ombudsmen is not the most common or most popular method of ADR. Ombudsmen are usually appointed by various institutions varying from private organizations to the national parliament⁶. Ombudsmen are characterized as neutrals that are independent of the organizations they could possibly investigate and they are usually appointed for a limited period of time. In three countries the role of the Ombudsman is that of recommending a certain action or solution⁷. In Slovenia and England the Ombudsman can give binding advice on the dispute to the parties involved. The Ombudsman is not consulted very often in business-to-business disputes in four countries. Only in England is there a growing tendency to use ombudsmen though there is no obvious connection with business-to-business disputes. In most countries the Ombudsman is available only in specific sectors⁸. The process that takes place under the auspices of the Ombudsman usually consists of multiple stages resulting in a decision by the Ombudsman himself. In England there are five stages before the final decision is made by one of the 26 different ombudsmen active at present. Al-

¹ Namely in: Cyprus, France, Latvia, Malta, Poland and England.

² There is no information available about neutral evaluation in Latvia.

³ According to Cyprus, Poland and the England the success rate is low. Latvia and Malta did not provide an answer to his question.

⁴ As stated by Cyprus.

⁵ Namely: Estonia, France, Latvia, Malta, the Netherlands, Slovenia and England.

⁶ In Malta.

⁷ Namely in: Estonia, France and Malta.

⁸ Namely in: France, Slovenia and England.

though the office of Ombudsman comes with substantial authority, SMEs do not make use of this form of ADR very often. It seems to be affiliated with other areas of disputes more than with conflicts arising from the business arena.

3.5 The provision of ADR in Europe

In this section the main results of the ADR service providers' survey will be described. To obtain insight into the characteristics of bodies providing ADR a survey was conducted among 130 bodies in 27 countries (for an overview of the number of respondents see Annex I). Because of the limited number of respondents, the results in this section are only indicative of the characteristics of ADR providers, especially at European level.

Characteristics of ADR service providers

ADR is provided by a wide range of bodies. There are private and public bodies. For some of these bodies ADR is their core business, for others it is a secondary activity. In table 32 the distribution of ADR service providers in the survey is shown.

table 32 Type of organisations of the ADR service providers

<i>Type of organisation</i>	<i>Number</i>
<i>Private organisations:</i>	<i>61</i>
- Lawyers	14
- Specialised commercial ADR-organisation	24
- Other private organisation (self employed, notary, insurance company, other legal service provider, etc.)	23
<i>Public or non-profit organisations:</i>	<i>69</i>
- Chamber of commerce	22
- Industry association	3
- Government department	4
- Independent public authority	7
- Specialised non-profit ADR institute (e.g. Ombudsman or complaint board)	22
- Other public or non-profit organisation	11
Total	130

Source: EIM, 2005, based on EIM/GDCC, European survey amongst ADR service providers in 2005.

Almost a quarter of the ADR service providers have affiliation or links to one or more of the possible parties in a dispute or their organisation (such as an association of industries).

Some characteristics of the European ADR service providers:

- 28% of the ADR service providers provide ADR for only one or some industries.
72% of the ADR service providers provide ADR for all industries;
- 82% of the ADR service providers provide ADR for business-to-business disputes where SMEs are involved

- 13% of the ADR service providers have only SMEs as client and for 52% of the ADR service providers 50% or more of the clients are SMEs.
- 85% of the ADR service providers provide ADR for disputes that originate anywhere in the country, 15% of the ADR service providers provide ADR that originates in a specific region only.
- 82% of the ADR service providers provide ADR in business-to-business disputes involving parties based in different countries.

Types of disputes

The surveyed ADR service providers mediate various types of disputes (see table 33). 75% of the bodies provide ADR in business-to-business disputes.

table 33 Type of disputes for which ADR is provided

<i>Type of dispute</i>	<i>% of ADR service providers</i>
Business-to-business	75
Business-to-consumer	64
Business-to-government	36
Business-to-employee	42
Other...	18

Source: EIM, 2005, based on EIM/GDCC, European survey amongst ADR service providers in 2005.

Types of ADR provided

The surveyed ADR service providers make a wide range of ADR-methods available (see table 34). The most common type of ADR is mediation, followed by arbitration, conciliation and med-arb.

table 34 Type of ADR provided

<i>Type of ADR</i>	<i>% of ADR service providers</i>
Arbitration	57
Complaint board	12
Contractual adjudication	13
Expert determination	18
Fact-finding	12
Med-Arb	25
Mediation	72
Conciliation	34
Mini-trial	13
Neutral evaluation	17
Ombudsman	11
Other...	12

Source: EIM, 2005, based on EIM/GDCC, European survey amongst ADR service providers in 2005.

Number of ADR-procedures

The number of ADR-procedures differs widely among the ADR service providers. Although many ADR service providers have all sorts of ADR available, the number of actual ADR-procedures in 2004 is often limited (even often zero).

In table 35 the number of procedures is shown divided into classes with the percentage of the ADR-bodies providing the listed type of ADR. The highest number of procedures is also shown. The high percentages in zero procedures class make it evident that many ADR service providers offer certain kinds of ADR but do not have any procedures for that type of ADR. Arbitration and mediation are by far the most important types of ADR actually provided by ADR bodies¹.

table 35 Number of ADR procedures in 2004 of the ADR-bodies providing the listed type of ADR

Type of ADR	Number of ADR-procedures					highest number
	0	1-10	11-100	101-1000	> 1.000	
Arbitration	16%	35%	33%	12%	4%	11,500
Complaint board	78%	7%	11%	4%	0%	200
Contractual adjudication	58%	25%	13%	4%	0%	150
Expert determination	59%	37%	4%	0%	0%	30
Fact-finding	67%	29%	0%	0%	4%	1,200
Med-Arb	51%	9%	20%	20%	4%	431
Mediation	20%	38%	23%	18%	1%	1,200
Conciliation	44%	27%	20%	10%	0%	900
Mini-trial	77%	15%	8%	0%	0%	100
Neutral evaluation	71%	21%	7%	0%	0%	30
Ombudsman	87%	9%	4%	0%	0%	20
other...	38%	13%	50%	0%	0%	40

Source: EIM, 2005, based on EIM/GDCC, European survey amongst ADR service providers in 2005.

The total number of ADR-procedures increased for more than 62% of the ADR bodies during the last 3 years. About 34% of the ADR-bodies reported that the total number of ADR-procedures in the last 3 years remained equal and only 4% of the ADR-bodies showed a decrease in the total number of ADR-procedures.

Table 36 shows the average number of business-to-business disputes as a percentage of the number of cases per type of ADR. On average more than half of the cases of fact-finding, arbitration, contractual adjudication and mini-trial involved business-to-business disputes.

¹ Pure arbitration was excluded from this study. Nevertheless, a lot of ADR-bodies offer various kinds of ADR (including arbitration) and often arbitration is the most important type of ADR for those ADR-bodies.

table 36 Business-to-business cases (Average percentage of the number of ADR-procedures in 2004 of the ADR-bodies providing this type of ADR in 2004)

<i>Type of ADR</i>	<i>% business-to-business</i>
Arbitration	55
Complaint board	32
Contractual adjudication	55
Expert determination	45
Fact-finding	61
Med-Arb	40
Mediation	46
Conciliation	32
Mini-trial	53
Neutral evaluation	44
Ombudsman	20
Other...	31

Source: EIM, 2005, based on EIM/GDCC, European survey amongst ADR service providers in 2005.

Lead time of ADR procedures

Quick resolution of disputes is very important for SMEs. In general, dispute resolution through the courts takes too much time. The lead times of ADR-procedures are usually much shorter. Of all the various types of ADR, arbitration and mini-trial have the longest lead time (around 110 days). The lead times of the other types of ADR range from 22 days for a complaint board to 42 days for med-arb and conciliation.

table 37 Average lead time of ADR procedures in 2004 for the ADR-bodies providing these types of ADR

<i>Type of ADR</i>	<i>days</i>
Arbitration	112
Complaint board	22
Contractual adjudication	36
Expert determination	25
Fact-finding	33
Med-Arb	42
Mediation	38
Conciliation	42
Mini-trial	111
Neutral evaluation	24
Ombudsman	35
Other...	22

Source: EIM, 2005, based on EIM/GDCC, European survey amongst ADR service providers in 2005.

Costs of ADR

The surveyed ADR service providers use different ways to set prices for ADR procedures (see table 38). 31% charge a fixed fee, while 42% use a variable rate depending on the amount in dispute (in financial terms) or the amount of work involved in the resolution of the dispute.

table 38 Pricing methods for ADR services

<i>Pricing method</i>	<i>% of ADR service providers</i>
Fixed price	7
Fixed price, dependent on the type of ADR	24
% of the amount involved in the case	11
Number of hours/days of work	31
Other	27

Source: EIM, 2005, based on EIM/GDCC, European survey amongst ADR service providers in 2005.

The average amount ADR service providers charge for solving a dispute of average complexity is € 740 for a case involving € 3,000. For a case of € 35,000 the average amount is € 1,920 and for a case of € 75,000 this is € 3,280.

3.6 Conclusions

The current situation of ADR in Europe

The conclusion of this chapter is that there are many different types of ADR and that they are implemented in many different ways. The 31 survey countries differ in the degree to which they have introduced ADR. Some countries, like Iceland, have only just begun, while other countries (for example Finland) are very advanced in this matter. Mediation is the most popular type of ADR. In all the countries, except for Iceland, Malta and Turkey, mediation procedures are offered to solve business disputes. Mediation is also the most commonly used of all ADR types. In 15 of the 31 countries more than 90% of all the ADR cases applied mediation.

ADR is less important for business-to-business disputes than judicial adjudication. In 22 of the 31 countries surveyed, the ratio ADR/judicial adjudication is less than 5%.

The use of ADR in business-to-business disputes is very low. The main obstacles are:

- lack of awareness of the benefits of ADR;
- strong tendency to ‘have a day in court’;
- court is more trustworthy;
- cultural obstacles;
- lawyers’ lack of expertise;
- conflicting interests among professionals;
- good, efficient legal system.

Country clusters

For the further analyses in the study the group of the 31 countries was divided into clusters with comparable characteristics. Clustering was based on three criteria:

- 1 whether the countries are part of the common law or the civil law tradition;
- 2 the extent to which ADR has been introduced;
- 3 the litigation culture.

These three criteria were used to cluster the countries into the following groups:

Cluster 1 = Latin Group

Long tradition of formal types of ADR (e.g. arbitration, conciliation and mediation): Austria, Belgium, France, Italy, the Netherlands, Portugal, and Spain

Cluster 2 = Scandinavian Group

Long tradition of 'consensus'-ADR (e.g. complaint boards) Denmark, Finland, Norway and Sweden

Cluster 3 = Anglo-Germanic Group

Strong litigation culture with low barriers for starting a judicial procedure. Cyprus, Germany, Ireland, Malta and England

Cluster 4 = Newcomers Group

Countries for which ADR and/or the private SME-sector are new phenomena. Bulgaria, Czech Republic, Estonia, Greece, Hungary, Latvia, Liechtenstein, Lithuania, Luxembourg, Poland, Romania, Slovak Republic, Slovenia, Iceland, Turkey

The use of specific types of ADR

Mediation is the most frequently used method of the ADR spectrum in this group of 31 countries. The use of mediation in business-to-business disputes varies between countries, and shows that mediation in this category of disputes is not well established in most countries.

Mediation is not the only alternative method used to resolve disputes. In 13 of the countries alternative forms of arbitration and med-arb are used as a means to resolve disputes in the business-to-business area. Expert determination is used in 9 countries. The ADR method of neutral evaluation is used in 6 countries on a relatively small scale and the Ombudsman is a well-known phenomenon in 7 countries.

The provision of ADR services in Europe

ADR services are provided by a wide range of bodies. Almost a quarter of the ADR service providers have affiliation or links to one or more of the possible parties in a dispute or their organisation. 75% of the bodies provide ADR in business-to-business disputes. The most important type of ADR is mediation, followed by arbitration, conciliation and med-arb.

The number of ADR-procedures differs widely between the ADR service providers, from zero to 11,500.

The speedy resolution of disputes is very important for SMEs. In general dispute resolution through the courts takes too much time and the lead times for ADR procedures are much shorter. Arbitration and mini-trial have the longest lead-time (around 110 days).

4 The potential of ADR in business-to-business disputes involving SMEs

4.1 Introduction

Chapter 2 explained that not all business-to-business disputes involving SMEs are solved in an adequate way and that unsolved disputes result in extra costs for SMEs. In the previous chapter the place and use of ADR as a means to solve disputes was discussed and it was made clear that the development of ADR differs largely between countries, the supply of ADR services is fragmented and that the use of ADR in business-to-business disputes is limited. The next question is whether ADR could be an interesting way of solving business-to-business disputes when SMEs are involved. This chapter deals first with the needs of SMEs with respect to dispute resolution. Section 4.3 shows the familiarity and experience of SMEs with ADR. In section 4.4 performance indicators are developed to improve the potential of using ADR in business-to-business disputes where SMEs are involved.

4.2 SMEs' needs with respect to dispute resolution

4.2.1 Major requirements for solving disputes

Requirements

In the telephone survey the SMEs were asked about their most important requirements in terms of solving disputes. The respondents were allowed to give more than one answer. Table 40 presents the percentages of SMEs with disputes that mentioned certain requirements for dispute resolution. The most important requirement for dispute resolution is that it should be quick (mentioned by 73% of the SMEs involved in disputes). SMEs do not have time for long procedures to solve business-to-business disputes. Business goes on and if SMEs have to wait a long time for the dispute to be solved they no longer need that solution. So, a speedy solution is necessary to keep business moving. For 42% of the SMEs with disputes it is important that dispute resolution is cheap and for 33% that it leads to a favourable outcome. The requirements of small enterprises are quite similar to those of medium-sized enterprises.

table 39 Major requirements for the resolution of SME disputes (% of SMEs with disputes in the last three years), by size class¹

<i>Requirements</i>	<i>Size class</i>			<i>Total SMEs</i>
	<i>Small</i>	<i>Medium</i>		
Cheap	42	46		42
Quick	73	59		73
Low barriers	23	28		23
Independent	21	26		21
Good	29	37		29
Flexible	23	26		23
Favourable outcome	33	31		33
Other and do not know	16	22		16

¹ Various answers possible.

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Although there are some differences in requirements for dispute solving between the sectors, these differences are not very significant and the pictures of the three sectors seem to be quite similar (see table 40).

table 40 Major requirements for the resolution of SME disputes (% of SMEs with disputes in the last three years), by sector¹

<i>Requirements</i>	<i>Sector</i>			<i>Total SMEs</i>
	<i>Manufacturing/ construction</i>	<i>Trade</i>	<i>Services</i>	
Cheap	37	51	39	42
Quick	65	76	77	73
Low barriers	20	25	23	23
Independent	21	28	17	21
Good	34	34	21	29
Flexible	18	28	24	23
Favourable outcome	34	32	32	33
Other and do not know	7	14	24	16

¹ Various answers possible.

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

A successful ADR case in Poland

The dispute concerned some sub-standard darning thread supplied to a large cloth manufacturer providing cloth for the women's clothing industry. Upon the arrival of the sub-standard thread, the cloth manufacturer refused to accept the shipment and threatened the thread manufacturer with large penalties specified in a previous contract between the two parties. Since the size of the penalties could endanger the cash-flow of the thread manufacturer as well as the relations with its clients, the thread manufacturer suggested calling experts before the case would find its way to the court of arbitration as specified by the contract. The experts confirmed the claims of the cloth manufacturer and suggested that the manufacturer of the faulty thread should cover the price difference for purchasing the darning thread from another, more expensive source. The thread manufacturer readily agreed to this resolution instead of risking a costly loss in the court of arbitration. Both sides settled out of court before the case reached the court of arbitration.

Requirement ranking for dispute resolution

The SMEs were asked to mention the most and the second most important requirements for dispute resolution to be able to rank these requirements according to their importance (see table 41). The most important requirements are that dispute resolution is quick and that it results in a favourable outcome. Although the low cost of dispute solving is quite important, a favourable outcome seems to be even more important than the cost of dispute solving.

table 41 Ranking, according to importance, of requirements for solving disputes involving SMEs (SMEs involved in disputes in the last three years), by size class

<i>Requirements</i>	<i>Size class</i>		
	<i>Small</i>	<i>Medium</i>	<i>Total SMEs</i>
Quick	1	1	1
Favourable outcome	2	2	2
Cheap	3	4	3
Good	4	5	4
Other	5	3	5
Flexible	6	7	6
Independent	7	6	7
Low barriers	8	8	8

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

There are some differences in the ranking between the sectors (see table 42). In all sectors quick dispute solving is the most important. The second most important requirement differs between the sectors. In manufacturing/construction a favourable outcome is ranked among the ranking of requirements, while for SMEs in trade and services the low cost of dispute solving is more important.

table 42 Ranking, according to importance, of requirements for solving disputes involving SMEs (SMEs with disputes in the last three years), by sector

<i>Requirements</i>	<i>Sector</i>			<i>Total SMEs</i>
	<i>Manufacturing/ construction</i>	<i>Trade</i>	<i>Services</i>	
Quick	1	1	1	1
Favourable outcome	2	4	3	2
Cheap	4	2	2	3
Good	3	3	5	4
Other	5	5	4	5
Flexible	7	6	6	6
Independent	6	8	8	7
Low barriers	8	7	7	8

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

4.2.2 Preferred way of solving disputes

Preference

The most common ways of solving disputes between businesses are informal negotiation, court proceedings and ADR. From the telephone survey¹ we learned that SMEs prefer to solve their disputes by informal negotiation (see table 43). This is not surprising since informal negotiation is quick and cheap and in most cases relationships between the parties can remain stable. 6% of the SMEs prefer a form of ADR and 9% court.

table 43 Preference for solving disputes involving SMEs, by size class

<i>Size class</i>	<i>Way of dispute solving</i>			<i>Other</i>
	<i>Informal negotiation</i>	<i>Form of ADR</i>	<i>Court</i>	
Small	78	6	9	7
Medium	76	9	7	8
Total SMEs	78	6	9	7

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

There seems to be some differences between the sectors. Particularly noticeable is that more SMEs in manufacturing/construction and trade prefer to solve disputes through the courts (see table 44.)

¹ Since ADR was not familiar for many SMEs in the telephone survey, ADR was explained before asking questions about the preferred way of dispute solving.

table 44 Preference for solving disputes involving SMEs, by sector

<i>Sector</i>	<i>Way of dispute solving</i>			<i>Other</i>
	<i>Informal negotiation</i>	<i>Form of ADR</i>	<i>Court</i>	
Manufacturing/ construction	74	8	13	5
Trade	72	6	14	8
Services	83	5	5	8
Total SMEs	78	6	9	7

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

In table 45 the preferences for various dispute resolution methods are shown for each country (and clusters). Some striking results are that in Turkey and the Remaining South Europe there is a relatively strong preference for litigation and that in Poland, the Remaining North and Central Europe and the Remaining East Europe there is a preference for ADR in some form.

table 45 Preference for solving disputes involving SMEs, by country (cluster)

<i>Country(cluster)</i>	<i>Way of dispute solving</i>			<i>Other</i>
	<i>Informal negotiation</i>	<i>Form of ADR</i>	<i>Court</i>	
France	86	1	6	7
Germany	93	4	2	1
Italy	77	5	10	8
Poland	69	16	13	2
Spain	94	1	5	0
Turkey	57	5	26	12
England	75	1	6	48
Remaining North and Central Europe	63	12	7	18
Remaining South Europe	60	5	31	4
Remaining East Europe	79	12	6	3
Total of European SMEs	78	6	9	7

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Differences between domestic and international cases

The preferences for procedures of dispute resolution do not differ very much between domestic and international disputes (see table 46). Informal negotiation is preferred for both types of disputes. However, some more SMEs prefer to solve international disputes by ADR or through the courts

table 46 Most efficient way of solving domestic and international disputes, percentage of SMEs

	<i>Way of dispute solving</i>		
	<i>Informal negotiation</i>	<i>Form of ADR</i>	<i>Court</i>
Domestic disputes	78	10	12
International disputes	71	13	16

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

4.3 SMEs and ADR

Knowledge of ADR

The vast majority of SMEs that had been involved in disputes (83%) did not know what ADR is (see table 47). Small enterprises are even less familiar with ADR than medium-sized enterprises and SMEs in manufacturing/construction are less familiar with ADR than SMEs in trade and services.

table 47 Knowledge of ADR (percentage of SMEs involved in disputes with other businesses during the last three years), by sector and size class

<i>Sector</i>	<i>Size class</i>		
	<i>Small</i>	<i>Medium</i>	<i>Total SMEs</i>
Manufacturing/construction	11	26	11
Trade	17	32	17
Services	22	23	22
Total	17	26	17

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Experience of SMEs with ADR

Only 4% of the SMEs have ever been involved in an ADR procedure (see table 48). Medium-sized enterprises have more experience with ADR. 11% of the medium-sized enterprises have been involved in an ADR procedure. There are no differences between sectors.

table 48 Involvement of SMEs in ADR-procedures¹ (percentage of SMEs), by size class

<i>Size class</i>	<i>%</i>
Small	4
Medium	11
Total	4

¹ These can be ADR procedures in business-to-business disputes, but also in business-to-consumer or business-to-government disputes.

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

A recent survey about business mediation in Austrian SMEs showed that when mediation is used, 90% of the cases are resolved and 82% of the companies, which used it, would recommend it. It is a comparatively cheap way of resolving business-to-business disputes, a lot of time is saved and companies appreciate the confidentiality of the procedure.

Use of ADR clauses

In the telephone survey it was explained what ADR is and what forms of ADR exist. After this explanation SMEs were asked if they thought it was a good idea to incorporate ADR clauses in contracts. 81% of the European SMEs considered this a good idea. Many SMEs argued that this might lead to faster dispute resolution. But at the moment only 10% of the European SMEs use ADR clauses in all their contracts and 13% for some of their contracts.

A successful ADR case in Ireland

The dispute took place between a manufacturer and a distributor. The distributor owed the manufacturer money according to the invoices duly sent out to the distributor. The manufacturer no longer wanted to receive payment but wanted to terminate his association with the distributor. The first stage in attempted resolution was in the form of letters written demanding payment and giving notice of the termination of the contract between the parties. The distributor, aggrieved by this, sent a letter from his solicitor alleging a host of contractual breaches on the part of the manufacturer. In short, the case looked almost intractable - things looked like becoming very nasty

Both sides consulted lawyers and these met and discussed the issue and were of the opinion that mediation could offer a solution. As the parties did not have a mediation clause, this depended on their agreement which was forthcoming and an ad hoc mediation clause was created. Counsel, on behalf of their clients agreed on a mediator and within two weeks mediation had resulted in a settlement.

Comparing ADR and the courts for dispute solving

Of course, informal negotiation is the best way to solve disputes. If mutual consent cannot be reached by informal negotiation, SMEs can decide to go to court to solve the dispute or use a form of ADR. In by far most of the disputes where mutual consent could not be reached by informal negotiation, the disputes were solved through the courts, while ADR was hardly used. Although SMEs are of the opinion that ADR is more efficient than court-based dispute resolution (see table 49), this outcome is not unexpected, as 83% of the SMEs do not know what ADR is (see table 48). If ADR were more familiar to SMEs, it would probably be used more often. The shorter period of an ADR procedure makes it more efficient, and thus attractive to SMEs.

table 49 ADR is more efficient than court-based dispute resolution (percentage of SMEs)¹

<i>Opinion of SMEs</i>	%
Yes, because the procedure is shorter	50
Yes, because of low costs of the procedure	24
Yes, because it leads to a better outcome	21
Yes, for another reason	22
No, because it is not legally binding	7
No, because court based decisions are better for future cases	5
No, for another reason	17

¹ Various answers possible.

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

Obstacles to using ADR

Although ADR seems to be more efficient for SMEs in solving disputes than does going to court, ADR is rarely used in business-to-business disputes. There seem to be important obstacles to using ADR. The most important obstacle is that SMEs are not fully aware of the possibilities offered by ADR to solve their disputes.

table 50 The major obstacles for using ADR (percentage of SMEs)

<i>Obstacles according to SMEs</i>	%
Not available	8
Possibilities unknown	48
Lawyer advises differently	4
Too expensive	7
Too difficult	3
Takes too long	3
Insufficient qualification of people providing ADR	1
Not legally binding	7
Other	19

Source: EIM, 2005, based on EIM/GDCC, European survey amongst SMEs in 2005.

4.4 Performance indicators

Discrepancies between opportunities and use of ADR

From the previous sections and chapters it can be concluded that there is a discrepancy between the opportunities offered of ADR and the actual use of ADR in solving business-to-business disputes where SMEs are involved. Taking into account the fact that many disputes remain unsolved and the needs of SMEs with respect to dispute resolution (quick, cheap, favourable outcome, etc.), one might presume that ADR can play an important role. Nevertheless, ADR is hardly used in business-to-business disputes. On the one hand the provision of ADR services is fragmented and often not explicitly focused on business-to-business disputes. On the other hand SMEs are not aware of the possibilities of ADR for helping to solve their business-to-business disputes. To improve

this situation the provision of ADR-services has to meet the needs of SMEs and SMEs should have more information about the supply of ADR-services and their quality and thus increase the demand for ADR. Performance indicators are needed to promote the better use of ADR in business-to-business disputes. Performance indicators can help ADR service providers to improve their services in the field of business-to-business disputes and they can help SMEs to assess ADR-services. Some performance indicators are developed in the next section.

Performance indicators

The purpose of performance indicators in this context¹ is to obtain transparency of the usability and quality of ADR-services for solving business-to-business disputes where SMEs are involved. Therefore the performance indicators should be in line with the needs of SMEs. By far the most important need of SMEs for solving business-to-business disputes is that the method should be 'quick', followed by 'cheap'. Solving business-to-business disputes is interesting for SMEs only when the resolution process does not take too long and does not cost too much. Otherwise solving business-to-business disputes is not attractive for SMEs. Doing businesses is an ongoing process that cannot wait too long for disputes to be solved. Suppose an SME has a dispute with a supplier, because the supplier does not deliver the right quality. Of course the SME tries to solve the dispute with the supplier through informal negotiation. If they do not reach a solution, the SME has to find another way to solve the conflict. This must not take too much time, because supplies are needed to run the business. So the SME has to choose between a quick solving process (when available) and not solving the conflict at all and looking for another supplier. Furthermore, the costs for solving business-to-business disputes have to be in line with the losses involved in not solving the dispute. Therefore small claims need to be solved using low cost means.

Besides 'quick' and 'cheap', there are more conditions for effective ADR to solve business-to-business disputes where SMEs are involved, such as a favourable outcome, effectiveness, flexibility, independence and low barriers. Performance indicators can be developed for all these conditions to measure the usefulness, effectiveness and quality of ADR. ADR service providers can use the performance indicators to measure the improvements in their ADR services to SMEs and to make their ADR services transparent for SMEs. SMEs can use the indicators to acquire information about the possibilities of ADR and to find suitable ADR services.

A successful ADR case in Austria

The dispute concerned a technology contract of a high-tech component supplier. An international plant construction corporate group A outsourced the engineering and construction department to a recently founded company of an ex-employee B (20 employees) in Austria. As service in return for the transferred know-how from A to B, it was agreed that A would receive a 10 % discount on deliveries from B for a duration of 5 years. Furthermore, B should bring in a bank guarantee (of a partial amount of € 220,000). He did not succeed in this last provision, which resulted in A refusing the payment of the full amount of the delivery (€ 100,000). The young company B came into financial difficulties and sued A. A looked for another supplier (who did not reach

¹ In this context performance indicators apply specifically to ADR service providers to measure the improvement in their performance with regard to meeting the expectations of SMEs. Performance indicators to measure performance in the use of ADR (such as awareness of the SMEs knowledge of ADR, actual use of ADR by SMEs, etc.) are left out of consideration in this report.

the usual quality standards) and company B was near to insolvency. B took the initiative to resort to mediation (co-mediation, i.e. mediation with two mediators). In one meeting of 3.5 hours the conflict was brought to a positive outcome for both parties. An immediate payment rate of 50 % of the second order to B was decided: B therefore had liquid funds and a part of the know-how fee could be settled. As a result, the remaining amount of the know-how fee was decreased, i.e. the time horizon for the payments from B to A shortened, giving A more security to receive the payment. Finally, a new order was discussed. The costs amounted to about € 1,000.

In table 51 performance indicators are summarized and linked to the needs of SMEs.

table 51 Performance indicators for forms of ADR (eventually divisible for certain kinds of disputes) and ADR service providers

<i>Needs of SMEs</i>	<i>Performance indicator</i>
Quick	Average time for solving business-to-business disputes Short lead time
Cheap	Average cost for solving business-to-business disputes
Favourable outcome	Satisfaction of customers about result
Good	Percentage of cases solved Involvement of certified mediators Quality control system Satisfaction of customers about process Active references
Flexible	Availability of ADR-service in several languages (for cross border disputes)
Independent	Involvement of certified mediators
Low barriers	Transparent and full information of the ADR-services Availability at national, regional or local level Availability for different sectors Availability of e-mediation

Use of performance indicators

The use of ADR in business-to-business disputes where SMEs are involved is still in its infancy. Therefore, it is not yet possible to describe a standard way of using performance indicators to improve the use of ADR in business-to-business disputes where SMEs are involved for all types of ADR, all types of disputes, all types of SMEs (size and sector) and all countries. Nevertheless, performance indicators can be helpful in further developing the use of ADR in business-to-business disputes where SMEs are involved. ADR suppliers can use the performance indicators as important criteria when (further) developing ADR for business-to-business disputes. For example: when developing mediation for b-to-b disputes it is very important for the ADR supplier to strive for short lead times. The second use of the performance indicators is to measure the performance of the services of ADR suppliers. Therefore ADR suppliers have to measure the actual results on the performance indicators for each of their services. To some extent this has to be done by asking the customers about their experience and satisfaction. ADR suppliers can set their own objectives and own norms for the ADR services (possibly differentiated by type of dispute, type of ADR and type of SME). The third use of the perform-

ance indicators is to inform SMEs about the possibilities of SMEs, to show what performance is reached by using ADR. SMEs can judge whether it is interesting for them to use ADR to help solve their b-to-b disputes and reduce the costs of unsolved disputes and maintain good relations with other businesses.

Finally, the performance indicators can be used by mediators' trade associations. In the short run they can use the list of indicators as checklist when stimulating the further development of ADR in b-to-b disputes. In the longer run they can use the indicators to set quality standards.

One example of an organisation applying performance indicators is CEMAP (Centre de Médiation et d'Arbitrage de Paris) established by the Paris Chamber of Commerce and Industry. CEMAP¹ promotes and facilitates mediation and arbitration for business-to-business disputes. It offers standard contracts, advice to mediators, and standard costs for dispute resolution systems. Statistics about mediation and arbitration cases are published on its website, e.g. costs, effectively, results. CEMAP is also active in e-mediation.

4.5 Conclusions

Needs of SMEs

In this chapter the potential of ADR in solving business-to-business disputes involving SMEs was discussed. First the needs of SMEs with respect to dispute resolution were assessed. The most important need seems to be that the method be 'quick'. Since doing business is an ongoing process, there is no time for long procedures to solve disputes. Furthermore dispute resolution should not be too costly. The cost of dispute resolution (in terms of time, fees, etc.) should not exceed the cost of leaving the dispute unsolved (unpaid accounts, lost of market, etc.).

Preferred way of solving disputes

Of course, SMEs prefer to solve disputes by informal negotiation. In general, informal negotiation is quick and cheap. When SMEs do not succeed in solving disputes by this means they can try to solve the dispute through the courts or by ADR. At the moment somewhat more SMEs prefer to solve disputes in court rather than by ADR. On the other hand the knowledge SMEs have about the opportunities of ADR is limited. Most SMEs are not familiar with ADR. But, after it has been explained what ADR is, many SMEs see the advantages of using it to solve disputes. However, the main obstacle for using ADR still is that SMEs are not full aware of the service offered by ADR.

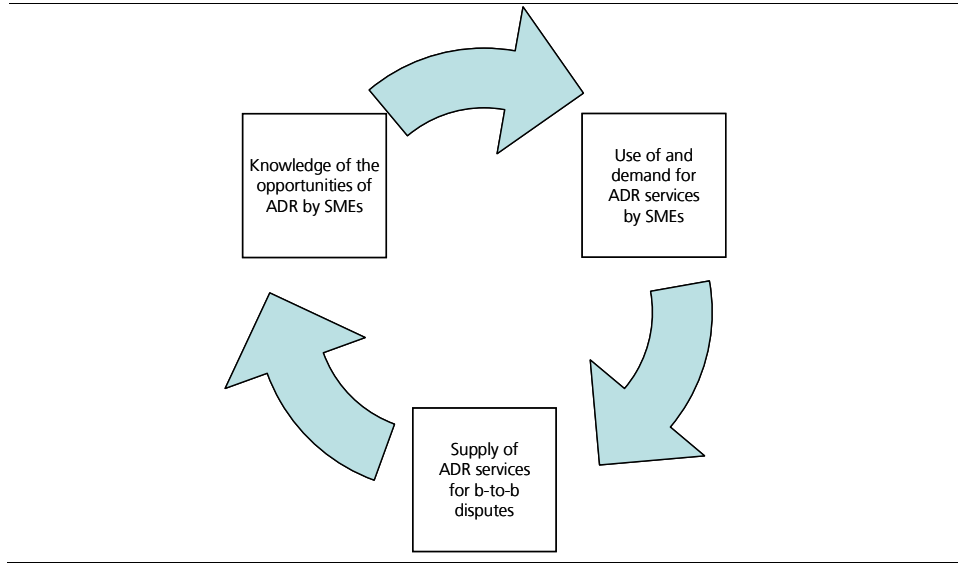
Development of ADR for b-to-b disputes of SMEs

The actual stagnation in the development of ADR for b-to-b disputes of SMEs can be shown with the help of figure 4. At the moment the use of and demand for ADR by SMEs is limited because SMEs are unaware of the opportunities of what it offers. Because of the limited demand for ADR from SMEs the supply of ADR services for b-to-b disputes involving SMEs is also limited and fragmented and therefore it is very difficult to acquire sufficient information about the opportunities of using ADR. This vicious circle hampers the development of ADR in b-to-b disputes involving SMEs. This circle

¹ See: <http://www.mediationetarbitrage.com/>

needs to be broken if the use of ADR in b-to-b disputes involving SMEs is to be improved.

figure 4 ADR SME circle



Source: EIM, 2005.

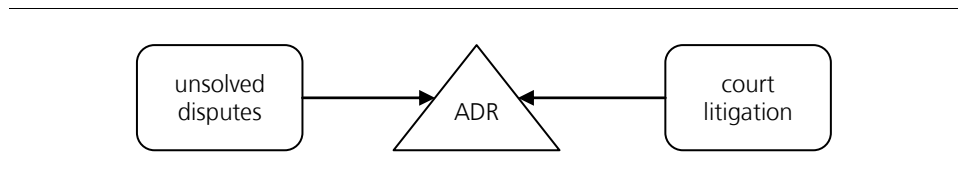
The next chapter will deal with ways of breaking this circle and facilitating the development of ADR for b-to-b disputes involving SMEs. In the previous section some performance indicators were developed to help ADR suppliers and SMEs to improve the use of ADR in b-to-b disputes. On the one hand the performance indicators can help ADR suppliers in (further) developing ADR for b-to-b disputes involving SMEs in accordance with their needs. On the other hand the performance indicators can be used to inform SMEs about the opportunities offered by ADR, so increasing their awareness of the possibilities of ADR.

Increasing the use of ADR

Improving the use of ADR might induce two flows (see figure 5). The results could be two-fold improving the use of ADR could reduce the number of unsolved disputes and it could also reduce the frequency of disputes being solved by judicial litigation. Consequently the following results might be achieved:

- a lower percentage of unsolved disputes,
- lower cost of dispute resolution,
- faster dispute resolution,
- maintaining business-to-business relations.

figure 5 Flows induced by improving the use of ADR



Source: EIM, 2005.

5 Promotion of ADR for SMEs

5.1 Introduction

This chapter will:

- Identify the most effective methods of promoting ADR among SMEs;
- Identify and propose ways of implementing these methods.

The promotion plan is based on the findings of the study. The most relevant findings are the following:

- Most business-to-business disputes of SMEs are with customers.
- By far the most disputes are about payments.
- According to SMEs dispute resolution needs to be quick, cheap, and should have a favourable outcome.
- Currently the most common ways to resolve disputes between businesses are: informal negotiation and litigation.
- There are important differences between countries with respect to the availability and forms of ADR.
- Social, cultural and legal differences between countries influence the way entrepreneurs consider forms of ADR as an alternative to judicial litigation.
- ADR is currently used by a very small percentage of SMEs involved in disputes.
- The vast majority of SMEs do not know what ADR is.

Promoting ADR in Ireland counts

It has often been argued that for successful ADR to develop (in particular mediation) stakeholders such as SMEs must be educated on the nature of ADR and its position relative to litigation (i.e. cost savings, time savings etc). In short, the simple fact that commercial ADR is perhaps not as successful as it could be in Ireland begets the important lesson that promotion counts and is needed. Thus the relatively inferior status of ADR to litigation can, arguably, be strongly related to the failure to promote ADR. The first lesson therefore is that the importance of promotion should not be under-estimated.

5.2 Identify the most effective methods for promoting ADR among SMEs

The aim of the promotion plan is to improve the awareness and ultimately the use of ADR by SMEs. This implies that not only should the demand for ADR be stimulated, but also that attention should be paid to the supply side of ADR services. The supply of ADR is fragmented and often not explicitly focussed on business-to-business disputes and on the demand side SMEs are not aware of the possibilities of ADR to solve their business-to-business disputes. To improve this situation the provision of ADR-services has to meet the needs of SMEs and SMEs need to have more information about the supply of ADR-services and their quality to encourage the demand for ADR. There is no point in promoting ADR among SMEs unless there are mediators available able to work for SMEs. The ADR promotion programme should be an integral programme that targets

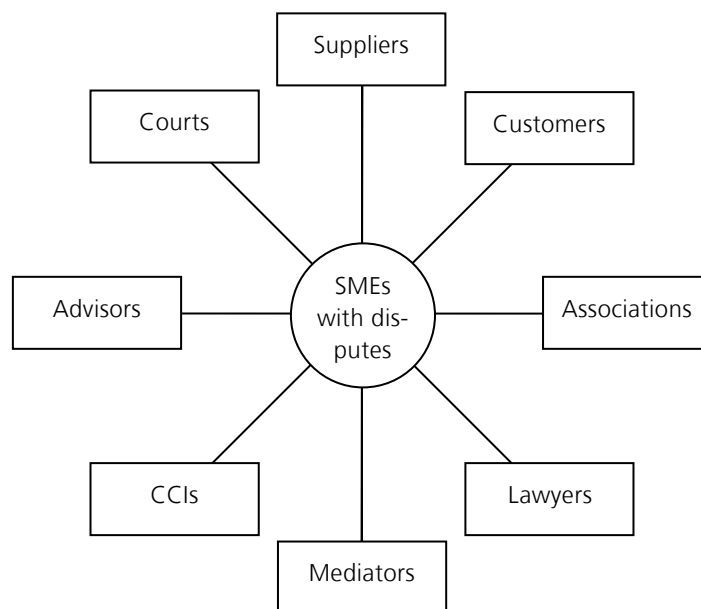
not only SMEs, but also pays attention to the principal conditions for the provision of ADR¹.

When promoting the use of ADR among SMEs, it is very important to take into account the differences between the Member States identified previously. This means that ADR has to be promoted in the various countries, in different ways, according to the local situation.

In order to meet these demands, the recommendations for promoting ADR among SMEs have to be targeted at various levels: not only at SMEs themselves, but at the entire ADR-framework of ADR suppliers (mediation centres, judges), ADR consumers (SMEs and SME-organisations), training institutions and national regulators (governments, regulators, and self-regulating trade organisations).

The identification of the most effective ways for promoting ADR among SMEs will therefore be focused on *all* stakeholders involved. The stakeholders are depicted in figure 6.

figure 6 Stakeholders of SMEs



Source: EIM, 2005.

A brief description of each stakeholder is given below. As there are so many differences among countries, the descriptions are rather general:

- *Suppliers* are businesses delivering goods and services to SMEs. This is a very heterogeneous group: enterprises can have a one-time relation with a supplier or a long-standing relation, eventually based on a permanent (framework) contract. Suppliers may be active in any sector (manufacturing, construction, transport, fi-

¹ See e.g. 'Alternative Dispute Resolution (ADR) On-line Mechanisms for SME Cross-border Disputes', Final report prepared by Prof. Fabien G  linas (McGill University, Montreal) for the OECD Directorate for Science, Technology and Industry, Paris, 2004.

nance, business services, etc.) and can both be domestic and foreign. Goods and services can be supplied directly by the producer, or indirectly by a trader (e.g. wholesale trader) or importer. In principle suppliers can be of any size: from micro to large enterprises, but on average suppliers are somewhat smaller than their customers. Disputes with suppliers may involve, for instance, payment, quality and timely delivery.

- *Customers* are buying the goods and services produced (or traded) by the SMEs, and are - like suppliers - a very heterogeneous group. In principle business customers can be of any size: from micro to large enterprises, but on average customers are somewhat larger than their suppliers. As for suppliers, disputes with customers may involve, for instance, payment, quality and timely delivery.
- *Business (or trade) associations* are private organisations representing the interests of their members. They are often active in a specific industry or line of businesses. Many associations operate on a local or regional scale and are member of a national umbrella association. At local and regional level business associations play an important role, although there are differences¹ between countries. Membership of business associations is voluntary, so enterprises will assess the benefits of membership against the costs: they want value-for-money. Many associations provide services to their members (information, advice, training, etc.); some services may be included in the membership fee, others will have to be paid for. Businesses associations often create a trustworthy environment for their members: the members speak the same 'language', often know each other and trust the board members. In this way business associations form a very interesting and effective channel to reach SMEs.
- *Lawyers* can advise and assist entrepreneurs in legal affairs. SMEs may need a lawyer to draw up or assess a contract with a supplier or customer. They may also need legal advice in labour affairs. Most SMEs do not need a lawyer in their day-to-day business. They also often consider lawyers to be very expensive. Sometimes business associations provide their members with legal advice.
- *Mediators*² are trained or experienced in dispute resolution. Mediators help the disputing parties to come to an agreement that is acceptable to both parties. Mediators do not make decisions, mediation is a voluntary process. Mediators come from a wide variety of professional backgrounds but most of them are lawyers or judges.
- *Chambers of commerce and industry (CCI)* are a well-known phenomenon in Europe. In principle there are two types of chambers depending on whether membership is voluntary or compulsory. Chambers with *voluntary* membership are comparable to business associations, although in most cases they are not sector-specific: they represent private businesses from all sectors in a certain local or regional community. They often protect the interest of their members in local and regional affairs. They offer their members certain services such as information, advice, and networking. Chamber membership can differ considerably between regions and is mainly dependant on the status of a chamber and the quality of its services, in relation to the membership fee. In some countries not all regions have such a chamber.

Chambers of commerce (and/or craft chambers) with *compulsory* membership can, for instance, be found in France, Italy, Germany, The Netherlands, and Luxembourg. These chambers often have public tasks, like keeping the business register,

¹ Especially in some new Member States the phenomenon of business associations is still in its infancy stage.

² The term mediators is used in this chapter for all types of ADR providers

providing official statements, stimulating export, participating in regional development projects, etc. Apart from that many chambers provide all kind of information and advice to (potential) businesses, run training courses, organise fairs and foreign missions, and run business searching and linking programmes for their members.

- *Advisors, consultants, accountants etc* form a heterogeneous group. The relation between SMEs and their advisors etc. very much reflects the heterogeneity of SMEs themselves. Very small (micro) enterprises rarely use advisors. They consider them to be too costly. However, they do often have a fixed relation (or a contract) with an accountant (or bookkeeper) specialized in small enterprises. Such an accountant would also give advice about a variety of issues: he/she often knows the business quite well and is trusted by the entrepreneur. If the accountant is not a micro firm, his/her company may also give legal advice. Very small enterprises may also seek advice from (semi-) public agencies like business advisory centres, innovation centres, Euro-Info Centres, but the relation with accountants/bookkeepers is generally stronger and more trustworthy.

Small and especially medium-sized enterprises more often consult advisors than very small enterprises. They have a need for more specialised knowledge (technical, administrative, managerial, legal, etc.) than micro firms. The cost of consulting advisors often forms a bottleneck for small and medium sized enterprises, so whenever possible they will seek advice from (semi-) public sources or limit the amount of advisory services they purchase.

- *Courts* form a special category. Most SMEs seldom have anything to do with courts. Depending on the national legislation, a business may need to go to court if it wants to fire an employee. Other reasons for going to court are disputes about deliveries, payments, (building) contracts, etc. For very small and small enterprises in particular going to court is a huge step: it is costly, takes a lot of time and the outcome of the procedure is uncertain.

Taking into account the main findings of the study as described above, as well as the identification of all stakeholders, the most effective methods of promoting the use of ADR among SMEs seem to be the following:

- A general information and promotion campaign by the European Commission
- Exchange of good practices between Member States
- National information and promotion campaigns for SMEs
- National information and promotion campaigns for potential suppliers of ADR services
- Stimulating the development of courses for ADR suppliers, judges and courts
- Exploring the possibilities of e-mediation
- Setting up national networks of ADR providers for (small and medium-sized) business clients.

In the next section ways and means of implementing these methods are identified.

Promoting ADR in Belgium

The organisation Cepani was founded in 1970 by the Belgian National Committee of the International Chamber of Commerce (ICC) and the Federation of Belgian Enterprises (VBO/FEB). It promotes and stimulates the development of national (and international) arbitration, mediation, expert determination, mini-trial and contractual adjudication. The organisation supervises the application of the relevant rules and renders quasi-judicial and administrative assistance to the parties and arbitrators. Cepani has drawn up some rules and regulations concerning the procedure to follow and nominates the arbitrators and mediators while applying strict criteria concerning professionalism, independence and availability. Cepani frequently adjust the rules and regulations taking the practical needs in consideration.

5.3 Identify and propose ways of implementing the proposed methods

A general information and promotion campaign by the European Commission could be developed by DG Enterprise and Industry, in cooperation with DG Justice, Freedom and Security and DG Internal Market and Services. The results of this study can be used as a starting point. An example of a similar campaign is the successful CSR¹ campaign. The campaign should be supported by brochures, a special webpage² on the Europe server, and articles in Enterprise Europe and Euroabstracts. During a one-day conference the issue of ADR should be highlighted, examples of good practices should be presented, and promotion material distributed. The conference should be prepared and organised in close cooperation with UEAPME, Eurochambres, UNICE, and mediators' organisations. Target groups would be: national governments, international and national business and trade associations, chambers of commerce and craft chambers, EICs, (international) associations of mediators, lawyers and judges.

The set-up of the information and promotion campaign could benefit from a handbook published by the OECD for the Istanbul Ministerial SME Conference. The handbook, which presents two educational instruments specifically aimed at SMEs for resolving e-commerce disputes online (B2C and B2B), represents one of the outcomes of a study undertaken on alternative dispute resolution (ADR). The handbook and the study were prepared by Prof. Fabien Gélinas (McGill University, Montreal)³.

¹ As a follow-up of the Communication of July 2002 on CSR (Corporate Social Responsibility), DG Enterprise organised a European CSR conference in close cooperation with UEAPME and Eurochambres on 12 October 2004. Furthermore DG Enterprise established a European Multi-Stakeholders Forum on CSR and started an Awareness Raising Campaign for SMEs. On 14 June 2005 the final conference 'CSR: Competitive, Small, Responsible' was held in Brussels.

² For instance an elaboration of the ADR-page (still in an infant stage) of DG Justice at: http://europe.eu.int/comm/justice_home/ejn/adr/adr_gen_en.htm

³ Proposal SEC(2004) 1314, COM(2004) 718 final, 2004/0251 (COD) of 22 October 2004. According to the proposal, 'The Commission and the Member States shall promote and encourage the development of and adherence to voluntary codes of conduct by mediators and organisations providing mediation services, at Community as well as at national level, as well as other effective quality control mechanisms concerning the provision of mediation services.'

In line with the Commission's Proposal¹ for a 'Directive on certain aspects of mediation in civil and commercial matters' a code of conduct for mediators was developed. DG Justice of the European Commission organised a conference² on 2 July 2004 in Brussels to discuss self-regulatory initiatives for mediation in general. During the conference the code of conduct³ was launched. DG Enterprise and Industry⁴ could take the initiative to assess to what extent this code of conduct meets the specific needs of SMEs. If necessary, the code should be adjusted.

The European Commission has taken a number of other initiatives⁵, for instance focusing on disputes between businesses and consumers, and to handling complaints from both businesses and citizens on misapplications of Internal Market law by public authorities. As this report is limited to business-to-business disputes, these items will not be further elaborated here.

¹ Proposal SEC(2004) 1314, COM(2004) 718 final, 2004/0251 (COD) of 22 October 2004. According to the proposal, 'The Commission and the Member States shall promote and encourage the development of and adherence to voluntary codes of conduct by mediators and organisations providing mediation services, at Community as well as at national level, as well as other effective quality control mechanisms concerning the provision of mediation services.'

² See: http://europa.eu.int/comm/justice_home/ejn/adr/adr_ec_code_conduct_en.htm

³ Organisations that have decided to commit to asking mediators acting under their auspices to respect the code of conduct are included on a list, published by the Commission on: http://europa.eu.int/comm/justice_home/ejn/adr/adr_ec_list_org_en.pdf

⁴ The address of the Enterprise and Industry DG website is: http://europa.eu.int/comm/dgs/enterprise/index_en.htm and the email address: Entr-Craft-Small-Business@cec.eu.int

⁵ On February 1st 2002 the Market Directorate General launched an out-of-court complaints network for financial services to help businesses and consumers resolve disputes in the Internal Market rapidly and efficiently by avoiding, where possible, lengthy and expensive legal action. This network, called FIN-NET, was designed particularly to facilitate the out-of-court resolution of consumer disputes when the service provider is established in an EU Member State other than that where the consumer lives. See: http://europa.eu.int/comm/internal_market/finservices-retail/finnet/index_en.htm#overview

The SOLVIT network has been operational since July 2002. SOLVIT is an on-line problem solving network in which EU Member States work together to solve, without resorting to legal proceedings, problems resulting from the misapplication of Internal Market law by public authorities. There is a SOLVIT centre in every European Union Member State (as well as in Norway, Iceland and Liechtenstein). SOLVIT Centres can help to deal with complaints from both citizens and businesses. They are part of the national administration and are committed to providing real solutions for problems within ten weeks. Using SOLVIT is free of charge. See: http://europa.eu.int/solvit/site/about/index_en.htm

Lessons to be learned from ADR promotion in Bulgaria

In Bulgaria ADR mechanisms were developed top-down, initiated by international bodies (European Commission, World Bank, foreign donors). The most important experiences are the following:

- There are very few chances to succeed if ADR (no matter what kind of ADR) is not regulated in the legislation. This is especially true for those types of settlement that require involvement of the state (judicial bodies, other state institutions).
- If a central government has decided to introduce and promote ADR, such policy has to get a follow-up in several different directions, e.g. introducing legislative changes, promoting ADR among regional entities, among the private sector and its organisations, etc.
- It is very important to use good practices from other countries that are at the same level of social and economic development (for example other former centrally-planned economies).

Exchange of good practices between Member States could be an excellent task for the European Commission. The Commission has a great deal of experience in exchanging good practices. It is an effective way of policy development: on the one hand it is an effective way for Member States to become acquainted with other policy instruments without re-inventing the wheel; on the other hand they will not be able to accuse the Commission of interfering with their national policies.

As long as the Commission clearly emphasizes that any policy has to be embedded into national legal, economic, and cultural circumstances, exchanging good practices is an interesting option.

With respect to the practical implication: apart from exchanging good practices at the European conference and in promotion materials, the Commission could, for instance, develop a 'turn-table' application on the internet to disseminate good practices across Europe. A multi-lingual internet application could be used to gather and distribute good practices of ADR cases where SMEs are involved.

What can be learned from Ireland?

The promotion and stimulation of ADR in Ireland is of recent date and its effects are not yet clear. The Irish Commercial Mediation Association (ICMA) recently received public funding which will support its direct promotion of commercial mediation. This is a positive step, but it is not yet clear what effect ICMA will have in the development of mediation in Ireland. There is no reason to say it will be ineffective, but neither is there as yet any evidence that ICMA has a strong visible presence. For example, it does not yet publish papers, nor host conferences. If of course, ICMA proves to have a positive effect on the promotion of commercial mediation, then the idea of publicly funding private initiative may become a persuasive one.

It is also very early days in the life of the Commercial Court. However, the view has been expressed both in literature and during consultation, that what is needed is something more 'inviting' to encourage ADR in Ireland. In particular, it has been suggested that the English model of financial penalties for failing to consider ADR would be the only really effective method of promoting ADR in Ireland.

National information and promotion campaigns for SMEs should be organised at a national level. Apart from stimulating and inviting the Member States to organise such campaigns, there is no major role for the European Commission. The only role could be to highlight the importance of *cross border* dispute resolution. As soon as ADR has been further developed at national level, the Commission could, for instance, invite the

Member States to set up a European network of ADR providers for (small and medium-sized) business clients

Taking into account the description of SME stakeholders presented in the previous section, and depending on the national situation, national promotion campaigns should be organised in close cooperation between the central government, (small) business associations, chambers of commerce, craft chambers, business support/advice agencies, (associations of) ADR suppliers, etc. The target group of national conferences to promote ADR would be *representatives* of trade associations, chambers of commerce, craft chambers, business support/advice agencies, (associations of) ADR suppliers, rather than SMEs themselves. SMEs should be approached in a separate way (depending on national channels) by their trade associations, chambers and advisors (bookkeepers/accountants).

The role of chambers of commerce in Germany

Some chambers of commerce (e.g. Hamburg, Düsseldorf, Frankfurt or Nürnberg) have become heavily involved with business mediation. Their home pages supply a list of mediators available in the region, from which the most suitable mediator (e.g. specialised in certain types of conflict, specialised in an industry) can be found. They publish 'mediation- and mediators directives' and regularly organise information events for SMEs, acting, therefore, as important information and helpdesks for SMEs.

Similarly, *national information and promotion campaigns for potential suppliers of ADR services* should be organised at national level. Apart from stimulating and inviting the Member States to organise such campaigns, there is again no major role for the European Commission. The only role could be to highlight the importance of *cross border* dispute resolution. The major goal of such campaigns is to inform potential ADR suppliers about the characteristics of SMEs. These suppliers have to become aware of major SME facts and figures as well as SMEs' (potential) need for ADR services. The results of the present study together with general information about SMEs¹ could prove to be a good basis for starting such a campaign.

As a follow-up to the national information and promotion campaign for potential suppliers of ADR services, *courses² and workshops for ADR suppliers, lawyers, judges and courts* need to be developed at national level. In this respect lessons can be learned from other countries with comparable legal and regulatory systems. Several countries already have associations of mediators that may have experience in this field. The message is: it is not necessary to reinvent the wheel, first check what has already been developed in other countries. Contacting international organisations of mediators or ADR, such as the European Association of Mediators (AME) and ACR³, the Association for Conflict Resolution (USA) is recommended.

¹ For instance from the reports of the Observatory of European SMEs, available from: http://europa.eu.int/comm/enterprise/enterprise_policy/analysis/observatory_en.htm

² According to the proposal of the Commission for a 'Directive on certain aspects of mediation in civil and commercial matters' (22 October 2004) 'Member States shall promote and encourage the training of mediators in order to allow parties in dispute to choose a mediator who will be able to effectively conduct a mediation in the manner expected by the parties.'

³ ACR is the largest professional association for mediators, arbitrators, educators and other conflict resolution practitioners in the United States. Its mission is to advance the practice, research, public understanding and teaching of conflict prevention and resolution. It has more than 6,500 members.

In some countries e-mediation¹ has been introduced as a promising way to solve certain types of disputes. Taking into account the bottlenecks SMEs face using traditional forms of dispute resolution (too costly and time consuming) e-mediation may be a good alternative². The possibilities of e-mediation for SMEs have to be further explored. The European Commission could collect evaluation studies of e-mediation carried out in Member States and make them available on its ADR site. Furthermore the Commission should encourage Member States *to explore the possibilities of e-mediation* at a national level. The Commission should ask the Member States to pay special attention to cross border e-mediation. EICs can play a role in the dissemination of information about cross border e-mediation.

Member States should be invited *to set up national networks of ADR providers for (small and medium-sized) business clients* (should this not yet have been done). Depending on the national situation, such networks should be created in close cooperation with SME associations, chambers of commerce, craft chambers, associations of mediators, etc. It would be an advantage for SMEs if national quality systems and/or voluntary codes of conduct for mediators were developed.

Self-promoting of ADR in Ireland?

Whereas ADR remains the 'little brother' of litigation, it is undeniable that its stature is growing - step by step. This is arguably because commercial entities are slowly beginning to recognise the benefits of ADR. In short, despite a dearth of State promotion, the clear economic benefits of ADR seem to be filtering down through the commercial world in Ireland. The lesson here is that a good ADR method (such as mediation) the cost of which is clearly stated and is efficient, can 'promote itself' over time, even in the absence of a legislative framework.

However this argument cannot be taken too far. Although the use of ADR (other than arbitration) is definitely increasing gradually, it still lags seriously behind both arbitration and litigation. It may therefore be assumed that in all cases the benefits of ADR will be evident for all parties to the extent that no government promotion is required.

To conclude, it may be expected that involving partners from the business community will increase the effectiveness of any promotion campaign. Depending on the regional level of the campaign (supranational, national, regional) partners in this implementation could be UEAPME, Eurochambres, UNICE, national and local SME organisations, trade associations, chambers of commerce, craft chambers, and the like.

What lessons can other countries learn from the promotion of ADR in the UK?

- Look for solutions that are based on consensus NOT imposition.
- Promote a National Mediation Helpline for ADR.
- Work closely with the mediation providers (Mediation Council).
- Provide adequate funding for research and judicial training in ADR matters.

¹ See for instance: <http://www.mediate.ca/emediation.htm>, <http://www.emediation.nl/index2.html>, <http://www.e-mediator.co.uk/>

² See e.g. Fabien Gélinas, Taking Stock of ODR: From Concept to Business Realities; in: *Using Technology to Resolve Business Disputes*, Special Supplement, ICC International Court of Arbitration Bulletin (2004). In this paper it is argued that online dispute resolution's greatest contribution to the world economy is likely to be in the resolution of SME disputes.

Annex I Sample report

Telephone survey ADR suppliers

A survey among 130 bodies in 27 countries was conducted to obtain insight in the characteristics of bodies providing ADR (see table 52). Because of the limited number of addresses it was not possible to obtain an equal distribution of respondents across the countries involved in this study.

table 52 Number of respondents per country

<i>Country</i>	<i>Number</i>	<i>Country</i>	<i>Number</i>
Austria	8	Lithuania	2
Belgium	6	Malta	3
Bulgaria	3	Netherlands	11
Cyprus	6	Norway	1
Estonia	3	Poland	4
Finland	6	Portugal	8
France	12	Romania	7
Germany	6	Slovak Republic	2
Greece	1	Slovenia	3
Hungary	3	Spain	8
Ireland	3	Sweden	1
Italy	7	Turkey	7
Latvia	1	England	7
Liechtenstein	1	Total	130

Because of the limited number of respondents the results were not reweighed.

Telephone survey SMEs

A survey was carried out among 1,275 SMEs in 31 countries to obtain insight in the business-to-business disputes of SMEs and the way these disputes are conducted (see table 53).

table 53 Number of respondents per country, size class and sector

Country	<i>Small enterprises</i>			<i>Medium sized enterprises</i>			Total
	<i>manufacturing</i> <i>/ construction</i>	<i>trade</i>	<i>services</i>	<i>manufacturing</i> <i>/ construction</i>	<i>trade</i>	<i>services</i>	
Austria	6	6	7	5	5	5	34
Belgium	6	6	6	5	5	6	34
Bulgaria	6	6	6	5	5	6	34
Cyprus	6	6	5	5	5	5	32
Czech Republic	6	6	5	5	5	5	32
Denmark	6	6	6	5	5	5	33
Estonia	6	6	6	5	5	6	34
Finland	8	7	7	5	5	5	37
France	17	17	18	5	5	5	67
Germany	17	17	16	5	5	5	65
Greece	6	6	5	5	5	5	32
Hungary	6	6	6	5	5	5	33
Ireland	8	6	6	5	5	5	35
Iceland	6	6	5	5	5	6	33
Italy	17	18	17	5	5	5	67
Latvia	6	6	5	5	6	5	33
Liechtenstein	6	6	6	6	5	5	34
Lithuania	6	6	5	5	4	6	32
Luxembourg	7	7	5	6	5	5	35
Malta	6	6	6	5	5	5	33
Netherlands	6	6	11	5	5	7	40
Norway	6	6	5	5	5	5	32
Poland	17	17	16	5	5	5	65
Portugal	6	6	6	5	5	5	33
Romania	6	6	6	5	5	6	34
Slovak Republic	6	6	6	5	5	5	33
Slovenia	6	6	5	6	5	5	33
Spain	17	17	17	5	5	5	66
Sweden	6	6	6	5	5	5	33
Turkey	17	17	17	5	5	5	66
England	17	18	17	5	5	9	71
Total	268	267	260	158	155	167	1,275

The results of the survey were reweighed to obtain representative data.

Country clusters

The number of respondents per country is very small. The statistical validity and reliability will increase when the countries are clustered. For this study we chose two ways of clustering.

Clustering 1:

For the seven largest countries (France, Germany, Italy, Poland, Spain, Turkey, England) the number of respondents was large enough to present results by country. The smaller countries were combined in the following clusters:

- Remaining North and Central Europe (Austria, Belgium, Denmark, Finland, Ireland, Iceland, Liechtenstein, Luxembourg, Netherlands, Norway, Sweden),
- Remaining South Europe (Cyprus, Greece, Malta, Portugal),
- Remaining East Europe (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Slovak Republic, and Slovenia).

Clustering 2:

The countries were clustered based on 3 criteria:

- whether they are part of the common law or the civil law tradition;
- the extent to which arbitration and ADR have been introduced
- the litigation culture.

This resulted in the following 4 groups:

Cluster 1 = Latin Group

Long tradition of formal types of ADR (e.g. arbitration, conciliation and mediation): Austria, Belgium, France, Italy, the Netherlands, Portugal, and Spain

Cluster 2 = Scandinavian Group

Long tradition of 'consensus'-ADR (e.g. complaint boards) Denmark, Finland, Norway and Sweden

Cluster 3 = Anglo-Germanic group

Strong litigation culture with low barriers for starting a judicial procedure. Cyprus, Germany, Ireland, Malta and England

Cluster 4 = Newcomers group

Countries for which ADR and/or the private SME-sector are new phenomena. Bulgaria, Czech Republic, Estonia, Greece, Hungary Latvia, Liechtenstein, Lithuania, Luxembourg, Poland, Romania Slovak Republic, Slovenia, Iceland, Turkey

Annex II Country characteristics

Introduction

The ADR situation in the 31 countries covered in this study will be discussed in the following paragraphs. It is important to take into account that, due to a recent increase in interest in ADR, many countries have taken initiatives to regulate ADR processes. Therefore, the current description is a picture of the status quo only, and this could develop in the near future.

Austria

Types of ADR

In Austria, the only 'institutionalised' form of business-to-business dispute resolution is *mediation*. Although expert determination, fact finding or neutral evaluation already exist in Austria, these dispute resolution forms cannot be assigned to alternative dispute resolution as defined for the purpose of this study. These procedures are used as a 'first attempt' to reach an agreement. If such an attempt is not successful, the case will be subjected to judicial litigation. The procedures are sometimes used to present evidence in court (i.e. neutral third party acts as an 'expert').

Arbitration is very common in business-to-business disputes in Austria, but in practice only pure arbitration is applied. If, for example a settlement agreement is not reached, it will still be possible to go to arbitration but this depends on the mutual agreement of the parties and/or on the nature of the case. In general, it is not understood as an official form of ADR.

Mediation is used by a small number of SMEs. Figures from the study¹ 'Business mediation for SMEs in Austria' show that 5% of the SMEs had used mediation but there was no distinction made between mediation within the company and business-to-business mediation.

Legal basis

Since May 2004 Austria has had the following ADR legislation or specific provisions dealing with ADR issues:

- Bundesgesetz über Mediation in Zivilrechtssachen (Federal Act on Mediation in Civil Code Cases). It regulates the constitution of an advisory board for mediation, the rights and duties of the mediators, the suspension of the time of limitation through mediation in civil cases, the requirements and the procedure of the registration of 1) persons on the list of registered mediators and 2) educational institutions and courses for mediation at the Federal Ministry for Justice.
- Verordnung des Bundesministers für Justiz über die Ausbildung zum eingetragenen Mediator (Related Decree of the Federal Ministry of Justice on the Education for Registered Mediators). This decree regulates the content of the theoretical and

¹ In 2003, the Federal Ministry of Economic Affairs and Labour commissioned a study concerning 'Business mediation for SMEs in Austria' conducted by the Fakultät für Interdisziplinäre Forschung und Fortbildung (IFF - Faculty for Interdisciplinary Research and Further Education) in cooperation with the consultancy Konfliktkultur which is published in spring 2005. This study is the first one dealing with the application of ADR in Austrian SMEs.

practical training of the mediators who wish to be registered in the official list of mediators provided by the Federal Ministry of Justice differentiated by the origin of the academic education already completed.

Having this approach Austria has become the international precursor as no other country has a comparable carefully worded and structured legal basis for the activities of mediators in civil code cases at its disposal.

This new act means that the practically unmanageable provision of various types of mediation training is subject to quality criteria. An official list of mediators is still being compiled.

The training/education of mediators is to be provided in an institute or seminar registered on the list of training institutes and seminars for mediation by the Federal Ministry of Justice. Furthermore, professional qualification also depends on the candidates' legal and other professional knowledge in the relevant field of action, in addition knowledge gained in the framework of education and on-the-job experience (e.g. as lawyer, notary, auditor, tax consultant or business consultant) will be considered.

Mediators are also obliged to attend 50 hours of further education within five years and provide proof of such for the Federal Ministry of Justice. It may, however, be assumed that the number of required hours will be increased considerably.

Mediators' clients may apply for cost-relief if this is approved by the responsible judge or a family consultant in court. The remaining amount payable by the client depends on his/her income.

In spite of a solid legal framework for mediation, this alternative dispute resolution method is not very commonly applied in Austria. Most of the mediators (primarily persons with legal education or business trustees) are employed in this way as a second job only.

In Austria it is *not* usual to incorporate an ADR clause in business-to-business contracts.

Organisations

The Federal Ministry of Justice is responsible for setting the legal framework for mediation in Austria and for the compilation and updating of the official lists of training providers and mediators.

The Mediation Platform (Plattform Mediation) constitutes a common forum of Austrian institutions offering training for mediators as well as for trade associations, unions and interested groups related to mediation. Since 1997, it has served as discussion forum regarding the application and future development of mediation.

The Forum Business Mediation (Forum Wirtschaftsmediation) is, as a competence centre and hub, the first contact point for business mediation in Austria. It compiles officially approved quality criteria for mediation.

Mediation Austria is an association of business trustees for mediation and conflict settlement.

The Austrian Federal Association of Mediators (Österreichischer Bundesverband der Mediatorinnen) annually publishes an interdisciplinary list of mediators in Austria.

There is also a wide range of smaller associations for specific forms of mediations as well as a number of university institutes active in this field.

The following (types of) institutions/organisations provide mediation service:

<i>Institution</i>	<i>Status</i>
Forum Wirtschaftsmediation (Forum Business Mediation) III	Association of various professions
ARGE Wirtschaftsmediation (Working Group Business Mediation)	Lawyers, psychologists, coaches
Verein für Co-Mediation (Association for Co-Mediation)	Association of various professions
Plattform Mediation (Platform Mediation)	Association of various professions
Anwaltliche Vereinigung für Mediation und kooperatives Verhandeln (Association of Solicitors for Mediation and Cooperative Bargaining)	Solicitors
GWM, Gesellschaft für Wirtschaftsmediation (Circle for Business Mediation)	Auditor, tax consultant, business consultant
Österreichischer Bundesverband der Mediatoren (Austrian Federal Association of Mediators)	Association of various professions

Relation between judicial dispute resolution and ADR

It can be assumed that ADR is applied in a minor percentage of business-to-business disputes. However, there is evidence of a more positive attitude towards the application of ADR (and many lawyers are also mediators).

The judge must make the parties aware of the possibility of mediation and of possible cost relief (see above). The registered mediator is sworn to secrecy. Even in court he/she has to refuse to make any statements. If two parties are involved in mediation, the period of limitation will be suspended. Judicial procedures are much more expensive than mediation.

In Austria the providers of ADR services and judicial litigation are seen as complementary to resolve disputes. Should it not be possible to resolve the conflict by ADR the case is taken to arbitration or to court. ADR could be considered as a competitive means as companies do not strictly require judicial litigation anymore in the early stages. However, judges as well as solicitors are also involved in ADR. Mediation in family affairs or, in a wider sense, in private matters (e.g. divorces) is commonly considered as helpful. ADR is still a rarely used instrument for resolving business-to-business disputes but it is being promoted. So, at the moment, ADR is seen as a complementary means to resolve disputes.

One major barrier to the application of ADR in Austria is the low level of awareness among Austrian companies/SMEs in this regard. The majority of SMEs are not aware of this way of resolving conflicts or are of the (false) opinion that it takes a long time and/or is accompanied by high costs compared to judicial litigation. Furthermore, the market for ADR in Austria can be seen to be rather fragmented (mediators might be lawyers, business consultants etc.).

Role of the government

There are no specific promotion / stimulation measures by the government. However, the government does seem to be taking interest in this matter: in 2003, the Federal Ministry for Economic Affairs and Labour commissioned a study on 'Business mediation for SMEs in Austria' conducted by the Fakultät für Interdisziplinäre Forschung und Fortbildung (IFF - Faculty for Interdisciplinary Research and Further Education) in coopera-

tion with the consultants Konfliktkultur published in the spring of 2005. This study is the first one dealing with the application of ADR in Austrian SMEs. The results might be seen as a stimulus for further policy action.

Belgium

Types of ADR

In Belgium ADR for solving business-to business disputes in which SMEs are involved is still in its infancy. For such disputes alternative forms of arbitration (50%), mediation / conciliation (48%), expert determination (1%) and mini-trial (1%) are available¹.

Legal basis

The subject of one chapter in the Judicial Code/Belgian Proceeding Code (chapter VI; articles 1676-1723) is arbitration. But there are no practical elements. Therefore Cepani, the Belgian Centre for Arbitration and Mediation, drew up some rules for arbitration. These have gained the reputation of being a standard code. (Bill for changes of the Judicial Code concerning arbitration and mediation (22-12-2004)).

Arbitration (and mediation) is mostly dealt with in a standard clause. Mini-trial may be included in a clause in the contract (but can also be included in the contract after the dispute has arisen).

Organisations

The following organisations provide *arbitration* services:

<i>Institution</i>	<i>Status</i>
Cepani	Belgian Centre for Arbitration and Mediation (non-profit, independent organization, national and cross-sectoral) (lawyers, notaries, professors, business leaders and legal experts)
Questia	Professional organisation of experts (jurists, accountants, lawyers, ...)
Chamber for Arbitration and Mediation vzw	Professional organisation of experts (group of specialized lawyers)
Kafradis	Independent Chamber of Arbitration for franchising and distribution (group of specialized jurists and professors in law, specialized in distribution law)
IT Arbitration and Mediation Commission (ITAMC)	Organisation managed by a business person and a lawyer in ICT law

¹ Due to lack of statistics the importance of the types of ADR given between brackets are rough estimates.

The following organisations provide *mediation* services:

<i>Institution</i>	<i>Status</i>
Cepani	Belgian Centre for Arbitration and Mediation (not-for-profit, independent organization; national and cross-sectoral) (lawyers, notaries, professors, business leaders and legal experts)
Questia	Professional organisation of experts (jurists, accountants, lawyers, ...)
Kafradis	Independent Chamber of Arbitration for franchising and distribution (group of specialized jurists and professors in law, specialized in distribution law)
Interdisciplinair Vormingscentrum voor Mediatie	Organisation of professors from some Belgian University who want to promote alternative dispute resolution and provide specialized courses for mediators
Kamer voor Bemiddeling en Mediatie vzw (Chamber for Arbitration and Mediation vzw)	Professional organisation of experts (group of specialized jurists)
Brussels Business Mediation Center vzw	Organisation that provides mediators, promotes mediation as dispute resolution and offers specialized courses.

The following organisations provide *mini-trial* services:

<i>Institution</i>	<i>Status</i>
Cepina	Belgian Centre for Arbitration and Mediation (non-profit, independent organization; national and cross-sectoral) (lawyers, notaries, professors, business leaders and legal experts)

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 10%/90%.
In Belgium ADR and judicial litigation are seen as complementary.

There is a psychological barrier that lawyers and businesses need to overcome. Most lawyers and the judiciary are not ready for ADR for SMEs because of judicial conservatism, a corporatist attitude and the lack of familiarity with ADR. Companies mostly wish to see a verdict given against their opponent and are mostly very badly informed about ADR.

Role of the government

An organisation like Cepani (founded in 1970 by the Belgian National Committee of the International Chamber of Commerce (ICC) and the Federation of Belgian Enterprises (VBO/FEB)) promotes and stimulates national (and international) arbitration, mediation, expert determination, mini-trial and contractual adjudication. The organisation supervises the application of the regulation and renders judicial and administrative assistance at the parties and arbitrators. Cepani has drawn up some rules and regulations concerning the procedure to follow and nominates the arbitrators and mediators while applying

strict criteria concerning professionalism, independency and availability. Cepani frequently adjust the rules and regulations taking practical needs in consideration.

The government facilitates ADR. For example: the Belgian minister of Justice, Laurette Onkelinx, has introduced a bill to install a system of judge-mediators in the courts. The mediator is expected to follow a generally approved course and has the possibility to be a judge at the same time. According to the director of Cepani the government wants to regulate everything too closely. This does not match with the needs of the businesses. Neither party will speak frankly if they know that their words could be used against them in later judicial procedures (Kris Barrezele, 11-01-2005). Marc Verwilghen, ex-minister of Justice, opposes the expansion of dispute resolution outside the courts. Therefore he introduced mediation-judges in every part of the court (except the Court of Cassation and the district courts). These mediation-judges must organise the alternative dispute resolution outside the tribunals but inside the court (Kris Barrezele, 11-09-2002; De Standaard, 02-07-2002).

Bulgaria

Types of ADR

Fifteen years ago, the resolution of commercial disputes by arbitration took place only for international disputes and for disputes between state-owned enterprises. The Arbitration Court (established more than 100 years ago as a Court of Conciliation at the Bulgarian Chamber of Commerce and Industry (BCCI) in Sofia) heard and settled civil disputes between legal persons, of which at least one was located outside Bulgaria. Its jurisdiction was binding for foreign trade enterprises from the Comecon Countries, based on the Moscow Convention of 1972 and based on a voluntary arbitration agreement entered into by the parties.

Amendments to the Bulgaria Civil Procedure Code in 1992 opened the door for the free negotiation of arbitration clauses applicable to commercial or civil disputes between local persons. For the last 20 years the Arbitration Court together with the BCCI has settled about 5,600 cases between natural and/or legal persons of 40 countries in the world. Meanwhile in the 1990s various other NGOs (mainly business organizations) began to provide arbitration and conciliation related to commercial and civil contracts. Such organizations include the Bulgarian Industrial Association, the Association of Commercial Banks, the Bulgarian Association of Hotel and Restaurant Owners, etc.

Other forms of alternative dispute resolution (mediation) are available only on a project-to-project base.

Legal basis

Bulgaria has legislation regarding mediation. In December 2004 the Parliament adopted the Mediation Act. The Mediation Act has five chapters: scope of the law; principles of the mediation; legal position of the mediator; mediation procedure and agreement. According § 1 of Transitional Provisions the Minister of Justice must, within 6 months from the day the Mediation Act came into force, approve standards for training mediators, procedural and ethical rules for mediators and develop and maintain a unified register of mediators.

The process of drafting a new Civil Procedure Code started in 2004. One of the issues to be included in the CPC is the possibility for the court to refer pending cases to mediation. Another aspect of the possible legislative amendments is to make the agree-

ment reached through mediation valid executive grounds under Art. 237 of the Civil Procedure Code. The admissibility of information disclosed in the ADR process in judicial proceedings should be determined in the CPC. The possibility to reduce state taxes should the parties decide to settle the dispute through mediation is another aspect of possible amendments.

In Bulgaria it is not usual to incorporate an ADR clause in business-to-business contracts.

Organisations

The following organisations provide *mediation* services:

<i>Institution</i>	<i>Status</i>
Foundation Partners Bulgaria	Foundation - NGO (not-for-profit organization)
Bulgarian Chamber of Commerce and Industry	Business association (NGO)
Bulgarian Industrial Association	Business association (NGO)
Association 'Mediator'	Association (NGO)
Bulgarian Association for Alternative Dispute Resolution	Association (NGO)
Chamber of Commerce and Industry of Stara Zagora	Business association (NGO)

The following organisations provide *conciliation* services:

<i>Institution</i>	<i>Status</i>
Foundation Partners Bulgaria	Foundation - NGO (not-for-profit organization)
Bulgarian Chamber of Commerce and Industry	Business association (NGO)

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 1-2%/98-99%.

In Bulgaria ADR and judicial litigation are seen as complementary.

In general the culture in Bulgaria does not promote the use of ADR. The main obstacles are that the Bulgarians prefer to sue the other party rather than to settle the dispute using ADR. There are very few examples of parties looking for a 'win - win' solution in an early stage of the conflict. As has been explained ADR methods are applicable in early stages of the conflict when the involvement of the third party to solve the issue is not required.

However, there is a room for the use of mediation as businesses need to preserve good relations, and part of the business activities are still in a 'grey economy', and judicial proceedings are evaded. According to the observations of interviewed mediators, people with a higher education are more inclined to accept mediation procedures.

Role of the government

The government incorporated the development of ADR as one of the goals of its Judicial Reform Strategy. Goal XVI is titled 'Introduction of ADR'.

Short-term priorities are:

- to develop and adopt ADR legislation in the areas of family and labour disputes and consumers protection;

- to develop training programs for mediators;
- to introduce the institute of the ombudsman;
- to increase the number of arbitration courts.

Middle-term priorities are:

- to train mediators to apply the alternative mechanisms for dispute resolution;
- to develop an ethical code for mediators;
- to develop a register of mediators under the Ministry of Justice.

Long-term priorities are:

- to develop an integral system for ADR.

The amendments to the Civil Procedure Code are drafted with the active participation of the Ministry of Justice and Bulgarian experts (judges, attorneys, etc.).

The courts are not active in promoting mediation. Most of the judges are not well acquainted with mediation as a process. Another obstacle to promoting mediation is the lack of specific text in the procedural laws that give the judge the right to refer a pending court case to mediation. If there is such a provision, the promotion of the mediation by the courts will probably increase significantly.

The development of mediation is still in a very early stage as far as state regulation mechanisms are concerned. Although there are a lot of specialists and mainly NGOs working with mediation the involvement of the state is not significant. The first two steps have been taken i.e. the adoption of the Judicial reform strategy and the drafting and adoption of the Law on Mediation. The next step will be the development of ethical rules for the mediators, training regulations and the development of a registry of qualified mediators under the authority of the Ministry of Justice. There is no specific focus on SMEs.

There are fields in which the law makes allowance for specific arbitration procedures (these are not business-to-business disputes or apply to more classical arbitration procedures than ADR). Such laws are the Public Procurement Law, the Law on Protection of Consumers, the Law on Public Offer of Securities, the Law on Crafts, etc.

Cyprus

Types of ADR

Extrajudicial resolutions of disputes occur most often in the construction industry. The resolution of such cases is usually undertaken by individual specialists. The most widely used forms of ADR are contractual adjudication, expert determination and mediation/conciliation. Other forms are fact-finding and neutral evaluation.

Legal basis

Generally speaking Cyprus has no ADR legislation. However, in the law governing the Chamber of Technology there is a clause dealing with ADR, in particular for contractual adjudication. This is the only reference in the Cyprus legislation to resolving disputes outside the court other than arbitration. Reference is made to arbitration on various occasions

In Cyprus it is not usual to incorporate an ADR clause in business-to-business contracts; however it is often suggested by interested bodies - such as the Chamber of Technology - that ADR clauses should be incorporated in certain cases of this type of contract.

Organisations

The following organisations provide ADR-services:

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Cyprus Chamber of Commerce and Industry	Officers of the chamber	Mediation/conciliation
Lawyers	Independent	Mediation/conciliation
Chamber of Technology Cyprus	Under the umbrella of the chamber established by law	Expert determination Fact-finding
Professionals in technical disciplines	Engineers operating on ad-hoc basis	Expert determination
Cyprus Association of construction contractors	Retired judges, independent lawyers, quantity surveyors architects and engineers	Contractual adjudication Fact finding
Cyprus Federation of Craftsmen, tradesmen and shopkeepers	Non-profit	Neutral evaluation
Government	ADR bodies are in the process of being set up. There is a draft law which is being examined by the attorney's general office. However in certain fields there are ombudsmen within the government.	Ombudsmen

Relation between judicial dispute resolution and ADR

Most of the disputes (more than 90%) find their way to the courts for resolution. This is an expensive and time consuming process in a Cypriot court. It could take up-to five years to pass judgement on a dispute. Numerous problems could arise as a consequence of such long delays.

In Cyprus ADR services are seen as complementary means to resolve disputes, quite often courts recommend disputing parties to refer to ADR.

There are some obstacles for the application and promotion of alternatives for adjudication in Cyprus. Court procedures are considered to be as trustworthy as any other procedure, many businesses (operating small businesses) are unaware of such alternative dispute resolution procedures and many cases resolved are initiated on an ad-hoc basis.

Role of the government

The government is reluctant, as yet, to promote ADR for business to business. The government is under pressure from various bodies to pass legislation on certain forms of business-to-business ADR. The government has no objection, but the process is very slow. Draft legislation for ADR (consumers and family cases) is being processed. Courts refer some cases to mediation-conciliation, expert-determination, fact finding, either for resolving disputes or so that they would be able to use the results in their proceedings/findings during judicial procedures.

Czech Republic

Types of ADR

Arbitration became an alternative to judicial procedure by the Act No. 216/1994 Coll. about arbitration process and the performance of arbitration results, and the Act became effective on January 1, 1995. It is applicable to the broad range of property cases (except bankruptcy and those cases that are not possible to conclude at the court by reconciliation). Arbitration is faster and more flexible compared to the court trials. However the majority of procedures are the same. In practice, the most common way of establishing the jurisdiction of arbitration is the 'arbitration agreement'. This is an agreement between the contractual parties that possible disputes shall be decided upon by the way of arbitration. Arbitration represents the higher level of legal consciousness, and the effort to solve lawsuits by alternative means mediated by private arbiters. At this moment there is just one other form of ADR available: mediation. However, in the Czech Republic there still is room for other forms of alternative dispute resolution.

Legal basis

There is usually a general commitment to solve possible problems by mutual negotiations and reconciliation. Very often no specific ADR procedure is explicitly mentioned. For larger contracts, arbitration can be mentioned as a way to solve possible disputes. In the Czech Republic, the issue of the enforceability of law and contracts is a critical point in the functioning of economic relations. Litigation through a court, especially complicated commercial affairs, lasts months and often even years. This very long period of time frequently means that the dispute has lost its economic importance for the disputants. Cases in which judicial litigation leads to bankruptcy of the companies in dispute are no exception.

Making the manner of resolving disputes and the enforceability of law more effective is essential in order to ensure legal security in commercial contractual relations, as well as to protect property. This would involve the essential reform of the judicial system as well as a much broader usage of alternative ways of resolving disputes, such as arbitration.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Association of Czech Mediators	Mediation centre	Mediation
Mediace	Mediation centre	Mediation
Partners Czech	Mediation centre	Mediation

Relation between judicial dispute resolution and ADR

Czech courts deal with more than 200,000 civil cases annually. Mediation is a quite rare procedure. There are only a few dozen cases of mediation a year. Business-to-business mediation cases are much less frequent.

The providers of ADR services are seen as a complementary means to resolve disputes. There is very low awareness of the possibilities of ADR. The legal community prefers judicial litigation because of the higher charges. General feelings of entrepreneurial ethics are rare, therefore an ADR approach in business-to-business cases is not considered as effective.

In the Czech Republic there is a very strong feeling about 'authority directive decision', so it is very difficult to persuade people in any conflict to do it in an alternative way, i.e. through a mediator. There are cities where there are so called Reconciliation Committees - Prague 2, Brno-centre, Vsetin, and preparation is on-going (the volunteers were

trained) in Pardubice and Chomutov to offer mediators in inter-ethnic conflicts, mostly Roma-minority.

Role of the government

The Ministry of Justice, with the help of the Open Society Fund and other institutions, is coordinating the project for establishing a framework for mediation. The aim of the project is to create standards for providing mediation services, a system to train mediators (education) and a legislation framework for mediation services. It is expected that a new mediation act for business and civic life will be created ('business-commercial mediation and community mediation, extrajudicial resolution'). Mediation has been included in criminal law since 2001. The promotion of ADR and awareness raising is undertaken mainly by the civil organizations participating in the project.

Denmark

Types of ADR

In Denmark, there have been significant developments in alternative means of solving civil disputes outside the courts with the assistance of a neutral third party. As a result there are presently various opportunities for alternative dispute resolution, business-to-business as well consumer-to-business.

Among the most recent ADR developments in Denmark are experiments with ADR mechanisms in the Danish courts that can be used as an alternative to the widely used settlements by arbitration. In addition, there are a myriad of complaint boards and boards of appeal within different industries and sectors in Denmark that resolve civil disputes by means of mediation and professional guidance.

Legal basis

Denmark has no ADR legislation and it is not usual to incorporate an ADR clause in business-to-business contracts, but this seems to be changing at the moment. Since 2003 the association of Mediator Lawyers has provided a clause that companies can choose to include in a contract if they so wish. Expert Pia Deleuran's impression is that the usage is growing but it is still too early to provide statistics for the usage of this clause.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Justitsministeriets Forskningsenhed (research unit of the Ministry of Law)	In charge of introducing ADR to judges/Danish courts	Mediation
Deleuran Advokater (Deleuran Lawyers)	Independent lawyers	Mediation
Advokatsamfundet (Lawyers' Society)	Coalition of lawyers	Mediation
Advokatfirma Philip & Partnere (Lawyer firm)	Independent lawyer	Mediation
DI (Danish Industry)	Confederation of Danish industries	Mediation
Bech, Brun & Dragsted (Lawyer firm)	Independent lawyer	Mediation

Relation between judicial dispute resolution and ADR

ADR in relation to judicial adjudication does not seem to be so important in business-to-business cases in Denmark at the moment. Mediation has been used properly for a couple of years. Experts indicate that the importance is growing quite fast.

Since 1st of March 2003 ADR has been used on a trial basis in 5 Danish courts in civil cases. This trial period has just been extended and will probably be made a permanent solution in the five courts. There are currently discussions about making it a permanent solution in all Danish courts. Additionally, lawyers are advertising their mediator skills and many are undergoing additional training as mediators (150 lawyers out of 4,000 since 2002).

There is no tradition of using ADR in business-to-business cases in Denmark. This could perhaps be due to the fact that court cases are not as expensive as in the United States for example, so the incentive to solve cases out of court is not as great as in other countries. Disputes between other parties (e.g. employer and employee) are commonly solved using ADR.

ADR seems, though, to have been embraced and integrated fast in Denmark. This is due to the fact that Denmark has a positive mentality towards negotiating and Danes are used to negotiating in many other aspects of society. Therefore, ADR appeals to many Danes and is therefore likely to be adopted in Denmark. Since 2002 150 out of 4,000 lawyers have taken the seven-day course it requires to become mediator and there is a high focus on ADR among Danish lawyers.

Role of the government

The government does not specifically promote and stimulate ADR where SMEs are involved. The government promotes ADR in general by allowing it to become an alternative to judicial litigation. There are ongoing discussions at the moment about integrating ADR mechanisms permanently in all Danish courts in civil cases (including business cases). The results from the trial period in 5 Danish courts are very positive and the current government has therefore decided to continue working with ADR in Danish courts. This decision has been included in the 20045 Government bill (Government bill published after a new government took office after the election of January 2005 and included the aims of the new government). Usage of ADR in courts is believed by experts to have a positive impact in the view and knowledge in general of ADR, including SMEs, therefore its is likely to be extended outside the courts.

Estonia

Types of ADR

The Estonia legal system offers the following ADR possibilities: arbitration and conciliation. These ADR methods are regulated by law. In civil cases other methods are also applied that are not directly related to the law. In practice negotiation and mediation and other methods of ADR are also widely used. Many organizations may be involved in such cases. The only limitation is that organizations cannot be one of the interested parties.

Legal basis

Arbitration is regulated by the General Part of the Civil Code Act and is conducted by the Estonian Chamber of Commerce. The Civil Code Act distinguishes the following types of arbitration¹:

- 1 Ad hoc agreement
- 2 Rules by reference
- 3 Advisory arbitration
- 4 Binding arbitration

Conciliation is regulated by the Code of Civil Procedure and the General Part of the Civil Code Act. Usually conciliation is used as a pre-trial proceeding in the courts. In the pre-trial proceeding concerning a matter that does not involve the public interest a court may appoint an impartial person as the conciliator and require the parties to appear before this conciliator during the term specified by the court. A person may be appointed as a conciliator if the said person has given his or her prior written consent. There are no regulations on mediation in Estonia.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Legal Chancellor	Civil service	Ombudsman
Ministry of Culture (Copyright committee)	Formed by the Ministry of Culture and acts in the capacity of an expert committee	Mediation/conciliation
Public Conciliator	Impartial experts appointed to office for a term of 3 years by the Government of the Republic on the basis of a joint agreement of the Ministry of Social Affairs and central federations of employers and federations of employees.	Mediation/conciliation

There are no private organisations providing mediation services.

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx 1%/99%. ADR is rarely applied in Estonia. It has been noted that Estonians prefer to solve the disputes in the court. However, due to lengthy and costly proceedings, quasi-judicial organs, such as The Labour Dispute Committee, the Lease Committee, the Consumer Claim Committee, the Arbitral Tribunal for resolution of insurance disputes etc, are also popular, mainly because of their relatively fast and inexpensive proceedings.

Role of the government

The government of Estonia promotes and stimulates ADR. For example, under the Code of Civil Procedure a court may appoint an impartial person as the conciliator of the parties and require the parties to appear before such a person with a view to achieving conciliation during the term specified by the court, provided the matter does not involve the public interest. A conciliator may be appointed if the person named as conciliator has given his or her prior written consent.

¹ Possibly only the last type of arbitration is to be considered as 'arbitration proper' in view of the definition in the tender documents.

Finland

Types of ADR

In Finland, as in the other Nordic countries, the structure of the administrative bodies and procedures cover a multitude of activities labelled in international discussions as 'alternative dispute resolution'. For example, the Administrative Law (434/2003) requires civil servants to provide counselling in general terms. It has been suggested that the practices developed in Finland towards alternative means of resolution result from other sources than the 'ADR -movement'. They are seen to be part of the general development of the welfare society.

Legal counselling services are widely available from both the public and the private sector. Mediation is applied in different sectors (e.g. divorce and family law, as well as in the business sector) to resolve disputes. In 1988, the Finnish Bar Association (<http://www.asianajajat.fi>) confirmed the principles of mediation. However, the usage rate has been quite low so far. Committees/panels of laymen have been formed to resolve disputes or to issue general statements regarding important issues. Furthermore, *justitieombudsman* and other forms of legal controllers are part of the Finnish society. Based on the estimate of the Finnish Chamber of Commerce arbitration increased in business life over the past few years. There are about 120-150 cases per year compared to less than 100 cases previously. Mediation in the courts is also an option and is currently being further developed. The aim is to provide an alternative system for the resolution of disputes with mediation, instead of adjudication, also being a possibility within the court system itself.

Legal basis

There is legislation on arbitration. There is a bill on the mediation procedures in the court of justice at the present time. An arbitration clause is usually included in business-to-business contracts. Mediation is also sometimes used ('*Any disputes arising from this agreement are to be brought for settlement by mediation in accordance with the mediation rules of the Finnish Bar Association*').

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
The Arbitration Institute of the Central Chamber of Commerce of Finland	Specialised commercial agencies	Arbitration
The Finnish Bar Association	Independent lawyers	Mediation

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 40%/60%. In Finland there does not seem to be any competition between ADR services and judicial litigation. The courts do not have to deal with an excessive number of cases and the legal system is efficient. To date few forms of ADR are used in Finland but two forms of ADR that are complementary to each other are used in addition to legal litigation

Role of the government

Promoting ADR is included in the present agenda of the Finnish Government. The government facilitates ADR more in consumer cases than in the business-to-business sector. On the other hand, it seems to be understood that in Finland the government does not become involved in business-to-business ADR to any great extent; it deems it better that

the companies act voluntarily and take the initiative themselves (which more or less is the system now).

According to the law every municipality in Finland must offer its residents consumer-advice services. The consumer-advice service is intended for consumers, but also affects SMEs, because through that system consumers can require SMEs to take part in mediation/conciliation. The government does not, however, promote the mediation given by the Finnish Bar Association or the arbitration by the Arbitration Institute of the Finnish Central Chamber of Commerce. The Board system, e.g. the Consumer Complaint Board is also very important in the process of solving disputes in Finland, but it is not actually offering mediation/conciliation services. But the Boards play an essential part in the system and the government facilitates these boards.

France

Types of ADR

The legal framework of ADR in France is very old. During the period 1791-1804, a national system of *Bureaux de Paix et de Conciliation* was set up. These bureaux consisted of laymen (non-jurists) and were allowed to conciliate all disputes that would otherwise have been brought before the court.

More recently, in 1995, 1996 and 1998, judicial mediation and judicial conciliation underwent a revival in France (Civil law, NCPC). French judges have the legal task to reconcile the conflicting parties. The law enables judges to remit parties (on a voluntary basis only) to conciliation or mediation by a third party, at any stage during a trial. In addition to judicial mediation and judicial conciliation, there is also conventional (contractual) mediation.

Mediation is an amicable dispute settlement process that involves an impartial, independent, neutral third party whose role is to help the parties to find a mutually acceptable solution to their dispute. Conciliation is a direct agreement by the parties to settle their dispute. The parties can achieve conciliation by getting together, without a third party present. Conciliation can also be practised with the help of a third party, the conciliator, whose role is to help the parties reach a settlement. In conventional matters there is, in practice, no difference between the role of the mediator and that of the conciliator.

In addition to mediation and conciliation other forms of ADR are available, such as expert determination, med-arb, neutral evaluation and the ombudsman.

Legal basis

Judicial mediation is regulated: Act dated 8 February 1995, Decree dated 22 July 1996, transposed in the New civil procedure code articles 131-1 to 131-15. The mediator is nominated by the judge on his/her own initiative or at the request of parties. The initial time period of the mediation is 3 months that can be extended once. The process is totally confidential for third parties including the judge. The mediator informs only the judge about the results of the process. If an agreement has not been reached neither party is allowed to use exchanges made during the mediation process.

Contractual or conventional mediation is not regulated by law. Clauses relating to contract law have enforceable value.

Mediation centres have internal deontology rules which in general include total confidentiality about the process and the fact that no statement or proposal made before or by the mediator may be subsequently used, notably in arbitral or legal proceedings.

Because of this confidentiality clause, a mediator can not become an arbitrator in the same dispute.

The agreement reached by the parties at the end of the mediation may be the subject of a written agreement, if the parties so wish. This has the advantage of rendering the agreement *res judicata*, i.e., conferring upon it similar status and effect as a final judicial judgement (transaction in the sense of the Civil Code, article 2044).

There is a statutory obligation to set up an Ombudsman (*médiateur*) in the following sectors:

- banking;
- finance;
- insurance;
- postal services.

But this is not geared specifically to disputes in which SMEs are involved.

Organisations

The most important self-regulating organisation in the field of business disputes is the *Centre de Médiation et d'Arbitrage de Paris* (CMAP). There is no umbrella organisation as such but there are at least two professional organisations of mediators (UNAM and FMCML).

Four types of disputes relating to enterprises can be distinguished: disputes with individual customers or clients, disputes with other businesses, disputes with employees and disputes with administrative authorities.

Civil Law (NCPC) regulates ADR in the field of disputes with other businesses and clients or customers.

There are several mediation centres in France developed by 'private' organisations such as Chambers of Commerce, chartered accountants organisations, employers' associations or branch organisations, etc. They act in the field of contractual mediation and of judicial mediation. Large enterprises and organisations have their own ombudsmen (such as SNCF, RATP, banks, insurances, etc.). They are in charge of ADR with customers and clients, largely inspired by the model of the *Médiateur de la République*.

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Mediation centres	Non profit organisations (associations Loi 1901)	Mediation

Relation between judicial dispute resolution and ADR

There is no official data about the importance of ADR in relation to judicial adjudication. But the number of disputes dealt with by French commercial courts in 2003 (175,200) can be compared with the average number of mediations dealt with by CMAP, the most important French mediation centre: 100 cases!

It is generally estimated that mediation or ADR in general is developing in France but that they are still far behind the UK, because, for instance the French do not have a culture of 'compromise'.

Role of the government

The government promotes mediation in general as a mean to resolve civil disputes. It has no particular means for dealing with disputes between enterprises; the government is more active in B-to-C disputes and in family disputes.

The government distributes information about ombudsmen but this information is not geared specifically to SMEs, much more to consumers.

Chambers of commerce (which are public bodies in France), and professional bodies of lawyers (bars) and of chartered accountants promote arbitration and mediation as a means to resolve disputes between enterprises. In particular they implement (non-profit) mediation centres. These centres organise information sessions, seminars, etc.

Germany

Types of ADR

In Germany, access to the system for legally based dispute resolution is relatively easy. Germany has a high number of judges per capita, lawyers' fees are regulated by law, and 90% of all Germans are insured against legal costs. Based on these facts, it may be expected that ADR will not be very well developed in Germany. In practice, things are more complicated.

On the one hand, the legal situation differs in each 'Bundesland'. For instance, some 'Bundesländer' (e.g. North-Rhine Westphalia) have appointed official conciliators ('Schiedsmänner'), but this position does not exist in other 'Bundesländer'. On the other hand, German judges (especially in employment cases) have always tried to reconcile parties before taking up the actual lawsuit. Since 1924 this reconciliation phase has been mandatory for the 'Amtsgerichte' (lower courts), and since 2000 some 'Bundesländer' have enacted a law that requires parties to make use of mediation before going to court to settle disputes relating to property law, small claims for compensation, neighbourhood law and slander or libel. The latter law was expected to stimulate the use of ADR. However, an interim evaluation report shows that the mandatory ADR does not live up to the high expectations. There are three reasons: parties that are not willing to resolve the dispute by mutual consent can use an escape route via a judicial warrant; mediation is unknown; the legally established mediation fees do not cover the mediators' costs.

Never the less, in the 1990s, German interest in ADR also increased. Lawyers and business councillors took the lead, and set up private mediation initiatives. Like Austria, Denmark, Finland, Hungary, Italy Poland, the Slovak Republic, Spain, Sweden and the United Kingdom, Germany now has provisions regulating the qualifications and neutrality of ADR practitioners in statutory ADR bodies.

Arbitration is mainly used in business-to-business conflicts in Germany. However, it often refers to pure arbitration. An alternative form is arbitration committees. Although expert determination, fact finding and neutral evaluation do exist in Germany, these types of dispute resolution cannot strictly be assigned to alternative dispute resolution as defined for the purpose of this study. These procedures are used as a 'first attempt' to reach an agreement. If it is not successful, judicial litigation will follow. In addition the procedures are used during trials to present evidence (i.e. neutral third party acts as an 'expert').

The Ombudsman is widely institutionalised in Germany but mostly in business-to-consumer conflicts. Private banks, for example, employ a national Ombudsman.

Legal basis

Two main paragraphs of the Civil Procedure Code regulate ADR.

Paragraph 278 of the ZPO regulates the suspension of time limitations, if mediation is used during a procedure. Paragraph 15a was enacted in 2000 to strengthen ADR-mechanisms and requires parties to make use of mediation before going to court to set-

tle disputes relating to property law, involving small claims for compensation (< € 7.500), neighbourhood law and claims for slander and libel. The content of the paragraph is an 'Öffnungsklausel' (escape clause) which allows the Governments of the German federal states to enforce regional laws concerning the obligatory mediation. At the moment, 8 out of 16 federal states have enacted such a law. Paragraph 5a of the 'Richtergesetz' (Law of Judgeship) and the reform of the 'Rechtsanwaltsvergütungsgesetz' (Lawyers Remuneration Law) should also be mentioned in this context as specific legislation dealing with ADR.

In Germany it is not usual to incorporate an ADR (general) clause in business-to-business contracts.

Organisations

The largest provider of business ADR-services in Germany nowadays is the 'Gesellschaft für Wirtschaftsmediation und Konfliktmanagement' (GWMK) in München. In addition to these private initiatives, the Chambers, for example the 'Handwerkskammern' (craft chambers) also have ADR schemes. Many associations of mediators have established self-regulation and certification schemes. ADR decisions rendered by bodies operating under national schemes can, in certain circumstances, be enforced.

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Nürnberg Society for Mediation	Association of various professions (e.g. lawyers, business consultants, psychologists)	Mediation
Centre for Mediation	Association of various professions	Mediation
Chamber of Commerce Hamburg, Düsseldorf, Frankfurt, Nürnberg	Non-profit complaint board under the patronage of a trade association	Mediation
Society for Business Mediation and Conflict Management	Association of various professions	Mediation
German Association of Mediation	Association of various professions	Mediation
German Society for Mediation in the Economy	Association of various professions	Mediation
German Association of Mediation in Business and Work Environment	Association of various professions	Mediation
Integrated Mediation	Association of various professions	Mediation
German Society for Mediation	Association of various professions	Mediation

Relation between judicial dispute resolution and ADR

No serious estimate of the extent to which ADR is applied can be provided. Nevertheless, it can be assumed that ADR is applied in a minor percentage of business-to-business disputes. There is a positive attitude regarding interest in ADR and many lawyers and judges are mediators.

The providers of ADR services and judicial litigation are seen as being complementary in Germany. The 'Zivilprozessordnung (ZPO)' (German Civil Procedure Code) states that if mediation is used during an ongoing procedure, the procedure will be interrupted and the time limitations suspended (§278).

Germany has an efficiently operating judicial system and 90% of Germans (i.e. private persons) have insurance for legal costs. The Germans have great trust in their judicial system. It is 'normal' in Germany to go to court.

SMEs are still reluctant to consider mediation. They are to some extent aware of this possibility to resolve conflicts but ADR is still rather new and, therefore, not widely implemented in the companies.

Role of the government

The government does not promote or stimulate ADR.

Greece

Types of ADR

The Greek Organization of Mediation and Arbitration (OMED) was founded in 1990 (Law 1876/1990). Its primary goal is to help the parties in a social dialogue to reach a resolution through mediation and arbitration. It functions through a variety of activities in order to help 'collective bargaining'. Mediation, arbitration, conciliation and other forms of alternative dispute resolution are used for disputes and problems in labour relations. In the meantime court dispute resolution (adjudication) is the main method for settling disputes in Greece.

A study of collective agreements and arbitration decisions between 1961 and 2001 indicates the following:

- A significant reduction in the number of arbitration decisions since Law 1876/1990 came into effect and OMED came into operation;
- Enterprise-level arrangements constitute the majority of collective agreements signed every year; and
- Since 1992, the number of sectoral and enterprise-level arrangements has been increasing more rapidly than the number of occupation-based arrangements, which was the outcome sought by Law 1876/1990.

The most commonly used types of ADR Greece are Mediation and Conciliation. During the period from 1992 to 2001, a total of 1,825 requests for mediation and arbitration services were submitted to OMED's [Mediation and Arbitration Service](#), of which 1,652 were requests regarding cases based on law 1876/1990, and 173 concerned cases of mediation to designate emergency staff during strikes or carry out 'public dialogue' to defuse conflicts, based on Law 2224/1994. In more detail, the 1,825 requests were broken down as follows:

- 1,117 were mediation cases (under law 1876/1990);
- 535 were arbitration cases (law 1876/1990);
- 93 were mediation cases regarding the designation of emergency staff (law 2224/1994); and
- 80 were 'public dialogue' cases (law 2224/1994).

The majority of the cases dealt with by OMED concerned the private sector - 70% compared with 30% related to the public and 'broader public' sector. OMED cases were sectoral or occupation-based, though enterprise-level cases have been steadily increasing in number.

Mediation cases

In the period 1992-2001, 46% of the 1,117 mediation cases regarding the conclusion of collective agreements were successful. In cases at the enterprise level, the success rate was 81%. It should be pointed out that a total of 574 collective agreements were signed through OMED over this period (512 at the mediation stage and 62 at the arbitration stage). They represented 21.4% of all collective agreements (2,763) signed na-

tionwide in the 1992-2001 period. Of the total of 2,763 collective arrangements concluded all over the country during the decade after law 1876/1990 allowed enterprise-level agreements on a broad scale, the vast majority were enterprise-level agreements.

Legal basis

Law 2479/97, enacted in September 2000, provides for a mandatory pre-trial attempt at ADR for civil law cases (excluding family and probate) with a value € 80,000 or more. The process is to be conducted either by the parties' lawyers [the parties' presence is optional, according to the wish of each party], or with the presence of a third party, to assist the negotiations towards a settlement. There are no special rules concerning limitation periods for mediations / conciliation, nor suspension of trial / arbitral proceedings pending an ADR procedure. As to admissibility in judicial / arbitral proceedings of information disclosed in the ADR process, Law 2497/79 stipulates that where a mediation attempt has failed and the case goes on to court, the mediator cannot appear in court to be questioned in any capacity (witness, expert, technical advisor, etc.). A mediation settlement agreement may be enforced as an arbitral award (art. 1069, of Code of Civil Procedure) wherein a mediator is appointed as an arbitrator after having reached a settlement agreement (a consent award). Nonetheless, the parties may avail themselves of the provisions of Law 2479/97 whereby a settlement agreement reached in the ADR pre-trial stage can be ratified by the relevant Court, and enforced thereafter as a judicial judgement.

It is not usual to incorporate an ADR clause in business-to-business contracts.

Organisations

Early in its existence, OMED set a basic objective of improving mediation and arbitration services through the development of a network of supplementary services, such as: provision of educational services for the social partners; organisation of services for wide-spread information and documentation (creation of a website, publications etc); and the development of advisory services such as preventive mediation and arbitration. OMED has put some of these into operation, while others are included in the development programme that it has been implementing for the past three years.

The basic areas covered by OMED's supplementary services are the following:

- Educational activity (specialised information seminars at central and regional levels);
- Creating an 'e-library' and linking it with actors and organisations in Greece and abroad;
- Publications (constant information on and enrichment of the codification of collective arrangements, an annual report, popularised publications such as codes of practice etc);
- Technical support for the two sides of industry and for mediators/arbitrators, through the creation of a database of collective arrangement terms, specialised software etc;
- Development of research and study activities within OMED's scope of knowledge; and
- Development of collaboration with organisations similar to OMED, such as the [International Labour Organisation \(ILO\)](#), or the UK's [Advisory, Conciliation and Arbitration Service \(ACAS\)](#).

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
The 'Epilysis' Centre Athens	Independent lawyers, trained as mediators certified and accredited by CEDR	Mediation
Athens Chamber of Commerce and Industry		Mediation
Independent lawyers		Mediation

Relation between judicial dispute resolution and ADR

ADR could be of some increasing importance, however, at present judicial adjudication still features as the vastly predominant applicable means of dispute resolution. As long as ADR services remain virtually unknown to lawyers (the key players in ADR) no issues of competitiveness or complementation arise.

The inherent tendency of business people simply to 'leave' their case to their lawyer, coupled with the [ill- conceived] financial interest of lawyers in having the case becoming a long, drawn-out process greatly reduces the chances of cases being referred to ADR.

Role of the government

The government does not promote and stimulate ADR.

Hungary

Types of ADR

ADR - within the meaning of the EU Commission's Green Paper of 2002 - was almost unknown to the local business community before March 2003. In that month, however, the Act no. LV of 2002 on Mediation (Mediation Act) came into force. Pursuant to the Mediation Act, 'mediation is a form of alternative dispute resolution where a neutral third party, the mediator, assists the parties to come to an agreement settling their legal dispute on terms that each finds acceptable'. The Mediation Act provides the basic rules of the less formal procedures and the requirements applying to mediators, such as personal and technical qualifications as well as checks carried out by the Ministry of Justice.

In Hungary, anyone with a clean criminal record, a university degree and a minimum of 5 years experience in his/her profession may become a registered mediator. At this time, there are no legal requirements governing a special mediators' education/training programme, however, the market offers a modest selection of accredited programmes for the different strata of mediation (business and commercial, family, neighbourhood, peer, etc.). The Ministry of Justice has a list of registered mediators, which is available to the public through the internet. Unfortunately, the Hungarian State has made few efforts to make mediation well-known and popular in society as a whole and within the local business community in particular; this task has been left to the businesses and social associations (such as Budapest Attorney-Mediators' Society or Partners Hungary).

Roughly 1/3 of the accredited mediators originate from the legal community and are practising lawyers, but there are also many engineers, teachers, psychologists and physicians among them.

Mediators are obliged to report their finished cases (neutralized) for statistical purposes once a year to the controlling Ministry of Justice. In the first (though not complete) year

2003, there were 11 finished procedures. 9 of which proved to be successful. The number of mediations is increasing, though rather moderately in the business sector. The most important issue in Hungary at the present time is to promote and popularise and make legal a vehicle in a country where a commercial dispute, if litigated, may take 4-6 years, or even more to be finally resolved.

Legal basis

There is a Mediation Act: Act no. LV (55) of 2002 on Mediation (Mediation Act) the text of which can be found at: <http://www.mediacio.net/eindex.php?graf=e08&oldal=e05> Although it is not yet usual practice to incorporate a special mediation (or other ADR) clause into the B2B contracts, there is, however already some good news. Acting on a proposal from the Budapest Attorney-Mediators' Society (BAMS, a professional association of those Budapest practicing lawyers who also deal with mediation the State Privatization and Property Management Agency (ÁPV Rt.) requested all (less than 100) larger and medium sized companies partially or fully owned by the Hungarian State to incorporate an ADR clause into their contract when and where suitable. BAMS had provided ÁPV Rt. with a mediation clause in Hungarian and English and this clause is, albeit only sporadically, already being used by these companies.

The proposed mediation clause is as follows:

' Legal Disputes - Mediation Clause

The Parties shall attempt in good faith to resolve their legal disputes arising from and/or in connection with this agreement by direct and amicable commercial negotiations. Should their effort not lead to a result within 30 (thirty) days, calculated from the first negotiation aimed to resolve their legal dispute, the Parties expressly agree to resolve their legal dispute by mediation as defined by the Mediation Act No. LV. of 2003. Furthermore, the Parties expressly agree to select a neutral mediator from among those members of the Budapest Attorney-Mediators' Society (www.mediacio.net) who are properly registered as accredited mediators by the Ministry of Justice. The Parties warrant that they will not initiate arbitration or litigation procedures before the national courts while there remains a reasonable hope for resolving the legal dispute via mediation.'

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Individuals, listed as such by the Ministry of Justice	Accredited mediator	Mediation
Economic or social associations, listed as such by the Ministry of Justice, employing individual mediators	Mediator	Mediation

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx 1-2% - 98-99% (excluding formal arbitration).

The providers of ADR services and judicial litigation are seen as complementary means to resolve disputes.

Hungarians tend to turn to institutional power to resolve disputes, hence tend to litigate. Therefore, most of the Hungarians still await 'justice' in their legal/business disputes from a superior power, e.g. the courts instead of trying to resolve their dispute themselves by representing their own interests. It will be a long time before this society learns that a quick and fair settlement is always better than 'a day in court' that results

in a judgment that is practically non-executable. However, if the government leaves it to the people and does not help them to learn this lesson, the learning period will last a very long time in Hungary.

Role of the government

The government does not promote or stimulate ADR.

Iceland

There are a number of dispute resolution committees or tribunals currently operating in Iceland. These are mainly committees operated by the Consumers' Association and by employers' associations. In addition, Icelandic law provides for many more appeal/complaints tribunals, but these do not directly affect the operations of SMEs. Consequently there is no formal ADR-system in Iceland for resolving disputes between companies i.e. ADR in business to business affairs. However the legal department of The Iceland Chamber of Commerce informs us that their organization is preparing to introduce the use of ADR in Iceland and intends to have a conference next autumn on the subject.

Ireland

Types of ADR

Alternative dispute resolution in Ireland is mainly focused on arbitration. Only arbitration enjoys legislative support in the Arbitration Acts 1954-1980 and the Arbitration (International Commercial) Act 1998. That said, various statutory tribunals (such as the Office of the Director of Equality Investigations) employ mediation and conciliation methods. Non-arbitration dispute resolution is also offered by large law firms but the fact remains that there is no official recommendation as to mediation, conciliation, or indeed arbitration in either the Rules of the Superior Courts or legislation in commercial matters and thus it remains voluntary.

The Irish courts are very receptive to alternative dispute resolution. Policy dicta from the Irish Supreme Court indicate that the courts will interfere in the alternative dispute resolution process only in extreme cases.

Ireland is taking positive steps in e-ADR (or 'online dispute resolution' ODR). The Electronic Commerce Act 2000 permitted the use of electronic contracts in arbitration agreements and Ireland hosts the secretariat (in University College Dublin) of the ECODIR e-ADR/ODR platform.

The lowest court in Ireland, the District Court operates a small level and inexpensive (€7 fee) small claims procedure. SMEs have access to the expertise of the Chartered Institute of Arbitrators and Dublin is the location of the American Arbitration Association's European Office. At present the Bar Council of Ireland are formulating a fast-track small claims alternative dispute resolution procedure with a flat fee.

The available methods of ADR for B2B disputes involving SMEs are:

- mediation/conciliation
- med-arb
- expert determination

It should be noted that commercial ADR in Ireland is largely dominated by medium-to-large firms of solicitors that tailor services to meet client needs. Thus, if the needs of a particular client go beyond the trilogy of mediation/conciliation, med-arb, and expert-determination, those needs could conceivably be met on an individualised basis. There is, therefore, the possibility of other alternatives to arbitration and litigation being used in practice, but not with such a level of uptake that would warrant describing such a service as generally available.

The conclusion to be offered therefore, based on the range of consultation, is that the only visible ADR methods (other than arbitration) that are provided are mediation/conciliation, med-arb and expert determination.

Legal basis

The legislative framework for ADR in Ireland is dominated by arbitration. The only generally applicable ADR statutes are the Arbitration Acts, 1954-1980 and the Arbitration (International Commercial) Act, 1998. The Arbitration Acts, 1954-1980 govern the rules applicable to domestic arbitration, and the Arbitration (International Commercial) Act, 1998 incorporates the UNICTRAL Model Law into Irish domestic law. There are no other ADR statutes of general effect.

There is a discernible (and recent) trend for legislation to choose mediation as the preferred method of ADR in particular sectors. The year 2004 alone saw the introduction of mediation schemes under the Residential Tenancies Act 2004 and the Civil Liability Act 2004. Mediation schemes are also operated in respect of employment and equality issues under the Employment Equality Act, 1998 and the Equal Status Act 2000. Each of these Acts provides a different framework for mediation. However, given the limited sectoral embrace of these Acts, there is little scope for SME involvement in respect of B2B disputes.

What are relevant, however, are the procedural rules of the new Commercial Court. These are the only examples of legislative intervention in ADR (other than arbitration procedure) which may affect SMEs in B2B disputes. It has been noted already that there is potential for SME involvement in the Commercial Court, and therefore SMEs may become involved in the streamlined litigation process and its adjunct ADR processes. Under Order 63A Rule 6(1)(xiii) of the Rules of the Superior Courts a judge in the Commercial Court can, on his own motion, or upon application to him by a party to the dispute, adjourn the case for up to 28 days to allow parties to consider whether the dispute should be referred to mediation, conciliation or arbitration. Where the parties do in fact decide to refer, the judge is empowered to extend time for compliance with any aspects of the Rules of the Superior Courts. Many other provisions of the Rules of the Superior Courts have strict time limits, which can be extended upon specific application only. This Rule provides the Commercial Court with the ability to include the ADR process within the litigation process without causing the parties to 'miss deadlines' under the normal rules applicable in litigation.

The new rules also maintain the confidentiality of the ADR process. It is important to clarify one point in particular here. Order 63A Rule 6(2) empowers the sitting judge to make compulsory the disclosure of the particulars of mediation, conciliation or arbitration arrangements between the parties for the purpose of enabling him to decide whether to issue certain pre-trial orders. This does not seem to allow the judge to require the disclosure of what occurred during a previous ADR process, but rather allows the judge to compel the parties to disclose whether they have, in fact, an ADR clause or any other ADR structure in place.

An important point should be made here. The new Commercial Court rules speak only of referring disputes to mediation, conciliation or arbitration. A reasonable interpretation of these rules would mean that a Commercial Court judge, when considering whether to make any of the pre-trial orders available is limited to requiring the disclosure of mediation, arbitration or conciliation arrangements. The rules say nothing about disclosing expert-determination, mini-trial, or neutral evaluation arrangements.

It should also be noted that there is no specific enforcement mechanism for ADR built into the new rules. So, results reached during mediation, arbitration or conciliation would not be enforced under the law as generally applicable. In short, this means that mediation results must be enforced through the somewhat cumbersome law of contract and the normal civil legal process. Arbitration awards, on the other hand, can be enforced through the available legislative methods.

Whereas the evidence gathered from consultation is, by definition, limited it is generally agreed that it is usual to incorporate an ADR clause in B2B contracts. Whether such clauses can be labelled as 'general' or not is unclear. In arbitration for example, model clauses are of course used, but it would be most unwise not to engage in some tailoring to the specific needs of the client.

Of the ADR clauses used, arbitration dominates as the preferred method. The opinion expressed on consultation was that it would be rare to see a pure mediation clause in a B2B contract. Indeed, the experience of some experts consulted was that mediations in general are dependant on ad hoc agreements. This is either due to (a) the bad drafting of the mediation clause (if in fact there was one) or (b) the lack of a mediation clause. The inclusion of 'stepped' Med-Arb clauses is on the increase, but is still far behind pure arbitration clauses. The view did emerge during consultation that Med-Arb clauses are used more widely than pure mediation clauses. For example, there are signs that the construction industry (which has a close connection to ADR in Ireland) is replacing arbitration clauses with stepped clauses, obliging parties to attempt to conciliate or mediate their disputes before resorting to arbitration.

It may be queried, therefore, why in the response to Question 2b, was it reported that some expressed the view that mediation was more important than Med-Arb if the same persons believed that Med-Arb clauses were more frequent than pure mediation clauses. The answer is relatively simple. It is eminently possible that parties who contract with stepped Med-Arb clauses and who run into a dispute will settle their dispute during the first stage of Med-Arb - mediation. Therefore, it is quite possible for there to be a pre-dominance of Med-Arb clauses, and at the same time to be a greater number of mediations than disputes which follow the entire Med-Arb procedure from mediation through to arbitration.

It should be noted however, that even though a contract contains an arbitration clause, it is rare for parties to automatically proceed directly to arbitration. Almost always there will be an attempt to employ some other form of ADR be it negotiation or mediation. Thus, whereas arbitration may in fact be more visible in respect of express clauses, other forms of ADR are usually and informally 'tested' before resorting to arbitration - it is a form of informal Med-Arb.

Organisations

There is no umbrella State ADR body, nor is there any private ADR body which oversees the operation of ADR in Ireland or publishes data on ADR in Ireland. It is possible that the recently formed Irish Commercial Mediation Association ('ICMA'), may one day assume this role, but that has not yet occurred.

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Medius	Mediation service organisation	Mediation, Med-arb
Chartered Institute of Arbitrators Irish Branch	Arbitration service provider	Arbitration, med-arb
Large firms of solicitors	Independent lawyers	Mediation

Relation between judicial dispute resolution and ADR

The clear dominance of litigation and judicial adjudication indicates a *perception* that judicial litigation is more important than ADR. Roughly only 2-9% of commercial B2B disputes are dealt with by ADR. Therefore 91-98% of commercial B2B disputes are dealt with by litigation.

In Ireland, ADR is increasingly being associated by those engaged in its practice with Appropriate Dispute Resolution. That is to say: if one forum is appropriate to settle a dispute, then *prima facie*, that is the forum to which the dispute should go. Drawing an analogy with competition law, it is arguable that ADR does not compete with judicial adjudication if certain disputes are not suited to judicial adjudication in the first place - ADR and judicial adjudication cater for two different markets. Thus there is no issue of competition.

However, it is also the case that recourse to ADR is seen as a response to the perceived inefficiency and cost of litigation. In that sense, ADR may be seen as competing with judicial adjudication in the areas of cost and efficiency. However, it is still a fact that some disputes that are dealt with through ADR are best suited to ADR. In this way, ADR and judicial adjudication can be said to complement each other, as the growing perception in Ireland is that both deal only in disputes that are suited to either process.

On the other hand, some may feel this focus on Appropriate Dispute Resolution is overly technical. Indeed, most of the literature argues the relative benefits of mediation over arbitration and judicial adjudication that leads to the perception that ADR competes with judicial adjudication for 'business'. It is arguable that this is really an issue of awareness. If stakeholders are not aware of the suitability of particular forms of ADR for particular disputes, then they will view ADR as being in competition with judicial adjudication. They will need to be 'sold' on the idea of ADR. Where however, stakeholders are aware of the minutiae and suitability of particular forms of ADR for particular disputes, then the issue of competition will disappear as certain disputes will be viewed as being *prima facie* appropriate for ADR rather than judicial adjudication.

As awareness of ADR grows, there is an increased focus on Appropriate Dispute Resolution and the view that certain disputes are *prima facie* disputes for ADR. In that sense, the maturing view tends to be that ADR and Judicial Adjudication complement each other as they both play different roles in the civil justice process.

Whereas commercial ADR is by no means a macro-success, its relative superiority to consumer ADR may be due to several reasons:

1. It is to be expected that commercial organizations will put profit and cost issues before unsophisticated opposition to ADR on the basis that they want 'their day in

court' In short, it is arguable that commercial entities listen to economic sense. Thus commercial clients will, with increasing regularity, seek ADR methods.

2. Commercial entities are likely to be better informed than consumers and private persons in respect of ADR.
3. Commercial disputes may not be as 'personal' as, for example, a personal injury action involving medical negligence.

On the other hand, there are strong arguments that despite the above, there is an inherent opposition, even at the economically self-interested commercial level, to ADR. Similarly, it has been argued that both awareness issues and what may be the legal profession's general distrust of ADR to date, explain the lack of macro-success of commercial ADR in Ireland.

In short the claim that Ireland is culturally opposed to non-litigious methods of ADR or that lawyers prefer litigation cannot be discounted, nor, however can it be allowed to overwhelm the slow-burn increase in the popularity of ADR in commerce. On balance, the best view is that one can explain the small degree of success of commercial ADR in Ireland on the more sophisticated economic self-interest of firms and greater awareness, but one can also explain its general lack of macro-success on hostility and cultural factors.

Role of the government

As a general perception, there is a definite governmental commitment to supporting ADR in civil disputes. However, this policy is generally manifested in areas other than commercial ADR. Further, there is no specific policy commitment to or promotion of ADR in SME B2B dispute resolution. However, it should be noted that the Irish Commercial Mediation Association ('ICMA') have recently received public funding which will support its direct promotion of commercial mediation. Also, as has been noted, there is limited State involvement in ADR in the commercial sphere through the new Commercial Court. It is arguable that the specific powers of the Commercial Court in respect of facilitating ADR could be viewed as either government or judicial support and stimulation of ADR in disputes which could include SMEs. In particular, it seems quite reasonable to argue that the Courts' power to adjourn civil proceedings to enable parties to consider ADR is a 'stimulation' of ADR in disputes which may involve SMEs.

Other than the foundation of the Commercial Court and the consequent grant to it of powers which encourage the use of ADR, the only specific State involvement in commercial mediation is through the funding of ICMA. The stated policy of the government - the encouragement of ADR in civil disputes - is quite general, and it most definitely could not be said that promotion and stimulation of disputes involving SMEs is not part of government policy. However, at the same time, it is also clear that whatever may be said about the favourable climate for commercial mediation, it is most definitely not the case that government policy further distinguishes between commercial mediation and SME ADR.

Italy

Types of ADR

At present, alternative methods for dispute resolution (ADR) in Italy refer mainly to conciliation and arbitration procedures. They are not specifically designed for SMEs, although in many cases (tourism services, for instance) the enterprises involved are mainly SMEs.

From the second half of the 90s ADR has been the subject of increasing interest from both legislators and interested parties (citizens/consumers and enterprises alike). In Italy mediation and med/Arb are the most important types of ADR available for solving B2B disputes in which SMEs are involved.

Legal basis

It is important to note that the Italian legislator appointed the Chambers of Commerce as the institutions in charge of government approval for the resolution of economic disputes, if the interested parties wished to avoid the courts. Law n. 580/1993, art.2, subsection 4 states that the Chambers of Commerce may establish conciliatory and arbitral commissions (the Arbitral Chamber) for the extra-judicial resolution of disputes among enterprises and between enterprises and consumers. Subsequent to this Law many other regulations have recognized this role as belonging to the Chambers of Commerce, delegating important functions to these. For instance, Law n. 481/1995, establishing the Authority for Public Interest Services, singles out the Chamber of Commerce as the institution in charge of possible extra-judiciary solutions of disputes between users and firms providing Public Interest Services. Also relevant in this framework is Law n.192/1998, regulating subcontracting in productive activities. This law has introduced the compulsory attempt at reconciliation, through the Chambers of Commerce and, should the conciliation procedure fail, the law envisages the possibility of an arbitration procedure through the Arbitral Chamber, established in the Chamber of Commerce itself.

In another case, Law 281/1998 (regarding Consumers and Public Interest Services Rights) established that consumers' organisations may turn to the Chambers of Commerce for an attempt at reconciliation prior to the appeal to the Judge. The Reform of the National Legislation for the Tourism Sector (Law n. 135/2001) appointed Chambers of Commerce, individually or in an associated form, as the institutions providing Conciliation and Arbitration Commissions for the extra-judiciary resolution of dispute among enterprises/providers and tourists/users of tourism services. Finally, the Italian Government has just issued a bill, implementing a regulation within the general framework approved by the Italian Parliament, referring to the development of the new organisation for court resolutions of disputes among firms. This bill establishes a register of the Institutions entitled to deal with conciliatory procedures in the framework established by the new rules. It also states that the Conciliatory Commissions of the Chambers of Commerce have the right to enrol in this register.

The Chamber of Commerce most active in the field of ADR is, so far, the one located in Milan. Other important Chambers of Commerce in the same field include those in Turin and Florence. Unfortunately, there is no available analysis of the impact of this legislation on the economic structure, although it appears at a first glance that ADR in Italy, so far, has grown mainly in the more developed areas of the country

The predominant kind of ADR incorporated in B2B contracts refers to 'ad hoc arbitration' (introduced by an arbitration clause). It differs from the 'institutional arbitration' since the general clauses designed to manage the resolution process are directly fixed by the parties with no references to the arbitral regulation of the Italian 'arbitral chambers'.

On this subject Law n.192/1998, regulating subcontracting in productive activities, is also relevant. It introduced the compulsory attempt at reconciliation, to take place in the Chambers of Commerce and, should the conciliation procedure fail, the law envis-

ages the possibility of an arbitration procedure located in the arbitral chamber, established in the Chamber of Commerce itself.

Organisations

<i>Institution</i>	<i>Type of ADR</i>
Arbitral and conciliatory commissions of the Chamber of Commerce	Mediation, Med/Arb

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 2% - 98%.

ADR services have a complementary role (not only alternative) since they often are more suitable for the kind of disputes and, moreover, because they enable the parties to set up a dialogue (that otherwise would be not possible) and to consider (themselves) whether to involve the judge or not.

This consensual approach allows the parties, once their dispute has been solved, to maintain their business relationship.

In Italy there are strong cultural obstacles for the application of ADR. People are quite contentious and not always inclined to mediation and reconciliation.

Role of the government

The main bodies involved with the promotion and stimulation of ADR are the Chambers of Commerce. Their facilitations are general (not only for disputes between SMEs). For instance, they promote the introduction of common fees for the ADR procedures for all local chambers, even if they are totally independent and could decide to charge different fees according to the various cities.

The Chambers of Commerce would like to involve more SMEs in their activities to facilitate and promote ADR, but these SMEs are still reluctant to use these methods of dispute resolution.

Latvia

Types of ADR

The types of ADR available in Latvia for solving business-to-business disputes in which SMEs are involved are:

- 1 Mediation/conciliation
- 2 Expert determination (for construction industry)
- 3 Mini-trial
- 4 Neutral evaluation
- 5 Integrated mediation (mediation by a professional judge just before the trial. Usually the judge - for a fee - will listen to the parties for 2-3 hours and help them reach an agreement. If no agreement is reached, they proceed to trial. Integrated mediation resembles med/arb, but the difference is that it is done by a state court judge immediately before going to court)
- 6 Ombudsman (SME involved only as a claimant, e.g. in disputes with banks).

Legal basis

At present there is no ADR legislation at all. However, the Latvian Civil Law encourages judges to try to resolve a dispute by mediation, with the agreement of both parties involved. The Ministry of Justice is currently working alongside related EU institutions on a directive on mediation (the directive will set general requirements for mediators and

guarantee that agreements reached by mediation are recognized as decisions of courts) this directive is expected to be ready by October 2005, after which the ministry will proceed to draw up a national law on mediation.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Specialised commercial agencies		Mediation
National 3-party council consisting of: - State - Confederation of employers - Free Trade Union Confederation of Latvia Public Mediators	Legitimized by the Labour Dispute Law.	Mediation

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 10-90%. Currently ADR and judicial litigation are seen as competitive, but since ADR is much less often used, it is not perceived as an important competitor.

People are reluctant to solve their problems themselves; they believe that an all-knowing legitimate third party (basically, the state courts) should take the responsibility for making a decision. Moreover, the owners of SMEs or other decision makers often do not have the expert knowledge required to make a decision about the subject of the conflict, but the middle managers who do have this knowledge are not the decision makers.

Role of the government

Currently the Ministry of Justice is working on a project the aim of which is to find parties interested in ADR (law firms, academicians, businesses, trade associations etc.) and by consulting them to work out a plan of promotion of ADR in Latvia.

Liechtenstein

Types of ADR

In Liechtenstein, only mediation can be identified as form of business-to-business ADR. It should be mentioned that mediation is generally applied in civil cases being regulated in the civil process order. The issue of mediation was raised only rather recently. An Act on Mediation in Civil Code Cases became effective in January 2005 and a related decree on the education of mediators will follow (Diploma studies on mediation started in 2004 at the University for Human Sciences).

Nevertheless, the subject is not common knowledge within Liechtenstein's companies and SMEs. At the moment, there are no figures available giving more detailed information about the relative importance of mediation for settling business-related conflicts. NGOs are working to promote business mediation within the companies.

Legal basis

An Act on Mediation in Civil Code Cases became effective in January 2005. Furthermore, the government of Liechtenstein is currently working on a decree concerning the education of mediators. Both follow the Austrian example as it is considered to be the most suitable law on mediation (e.g. comparatively broad approach of the law) enacted in the countries surrounding Liechtenstein.

It regulates the constitution of an advisory board for mediation, the rights and duties of the mediators, the suspension of the time of limitation for mediation in civil cases, the requirements and the procedure of the registration of persons on the list of registered mediators. The registration list is held by the Government of Liechtenstein. The obligation to consult an intermediary no longer applies in cases where mediation procedure did not produce a positive result.

Organisations

The University for Human Sciences offers certification in mediation studies.

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Association for Mediation Liechtenstein	Association of various professions	Mediation

Relation between judicial dispute resolution and ADR

In Liechtenstein, there is a tradition of cooperative forms of conflict resolution: in civil cases (exemptions made for proceedings other than litigation, matrimonial matters, paternity, alimony and child support cases, compulsory execution, bankruptcy proceedings and civil cases where a first attempt is to be made to achieve resolution through a mediation procedure defined by the Act on Mediation in Civil Code Cases), it is binding to consult an intermediary / responsible civil mediator ('Vermittler') before a party may initiate legal proceedings. This is specified in the civil process order. Only if the intermediary issues a certificate ('Leitschein'), will the claimant be authorised to file a suit with the Court of Justice within two months. Each municipality has its official intermediary. It should be mentioned, however, that nowadays the intermediary is often only used to obtain the certificate, without attempting any kind of serious negotiation. Because mediation is in line with this tradition, it may be said that it is a complementary means of resolving disputes.

Before a party may initiate legal proceedings, the party must request the responsible civil mediator to order a civil mediation in which an amicable resolution through settlement, approval or renunciation is aspired. If this attempt is not successful, the civil mediator issues a certificate stating that the civil mediation has failed.

The certificate authorises the claimant to file a suit with the Court of Justice within two months. Prior civil mediation is generally required. However, certain cases (such as proceedings other than litigation, matrimonial matters, paternity, alimony and child support cases, compulsory execution and bankruptcy proceedings) are exempted from the requirement of mediation.

One major barrier for the application of ADR in Liechtenstein is the low level of awareness of ADR among Liechtenstein's companies/SMEs. The majority of SMEs are not aware of this possibility to resolve conflicts.

Furthermore, because of the small size of the country, discretion is very important. Conflicts will not be made public as the reputation of the company could be damaged.

Role of the government

Other than the necessity to consult an intermediary to try to resolve the conflict as a first step in civil cases, no particular promotion measures have been taken.

The establishment of an act on mediation depends, among other things, on how far (experience, estimates) courts will be relieved both organisationally and financially. These two items are to be reviewed in terms of their efficiency after 2 years. Should the anticipated success not be achieved, the entire act will be subject to a review.

Lithuania

Types of ADR

In Lithuania, public opinion is not very well-disposed towards courts. Official litigation is not only lengthy and costly and it is often mistrusted. Avoiding formal suits is a custom prevalent among local businessmen. Therefore, less formal ways of tackling existing or potential legal conflicts are more common.

Arbitration, as private judicial services, has existed in Lithuania since 1996 when the Law on Commercial arbitration was passed. At present there are two agencies - Vilnius International and National Commercial Arbitration and Vilnius Court of Commercial Arbitration. Nevertheless, arbitration is generally used only in international business relations, and it is rare for arbitration clauses to be included in local contracts. On the one hand, this is because businessmen are not fully aware of the advantages of arbitration and conciliation procedures. On the other hand, working in small markets and maintaining constant business relations means there are few disputes. Thus, finding trade-offs or complying with the requirements of partners becomes common strategy for companies.

Since seeking redress through a court of law is considered *ultima ratio*, business people try to sort out their own disputes without an intermediary, so professional mediators or conciliators are almost never involved. Only the above-mentioned arbitration institutions provide such services, while most law firms do not specialize in this field. In some exceptional cases ADR services such as contractual adjudication, expert determination and mini trial are also used.

As legal settlements of disputes are not considered very acceptable, more attention is paid to other means. Many Lithuanian companies employ the services of debt recovery agencies that consult about the credibility of partners and customers, urge debtors to pay and use other methods of indirect pressure - by public notification about persistent debtors or, for instance, by organizing informal actions near the debtor's office.

Legal basis

Normally, the contracts allow for some time for negotiations as well as the obligation to negotiate, or to appoint an independent party. In the case of a dispute: the court or arbitration respects such contractual clauses and requires that the parties exhaust such remedies and usually the parties abide by such arrangements.

When, and if, a contract is drafted this is done by an outside legal counsel, or a professional lawyer. Normally, such clauses provide for the appointment of a third party who is charged with the task of suggesting, a solution to the dispute for both parties concerned, e.g. a financial advisor would normally be asked to assess a price for the option-subject shares etc.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Independent lawyers	Usually attorneys	Contractual adjudication, expert determination, mediation, mini-trial
Independent experts within a certain sector		Expert determination
Vilnius Court of Commercial Arbitration		Mediation
Business consultants		Mediation

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 10%/90%. ADR includes also arbitration. The culture of litigation is not embedded in the business practice in Lithuania. Consequently, it is not expected that the use of ADR procedures will increase much in the near future.

Role of the government

The government does not promote or stimulate ADR.

Luxembourg

Types of ADR

The 'Centre de Médiation du Barreau de Luxembourg (CMBL)' was created on March 13th 2003 by the 'Ordre des Avocats du Barreau de Luxembourg', the 'Chambre de Commerce du Grand Duché de Luxembourg' and the 'Chambre des Métiers du Grand Duché de Luxembourg' (craft chamber). This association has as objective the promotion of the mediation procedure as well as promoting a favourable attitude towards mediation, by constituting a network of qualified mediators, chosen by the Centre and making use of their experience. Another objective is the provision for enterprises and private persons of a simple and less costly procedure for solving their disputes. The association is open to other legalized professions and is intended to attract the interest of enterprises and private persons for the subject of dispute resolution in the civil, commercial or social field.

On 1st May 2004, a specific 'Médiateur' was introduced within a legal framework, responsible for the follow up of all complaints coming from private persons about state administration. Other initiatives are currently being discussed: the inclusion of a mediation procedure in labour and employment legislation, based on recent proposals from the International Labour Organisation in Geneva.

There are other alternative methods for dispute resolution in Luxembourg; the 'arbitrage' procedure for mechanics working in garages (offered by the two associations of garages Fegarlux and Adal); the 'arbitrage' possibilities in the framework of the trade exchange (offered by the Chambre de Commerce du Grand-Duché de Luxembourg in relation to the International Chamber of Commerce); the specific 'mediation' procedures in the framework of certain legislation (family protection as well as 'minor' offences in relation to penalty clauses).

Legal basis

Luxembourg has no ADR legislation and it is not usual to incorporate an ADR clause in B2B contracts.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
CMBL	non-profit organization	Mediation

Relation between in-judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 0.5% - 99.5%.

Role of the government

The 'Centre de Médiation du Barreau de Luxembourg (CMBL)' was created in 2003 by two public institutions (the Chamber of Crafts and the Chamber of Commerce) and the Bar of Luxembourg.

Malta

Types of ADR

In Malta, the new Labour Law came into force on 27 December 2002. It is comprehensive legislation, covering the field of employment and industrial relations legislation. It is based on the Social Chapter of the European Union.

The Industrial Relations Chapter includes provisions for the voluntary settlement of disputes.

Where there is a trade dispute the parties to the dispute may agree to refer the dispute to:

- The Director of Labour, or
- A conciliator, chosen from the Conciliation panel, by the parties in dispute or (if they cannot come to agreement), by the Director of Labour.

The function of the conciliator is to communicate with the parties involved in the trade dispute immediately on referral. The conciliator will organize and preside over conciliation meetings between the parties as necessary to resolve the trade dispute. He will consider the causes and circumstances of the dispute and endeavour to bring about an amicable settlement of the dispute as expeditiously as possible. He will make such recommendations as the conciliator may deem fit in order to resolve the trade dispute.

Should the parties fail to agree on the appointment of a conciliator or should the conciliator report a deadlock, the Director will refer the matter to the Minister. The Minister may, if he thinks fit, appoint a court of inquiry or at the request of both parties in dispute, refer the trade dispute to the Industrial Tribunal.

The decision of the Industrial Tribunal is binding for both parties for at least one year from the date of settlement.

In Malta expert determination, med/arb, neutral evaluation and the ombudsman are available for solving business-to-business disputes in which SMEs are involved.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Specialists in the field	Independent specialist appointed by the Court or by the parties involved	Expert determination
Malta Arbitration centre	Independent lawyers	Med/Arb
The office of the Ombudsman	Appointed by national Parliament but totally independent of government	Ombudsman

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 10% - 90%. It would seem that one of the main obstacles to using ADR is culture. Although this is changing there is still a significant preference for court based settlements

Role of the government

Arbitration and mediation are the most common forms of ADR. In a bid to increase the use of arbitration and mediation the government has set up an arbitration centre for both domestic and foreign disputes. It has also passed specific legislation in the form of the Arbitration Act and the Mediation Act facilitating the use of ADR.

Part IV of the Arbitration Act contains a comprehensive legal framework which regulates domestic arbitration proceedings. The main thrust of its rules is to grant the parties autonomy in determining the manner in which their arbitral proceedings are conducted. This is, however, a general provision aimed at disputes excluding questions of personal civil status but including those relating to personal separation and the annulment of marriage.

The Netherlands

Types of ADR

Recently, Dutch attention for ADR has increased significantly. The rationale behind this increased attention is twofold. On the one hand, making more use of ADR can relieve the workload of the courts. On the other hand mediation is seen as a different approach to conflicts and litigation.

The Dutch government has initiated several projects to explore and promote the application of ADR. These court-annexed mediation projects explored the possibilities of several forms of ADR, among which mediation, binding advice and other forms of ADR.

Also, the popularity of ADR is increasing among disputing parties, illustrated by the rising number of completed mediations. Between 1998 and 2003, the number of mediations registered with the NMI, increased from 330 to 9,525 per year. Of these mediations, 29.5% involved employment issues and 11.9% other business disputes. More than two thirds of all registered mediations were successful.

table 54 Mediation in the Netherlands

<i>Type of case</i>	<i>Share</i>
Employment issues	29.5%
Family cases	45.3%
Health	2.5%
Environment	4.5%
Education	2.4%
Administration	2.2%
Business mediation	11.9%
Other	1.7%
Total	100%

Source: www.NMI-mediation.nl

Legal basis

In April 2004 the Minister of Justice decided to introduce mediation on a permanent basis in the national judicial system. A more fundamental revision of civil and adminis-

trative procedural law with regard to the facilitation of mediation is taken into consideration.

It is usual to incorporate arbitration and binding advice in business-to-business contracts. This is not usual for mediation.

Organisations

There are various institutes that provide ADR. In addition to the Nederlands Arbitrage Instituut (founded in 1949 and that also provides other forms of ADR, such as mediation/mini-trial), there are many mediators that are certified by the Netherlands Mediation Institute. In total, the register of the NMI contains 4,554 mediators, of whom 26% is certified. Some of these mediators are specialised in ADR in the field of SMEs. The ACB (ADR Centre for the business world, as a sub-division of the VNO/NCW (The Netherlands' Confederation of Industries and Employers) promotes the use of mediation by SMEs. ACB is carrying out a mediation programme for the Council of State for environment law cases.

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
NAI (Nederlandse Arbitrage Instituut)	Independent non-profit organisation,	Arbitration
NMI (Nederlands Mediation Instituut)	Independent lawyers	Mediation
ACB (ADR Centre for the business world)	Subdivision of VNO-NCW (The Dutch Confederation of Industries and Employers)	Mediation
Lawyers		Arbitration/mediation
The office of the Ombudsman	Government	

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 2% - 98%. The providers of ADR services and judicial litigation are seen as complementary means to resolve disputes.

The Dutch government indicates that, however important the access to the judge may be for the settlement of conflicts, government jurisdiction is not the most appropriate way in all situations. According to how the nature of the conflict varies, the nature of the most efficient solution varies accordingly.

There are some obstacles to the application and promotion of ADR in the Netherlands. These obstacles are:

- a very large percentage of SMEs is unfamiliar with the possibilities of ADR
- many people think that mediation is 'soft'.
- the reluctance of lawyers and judges to refer cases to ADR.

Role of the government

The Dutch government has initiated several projects to explore and promote the application of ADR. Examples of such projects are: 'Mediation naast Rechtspraak' (Court-annexed mediation), 'Mediation gefinancierde rechtsbijstand' (Mediation and legal aid) and subsidising the development of mediation. These projects were evaluated in a comprehensive study called 'Ruimte voor mediation' (Room for mediation), which was accompanied by an international literature study on mediation 'Mediation in civiele en bestuursrechtelijke zaken' (Mediation in civil and administrative cases). The actual use of arbitration and binding advice in relation to litigation has also been studied 'Aard en

omvang van arbitrage en bindend advies' (Nature and extent of arbitration and binding advice). Those studies laid the foundation for policy making on ADR in the Netherlands.

Norway

Types of ADR

Norwegian business life has a long tradition of conflict solution through negotiation, conciliation, mediation and arbitration.

Conciliation boards

Historically speaking the conciliation boards are the most important mediation institutions in Norway. They were set up simultaneously in the former twin kingdoms of Denmark and Norway about 200 years ago. The boards still exist in Norway, but in Denmark the system was changed 50 years ago with the boards being wound up and conciliation proceedings no longer being compulsory. What are still in the Danish procedural law are the non-binding programme formulations.

There are 439 municipal conciliation boards, each with three lay judges elected by the various municipal councils for a period of four years. In addition to conducting mediation, the boards possess certain powers, which enable them to pronounce judgement in civil cases. Although conciliation boards concentrate primarily on criminal cases, they also have the authority to mediate in cases relating to private claims for compensation, and, in practice, this power is also used to a certain extent in other civil cases. The mediation boards are regulated by a separate piece of legislation, which specifies that all municipalities should have a mediation board and that mediators should be appointed by a representative designated by the Municipal Council by a police representative and by a mediation board co-ordinator.

Mediation requires the consent of the parties involved and their agreement about the facts of the case to which the dispute relates. One mediator is used in individual cases, and makes the decision as to whether the agreement reached by the parties will be approved.

The system of conciliation boards in Norway emerges as being simple and practical after reading the provisions contained in the Norwegian Civil Litigation Act. However, in practice the system does not function as a method of resolving disputes. To some extent the conciliation boards function as an ADR process integrated in judicial procedure, and it is their task to facilitate settlements. However, the system lacks flexibility and is characterised by formal procedure. The statistics show that hearings carried out by the conciliation boards do not function as a mediation process. It is true that statistics show that over 90% of all disputes for which civil litigation is initiated, end in the conciliation boards. This should indicate that the boards play an important role in the Norwegian legal system, as an alternative to traditional judicial proceedings.

The limitations mentioned concerning the functioning of the conciliation boards, is one of the reasons why a pilot scheme of judicial mediation was introduced with effect from the first of January 1997, under a new provision amended to the Civil Litigation Act. The provisions are supplemented by regulations that include giving judges the mandate to initiate and participate in negotiations between the parties in dispute.

The characteristics of the new provisions are that they introduce court-linked mediation

auxiliary to adjudication. The provisions contrast with the traditional Norwegian procedural system because they encourage active sponsorship of settlements and involve the postponement of access to adjudication while work on achieving a settlement is in progress.

Legal basis

A new law is being prepared and the proposal is already in parliament. It is usual in arbitration to incorporate an ADR clause in business-to-business contracts. This does not yet apply to the new forms of ADR.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Oslo Handelskammer Institute for Arbitration and Alternative Dispute Resolutions	Association	Mediation
JUS (The Lawyers' Association Competence Centre)	Association	Mediation
Municipal courts	Judges	Mediation
Specialised lawyers	Lawyers	Mediation

Relation between judicial dispute resolution and ADR

When not only business-to-business disputes are included, the ratio ADR/judicial adjudication is estimated to be approx. 40%/60%. This figure is based on a survey made of 6 Municipal courts during the pilot phase from 1997-2000.

Role of the government

Most legal disputes are resolved before the dispute is brought before the court. The new law favours ADR/mediation. Various institutions provide courses on ADR. The Chamber of Commerce is positively involved in marketing ADR-services.

Poland

Types of ADR

The present possibilities of a non-judiciary litigation process between entrepreneurs are provided by Arbitration Courts (also called Compromise Trade Courts), and Arbitration by Fellow-Workers or Arbitration Commissions.

The authority of the Arbitration and Compromise Courts is embedded in the regulations of both Polish and international legislation.

The body most well known among entrepreneurs is the Arbitration Court of the National Economic Chamber in Warsaw. It was established in 1950 as the Jury of Arbiters at the Polish Chamber of Foreign Trade. In 1990 when the National Economic Chamber came into existence, it was renamed the Arbitration Court. The Arbitration Court at the National Economic Chamber is the founding member of the International Federation of Trade Arbitration Institutions, member of the European Arbitration Group of the International Chamber of Commerce in Paris and the Special Committee at the European Economic Commission in Geneva.

Pursuant to 'The New York Convention on recognition and execution of foreign arbitration decisions' concluded in June 1962, verdicts of the Arbitration Court at the National Economic Chamber are recognised by the 100 countries that signed this convention. Compromise Courts work on the basis of Articles 695-715 of the civil practice code.

They operate not only as economic chambers, but also as independent jurisdiction bod-

ies within other entrepreneurs' organisations. In Łódź there are two courts of this kind: one is located at the Łódź Chamber of Commerce and Trade, the other is located at the Regional Economic Chamber. The Arbitration Court in Warsaw settles disputes in which millions of zlotys are at stake. Courts outside main cities do not complain of excessive work loads - just the opposite.

The Arbitration Commissions and Arbitration by Fellow-Workers deal with disputes of minor importance. A curious detail is that there is no Arbitration by Fellow-Workers in the Łódź Chamber of Commerce and Trade (although that does not mean that there is no need for such a body).

In addition to arbitration, Poland also has contractual adjudication, expert determination, med/arb, mediation/conciliation and conciliatory boards for solving business-to-business disputes.

Legal basis

Regulations regarding alternative methods of dispute resolution (irrespective of the method itself) are in the Statute Book of the Civil Law (SBCL) - Bill of Nov 17 1964, Government Gazette Nr. 43, position 296 with later revisions (Articles 698-715). The Bill regulates access to the courts of arbitration (Article 698 of SBCL), appeals to higher courts (Articles 712-715), proceedings and scope of the courts of arbitration, and conditions under which records of the proceedings can/should be forwarded to the State courts. Judgments of the courts of arbitration require judicial authorization by a State court. If not secured by an initial contract, all decisions made of the arbitration court, whether composed of experts, mediators, or independent lawyers, can be challenged in the State court of law.

In Poland it is usual to incorporate an ADR clause in business-to-business contracts. The most common are clauses providing a mediation/arbitration or conciliation.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Public Institutions	Civil servants	Neutral evaluation
Lawyer offices	Independent lawyers	Neutral evaluation, mediation
Academic Institutions	Scientists	Neutral evaluation, Arbitration, expert determination, mediation
Mediation Centres	Independent arbiters	Arbitration, Mediation
Association of Mediators	Independent mediators	Arbitration, Mediation
Commercial and Industrial Chambers	Independent experts	Arbitration
Arbitration Commission	Members of the Commission	Contractual adjudication
Courts	Judges	Contractual adjudication
Main Technical Organisation	Experts	Expert determination
Technical Association and Experts Groups	Independent experts	Expert determination
Craft Chambers	Independent experts	Expert determination
Permanent Conciliation	Commercial agencies	Mediation

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 20%/80%. ADR is considered to be complementary to litigation in court. In cases where the conflicting parties

have not previously agreed (e.g. by contract) on the means of resolving disagreements, the dispute resolution reached by experts or mediators could be presented before the court of law and any suggestions or reports made by the experts or mediators could be submitted as evidence.

There is a certain lack of confidence in state courts that often issue verdicts perceived as socially unjust. In addition, the sluggishness and indolence of the courts result in a lack of trust in the possibility of resolution by ADR. Due to rampant corruption this lack of trust is not limited to the state courts only but extends also to the courts of arbitration.

Role of the government

On November 8 2004, in order to bring the Polish law more into line with that of the European Union, the Supreme Court of the Republic of Poland presented the Parliament (Sejm) with amendments to the Statute Books of the Civil Law and the Bill of Bankruptcy (based on Article 118 of the Constitution of the Republic of Poland of April 2, 1997). Currently, the bill is under discussion by the appropriate parliamentary committees. Another interesting initiative was taken by the National Chamber of Commerce, which announced a Jerzy Jakubowski Contest for the best MS thesis on the subject of conciliation and mediation. The objective of this contest is to widen awareness of ADR. Similar actions were taken by the Polish Association of Arbitration Courts in Warsaw as well as by the regional Chambers of Commerce.

Portugal

Types of ADR

Modern, formalised ADR was institutionalised in Portugal in the mid-eighties when specific legislation contemplating mediation, conciliation and arbitration centres was passed. Since then about 30 arbitration centres have been created in the country, most of them promoted by the Portuguese Consumer Institute and some municipalities and consumer associations. These centres tend to have a regional or local scope, deal exclusively with consumer disputes and run consumer information offices. Other centres are specialised in certain matters (labour, advertising, auto insurance, inheritance, etc.). Some of these centres are running the Portuguese nodes of EC promoted pan-European networks, such as EEJ-Net (cross-border consumer disputes) and FIN-NET (financial services disputes). In all of these disputes, SMEs can be one of the conflicting parties. In 2002, these arbitration centres were responsible for closing around 7,000 cases, a number that has grown at an average rate of 10% per year since the beginning of the 1990s. Most of the cases resolved through the arbitration centres concern consumer disputes (61 percent), car related matters, such as insurance and accident conflicts (26 percent), and labour related matters (11 percent). Mediation is the most frequently used resolution process (64 percent), followed by conciliation (19 percent) and arbitration (17 percent).

According to research conducted in late 90s these arbitration centres were responsible for settling more than 20 percent of the cases submitted to both the traditional judiciary system and ADR system in Portugal in 1997 and 1998 in various categories, better suited to the ADR approach (which cannot be as universal as the judicial system), such as car accidents, consumer contractual violations, civil responsibility.

More recently (2001) the Portuguese parliament passed a law re-introducing the Judge of Peace concept, aiming at dealing with small disputes at local level on a voluntary basis. Following this legislation, 3 peace courts were implemented covering 18 parishes and 200 000 people. As the experimental period proved quite successful, 8 new peace

courts were launched in 2003 expanding the coverage to 479 parishes and 1.6 million people.

Legal basis

Portugal has no general ADR legislation, but specific regulations concerning various ADR systems provide for some of the above provisions, notably: confidentiality, non-admissibility of information disclosed in the mediation processes in judicial or quasi-judicial procedures, the mediator cannot be an arbitrator nor participate in the pre-mediation stage in the same case, enforceability (which varies with the particular system).

It is not usual to incorporate an ADR clause in business-to-business contracts in Portugal.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Arbitration Centres	Non-profit associations, Chambers of Commerce, Universities, Civil Societies, etc.	Mediation, Arbitration, Med/Arb
Justices-of-the-Peace	A special type of court	Justice-of-the-Peace

Relation between judicial dispute resolution and ADR

The ratio of ADR/judicial adjudication is estimated to be approx. 2-3%/97-98%. The providers of ADR services and judicial litigation are seen as competitive means to resolve disputes.

In Portugal there are about 20 Courts of the Peace covering 28 counties (there are 308 counties in Portugal) and 2 million people (20% of total population) and more than 25% of the existing organizations (including companies, sole proprietor businesses, associations and other). The Courts of the Peace are a special type of court defined in the Portuguese Constitution and approved by Law 78/2001 of July 13, 2001. According to the regulations of these courts whenever a suit is filed both parties are offered a mediation service instead of going to court (a type of 'court annexed mediation'). Parties are free to accept or decline such services.

Role of the government

There is no special promotional effort by the government geared towards SMEs. All measures in Portugal concern general facilitation mechanisms.

Romania

Types of ADR

Romania is a country where economic and social relationships are becoming more and more intense and complex and where economic development and the appearance of new industries is leading to a continuous increase in the types and numbers of conflicts. It is common practice for two parties that agree and sign a contract, to stipulate that the first way to solve any contractual disagreements is through mediation. Only if the conflict is not solved through mediation, does the contract stipulate that the parties will agree to use a specific arbitration court or a certain court of law. Although mediation had not been institutionalised previously, professional mediation centres and organizations specialized in conflict mediation and dispute solving have recently appeared.

Mediation is not unknown in the Romanian judicial system. An example is the International Arbitral Court established under the Chamber of Commerce and Industry of Romania and Bucharest. In addition various laws in the civil code (including the Romanian 'Commercial Code') have stipulated mediation and conciliation as the best methods for solving conflicts between parties.

In the context of the constant preoccupation at international level to promote alternative methods for dispute resolution, mediation became one of the main themes in the reform of the Romanian justice system. Promulgating a law regarding conflict mediation is now a priority for the Ministry of Justice. In this context, the project 'Low' regarding mediation in civil disputes and the establishment of the mediator profession aims to offer a viable regulation for mediation, as an alternative solution to solve conflicts. This will lead to an increase in the quality of the judicial act. The project also envisages the necessity to harmonize Romanian legislation with EU regulations, especially now that Romania is in the process of joining the European Union. European institutions have the promotion of the alternative methods for dispute resolutions as a constant preoccupation.

In addition to mediation, there is an amicable settlement procedure preceding the filing of an arbitration request, which is provided for in arbitration clauses in Romania.

Legal basis

Article 7201 of the Romanian Code of Civil Procedure provides that:

'In the trials and in the claims on commercial matters which can be evaluated in monetary terms, prior to submitting the request for litigation, the claimant shall attempt a resolution of the dispute through direct conciliation with the other party.'

'For the purpose shown in paragraph 1, the claimant shall invite the opposite party, communicating in writing its claims and their legal basis, and also any evidentiary documents supporting them. The invitation shall be done by registered letter with confirmation of delivery, by cable, telex, fax or any other means of communication providing a transmission of the text of the document and of the confirmation of its receipt. The invitation can also be done by handing the documents against a signature confirming their receipt.'

'The date in the invitation for conciliation shall not be sooner than 15 days of the receipt of the documents communicated according to paragraph 2.'

'The outcome of the conciliation shall be recorded in writing showing the claims against each other relative to the subject-matter and the standpoint of each party.'

'The document on the outcome of the conciliation, or, in case the defendant failed to comply with the invitation provided by paragraph 2, the evidence that since such invitation was received 30 days have passed shall be attached to the request for litigation'

It is usual to incorporate an ADR clause in business-to-business contracts. Clauses provide for amicable settlement, mediation/conciliation and med/arb. The arbitration checks whether this requirement was fulfilled.

Currently a bill has been submitted to the Parliament on the subject of mediation in civil matters and on organising the mediator profession.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
The Centre for the mediation of Commercial Disputes	Organised by the Chamber of Commerce and Industry of Romania and Bucharest	Mediation/conciliation, med/arb
Individual attorneys-at-law for the performance of the procedure provided by Article 720 of the Romanian Code of Civil Procedure		Mediation/conciliation, med/arb
The Centre for Mediation and Arbitration	Organised by the Union of Legal Counsels	Mediation/conciliation, med/arb
National Regulatory Authority for Communications	Government body appointed by law to resolve disputes arising during the pre-contractual stage	Mediation/conciliation, med/arb
National Regulator for Municipal Services	Ditto	Mediation/conciliation, med/arb
Romanian Energy Regulatory Authority	Ditto	Mediation/conciliation, med/arb
National Regulatory Authority in gas sector	Ditto	Mediation/conciliation, med/arb
Romanian Copyright Office (ORDA)	Ditto	Mediation/conciliation, med/arb

Relation between judicial dispute resolution and ADR

The vast majority of businesses resort to litigation; arbitration and ADR are complementary because of the lack of training/qualifications in the use of ADR. As yet a preference for this type of dispute resolution has not been achieved.

Role of the government

The Government has established a legal and institutional framework for developing some ADR.

Slovak Republic

Types of ADR

How long does take for the courts to make a decision on a certain type of dispute, how many procedures are required, how complex are these procedures, and how high is the cost of legal proceedings? These are all very important factors for businesses. If the duration of a procedure is very long, if the procedure is very complicated, or the costs are very high, then basically entrepreneurs cannot rely on contracts anymore to guarantee their rights. The World Bank measured this using the procedural complexity index. The Procedural Complexity Index varies from 0 to 100, with higher values indicating greater procedural complexity in enforcing a contract.

table 55 Resolving disputes

Country	No. of proce- dures	Duration (days)	Procedural complexity	Costs as		Abso- lute costs (in USD)
				% of GNI per capita	GNI per capita (in USD)	
Slovak Republic	26	420	40	13.3	3,950	525
Czech Republic	16	270	65	18.5	5,560	1,029
Hungary	17	365	57	5.4	5,280	285
Austria	20	434	54	1	23,390	234
Germany	22	154	61	6	22,670	1,360
Netherlands	21	39	46	0.5	23,960	120
Regional (Central East- ern European) average	25	344	56	27.9	2,478	691
OECD average	17	233	49	7.1	23,135	1,643

Source: World Bank, *Enforcing Contracts Survey, 2003*

Based on this table, we conclude that Slovak companies have to wait a long time before their dispute is solved, almost twice as long as the OECD average and that, compared to OECD average, dispute resolution in Slovakia is quite costly. Compared to the regional average, Slovak courts perform as poorly as the regional average, especially with regard to the time it takes to reach a verdict.

It seems that improving court performance is a long-term process. Therefore, in 2002 Parliament passed the Act No. 244/2002 Coll.L.L., allowing extrajudicial resolution- arbitration, which can at least partially alleviate this unfavourable situation.

Arbitration has become an alternative to court procedures according to Act No. 244/2002 Coll. on arbitration process and performance of arbitration results, which became effective on July 1, 2002. It is applicable to the broad range of property cases (except bankruptcy, cases about establishing, changing or cancelling ownership rights to tangible assets, and those cases that it is not possible to end in the court through reconciliation). Arbitration is faster and more flexible compared to judicial litigation. However the majority of procedures are the same. In practice, the most common case of establishing the jurisdiction of arbitration is the arbitration agreement. It is the agreement by the contractual parties that all or just some of the property disputes that originated or could originate between them in the specified contractual or other legal relationship, will be decided by the said way of arbitration. Arbitration represents the higher level of legal consciousness and the effort to solve lawsuits by alternative means mediated by private arbiters. There is still room for the introduction of other forms of alternative dispute resolution. Slovak legislation concerning arbitration is fully harmonized with EU legislation.

The arbitration proceedings before the Arbitration Court are usually conducted in accordance with its Rules published in the official Trade Gazette ('Obchodný vestník') unless the parties to the dispute have agreed otherwise. The Rules, as well as other informative materials, are at disposal of disputing parties and other interested persons, from the seat of the Court or the regional judicial branches, free of charge, in Czech, English, German, French and Russian. Its judgements are enforceable both domestically and internationally.

The Act concerns a reconciliation procedure to resolve property disputes that could otherwise end in court. Parties can draw up an agreement that specifies that all or some of

their disputes will be solved by such a reconciliation procedure. The referee can be any physical person approved by both parties. A legal entity can establish a permanent referee court. Currently, such courts are established by the Slovak Chamber of Trade and Industry, Slovak Chamber of Crafts and by the Chamber of Commercial Lawyers. There are also others that are more highly specialised e.g. in IPR etc.

The Government adopted the Mediation Act 420/2004 Coll.L.L. in force from September 1, 2004, to improve the situation in the courts. Mediation has been practised since the 90s, but the number of cases has been very low. There have been a total of only about 50 cases of b-to-b mediation.

Mediation is an informal, voluntary, structured and confidential process of resolving conflicts. Mediation allows participants to take an active part in conflict resolution as well as the management of the entire process. Mediation usually takes 2 - 3 hours.

Legal basis

The Mediation Act No. 420/2004 Coll.L.L. is applicable for resolving disputes in the area of civil, family, business and labour law. The mediator is a physical person chosen by the disputing parties. Mediation is an entrepreneurial activity. The mediator has to be registered at the Ministry of Justice. and can be an associate of a mediation centres.

When a dispute is resolved by mediation it must be recorded in a written statement by the disputing parties or it must be recorded in the minutes written by the mediator and signed by the disputing parties. All information is confidential.

The resolution is binding for both parties. Either party can ask for court execution when the resolution has the form of a legal deed.

It is usual to incorporate an ADR clause in business-to-business contracts. There is usually a general commitment to solve possible problems by mutual negotiations and reconciliation. Frequently no specific ADR procedure is explicitly mentioned. Arbitration can be mentioned as a way to solve larger conflicts.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Mediation centre	Registered	Mediation

Relation between judicial dispute resolution and ADR

It is necessary to realize that Slovak courts deal with about 25,000 business cases annually. In 2003 it was 23,245 and in 2002 23,476 cases. In 2003 there were 22,967 resolutions and in 2002 24,420 resolutions. The number of arbitrations is negligible in comparison. In 2004 there were cases involving a total of 134 million Sk (3.34 million €) and in 2003 this was 1,000 million Sk (25 million €). These were predominantly international cases.

Mediation is a quite rare procedure. There were about 50 business-to-business mediation cases during the last 10 years.

ADR and judicial litigation are seen as complementary means to resolve disputes. There is very low awareness concerning ADR. The community of lawyers is not very interested to raising this awareness or suggesting ADR as an option because their income from judicial litigation is much higher.

ADR is not usually considered as an option. The legal community prefers judicial litigation because of the higher fees. The general attitude to entrepreneurial ethics is poor, therefore the ADR approach is not considered as effective

Role of the government

Ministry of Justice ran several international projects during the period of the Mediation Act preparation. These included conferences and awareness raising campaigns in the media. Currently, there is a pilot project organised by the Ministry of Justice that includes 5 district courts: Bratislava 2, Bratislava 3, Košice 1, Prešov and Banská Bystrica. The aim is to raise the awareness of, and make suggestions for, mediation to disputing parties as a general practice for courts. Courts should also learn what type of disputes is best suited to mediation. Results will be disseminated.

There are incentives in the form of much lower court charges if parties choose ADR during the litigation.

Slovenia

Types of ADR

In Slovenia the most commonly used forms of ADR are: arbitration, conciliation, mediation (to be precise mediation associated with legal proceedings) and neutral evaluation. Of the listed forms of ADR only arbitration is governed by law and, to some extent, so is mediation (The Civil Procedure Act gives the court the right (in accordance with its own decision) to direct clients to one of the alternative forms of dispute solution during the proceedings). Some topical laws include the possibility to dispute the settlement of the third party. For example, the Employment Relationship Act authorizes the inspector who works in this area to settle a dispute between an employer and employee.

There are two institutional arbitrations in Slovenia. One is organised under the auspices of the Chamber of Commerce and Industry of Slovenia, and covers all commercial disputes and is also authorised to provide conciliation between the disputing commercial parties. The other is arbitration under the auspices of the Insurance Company Triglav, which is specialised in insurance disputes. The law also provides an opportunity to practise ad hoc arbitration.

In practice mediation takes place in the Regional Court (Okrožno sodišče) in Ljubljana, Koper and Nova Gorica. This form of ADR started in 2001 in the Court in Ljubljana as a pilot project, part of the PHARE project and it was expanded with neutral evaluation in 2003. In the beginning the programme included only civil disputes but was extended to include commercial disputes in 2003.

At present in Slovenia, there are many discussions about ADR in professional circles and, many activities in the field of ADR are being carried out in practice. Two good examples are the creation of the Mediation Centre for Insurance Disputes within the Association of Insurance Companies and the creation of the Financial Arbitration Court within the Slovene Consumer Association.

In April 2004, the Official Gazette of the Republic of Slovenia published, within the PHARE programme, an invitation to tender as a service provider for alternative forms of dispute solving associated with legal proceedings. The Regional Court in Ljubljana is mentioned as the contractual institution.

Legal basis

There is no general ADR legislation or specific provisions dealing with ADR issues, but only some specific provisions that are included in the internal rules of private mediation bodies. It is not usual to incorporate an ADR clause in business-to-business contracts.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Permanent Court of Arbitration attached to the CCIS (Chamber of Commerce and Industry of Slovenia)	Autonomous and independent institution	Mediation
Arbitration at Triglav Insurance Company	Autonomous and independent institution	Mediation
Arbitration at Stock Exchange of Ljubljana	Autonomous and independent institution	Mediation
Commission for Settlement Disputes	Independent body under the Real Estate Business Association at the CCIS	Mediation
Court annex Mediation at District Court of Ljubljana	Judges, independent lawyers	Mediation
Mediation Centre	Autonomous body under the umbrella of Slovenian Insurance Association	Mediation
Court of Honour at the Chamber of Craft of Slovenia	Autonomous and independent body under the Chamber of Craft of Slovenia	Mediation
Insurance ombudsman	Ombudsman within civil service	Ombudsman

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 5%/95%. ADR and judicial litigation are seen as complementary means to resolve disputes. In Slovenia there is no tradition of ADR. The tendency to 'have a day in court' is still predominant.

Role of the government

The government of Slovenia does not promote or stimulate ADR.

Spain

Types of ADR

In Spain it is possible to identify three main methods for settling possible disputes amongst enterprises, in addition to court-dispute resolution processes. In essence these methods are conciliation, mediation and arbitration. All three methods differ considerably from each other in both nature and contents.

Conciliation

This is a process in which a neutral third party tries to reach a common understanding of the reasons for the dispute, trying also to promote an agreement between both disputing parties in a friendly way. The conciliator cannot administer justice, and the disputing parties are not obliged to accept the proposed agreement.

Mediation

This is a voluntary, informal and confidential process in which a neutral third party with knowledge of the subject helps both parties to reach agreement themselves. Disputing parties are not obliged to accept the mediator's resolutions. It is a flexible and informal ADR method. If an agreement is reached, both disputing parties write a draft agreement, that can be accepted or not.

Arbitration

This ADR method is binding for both disputing parties. An arbitrator, after having obtained information, listened to both parties and done whatever is necessary, makes a binding decision ('laudo' in Spanish). This carries the same obligation as a judicial-dispute resolution. There are different types of arbitration depending on the issues dealt with, the scope, or the institution in charge or acting as arbitrator.

This method is by far the most commonly applied in Spain, and there is a large legal corpus dealing with the issue. However, this practice is relatively novel in the Spanish context. Since May 1981, it has been possible to identify the existence of a Spanish Court of Arbitration ('Corte Española de Arbitraje', assigned to the High Council of Chamber of Commerce of Spain and, in addition, it is also possible to identify the existence of a number of private enterprises specialising specifically in this field. Finally, it is also worth mentioning the existence of a White Book on Extra-court Mechanisms for Alternative Dispute Resolution ('Libro Blanco sobre Mecanismos Extrajudiciales de Resolución de Conflictos en España'). As a result of the issue of this White Book, a new Law 60/2003 on Arbitration was published in Spain in 2003 ('Nueva Ley de Arbitraje en España, Ley 60/2003, de 23 de diciembre, de Arbitraje).

Legal basis

In Spain there is a new Law on Arbitration, i.e. Law 60/2003 of 23rd December on Arbitration (in force since 2004), which substitutes the previous Law 36/1988 of 5th December on Arbitration. In addition to this, Law 34/2002, of 11th July, services for the information society and e-commerce makes an explicit reference to ADR mechanisms, and makes a concrete reference to the existing legal framework on both arbitration and defence of consumers and users.

Basically, the main advantages linked to the new Law on Arbitration include the following:

- The arbitration award is more effective, since even in those cases where it can be opposed, it will have executive power.
- The arbitrators have more power now, since they can propose precautionary measures without the need to ask for the intervention of a judge.
- The law also suggests the possibility to ratify partial arbitration awards.
- Unless there is agreement by both parties, arbitrators have to make a decision within six months.
- Under the new Law, it is possible for arbitrators to ratify an award based on a previous agreement reached by both disputing parties.
- The new Law also gives more freedom to disputing parties to select the arbitrators.
- Finally, the new Law does not fully fit into the traditional Spanish legal framework, which is intended to encourage the use of Spanish arbitrators by non-Spanish disputing third parties located outside Spain.

It may be said that in Spain enterprises are increasingly of the opinion that resolving disputes via judicial litigation is a costly and lengthy process. Therefore, there is an increasing tendency to include a clause for resorting to arbitration mechanisms to solve

disputes in contracts and therefore to avoid traditional judicial litigation. The inclusion of other possible ADR tools in contract clauses is very rare and practically non-existent. Unfortunately, it is impossible to offer even a rough estimation of these trends.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
'Corte Española de Arbitraje' (Spanish Court of Arbitrage)	The 'Corte Española de Arbitraje' under the Higher Council of Spanish Chambers of Commerce, a Corporation of Public Law.	Arbitration, mediation/conciliation
'Asociación Comunitaria de Arbitraje y Mediación' (ACAM)	Non-profit association specifically intended to administrate arbitration and mediation mechanisms	Arbitration, mediation/conciliation
'Corte de Arbitraje de Madrid'	Corporation of Public Law. The 'Corte de Arbitraje de Madrid' belongs to the Madrid Chamber of Commerce.	Arbitration, mediation/conciliation
'Tribunal Arbitral de Barcelona'	Non-profit association, funded amongst others by the Barcelona Chamber of Commerce and the Barcelona Lawyer Association.	Arbitration, mediation/conciliation
'Asociación Española de Arbitraje Tecnológico' (ARBITEC)	Non-profit association	Arbitration, mediation/conciliation
'Asociación Europea de Arbitraje de Derecho y Equidad' (AEADE)	Non-profit association	Arbitration, mediation/conciliation
'E-Global ADR Tribunal', of the 'Asociación Española para el Derecho y la Economía Digital (AEDED)' (Spanish Association for the Digital Law and Economy)	Non-profit association	Arbitration, mediation/conciliation

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx.10/15% - 85/90% (this is inclusive of arbitration proper). To give some data (in fact, the only data available), the arbitration and mediation cases passing through the Spanish Chambers of Commerce (the most important bodies in this field but not the only one) amounted to 447 arbitration final decisions, and 477 conciliation cases that were solved before being brought to an arbitration referee (data for 2003). Interestingly, and in comparison to the previous year, conciliation cases increased by 101.3% (from 237 to 477), whereas arbitration final decisions decreased slightly from 475 in 2002 to 447 in 2003. Around 74% of the demand for arbitration originated from enterprises and the remaining 26% from private persons, and 84% of cases had a mercantile nature in contrast to 16% with a civil nature. 44% of cases were solved within five months and 45% involved an amount of less than 30,000 euros.

Therefore, it is evident that enterprises are increasingly aware of these ADR mechanisms. However, according to a recent survey carried out by the Higher Council of Spanish Chambers of Commerce amongst Spanish enterprises and lawyers of the situa-

tion of Arbitration in Spain, only 10% of Spanish enterprises use this mechanism in order to solve their business conflicts within the national scope, where this percentage increases to 20% in the case of international arbitration. Interestingly also, arbitration is completely unfamiliar to 40% of Spanish enterprises

It is important to distinguish the different ADR mechanisms, Arbitration is seen as a competitive means to resolve disputes, in the sense that the decisions resulting from arbitration are legally binding and have the same effect as a judicial decision. Therefore, arbitration is seen as an alternative to judicial litigation as it has the same binding effect for both parties but it is less costly in terms of time and money. By way of contrast, and for other ADR instruments (i.e. mediation), the outcome resulting from such tools are not legally binding, so judicial litigation is seen as a complementary means whenever an agreement between both parties is not reached. Interestingly these ADR methods (especially Arbitration) were traditionally seen as an appropriate tool only for large enterprises and not for small ones.

In Spain, the main problem affecting ADR mechanisms is that these methods are completely unfamiliar for a very large percentage of enterprises, and are seen as being more appropriate for large enterprises than for small ones. In fact, there is hardly any tradition of using these tools, but this has been changing in recent years (again, especially amongst the largest enterprises). However, it is expected that with new Law on Arbitration, ADR mechanisms will be increasingly used by Spanish enterprises of all sizes. In this sense, and according to the results of the Higher Council of Spanish Chambers of Commerce's survey, those enterprises that have used Arbitration are very satisfied in terms of quickness, economy, privacy and specialisation. ADR mechanisms have a particularly good reputation for solving trade disputes due to their flexibility and adaptability, and they are especially well suited to solving those cases in which both parties have to, or are eager to, maintain their business relationship after the procedure or when both parties are geographically far away from each other (i.e. inter-national trade or e-commerce).

In addition, it is to note that, according to some estimations made by the General Council of the Judicial Power ('Consejo General del Poder Judicial', the Spanish higher authority in judicial matters), around 80% of the Spanish judicial decisions are finally of a rejective nature, which implies that judicial disputes are intended only to postpone the final fulfilment of the agreements (information quoted in: Proyecto i+Confianza, Libro Blanco sobre Mecanismos Extrajudiciales de Solución de Conflictos en España (White Book on Non-judicial Mechanisms for Solving Disputes in Spain), Madrid, December 2002)).

Finally, and related to the previous item, it is worth emphasising that there is a certain cultural tradition in Spain to 'go to court', or at least to believe only in those mechanisms that imply a certain 'obligation' for disputing parties. This is the reason why ADR mechanisms are not so popular, an exception is made for Arbitration and, to some extent, for Mediation/Conciliation

Role of the government

The most important public development in this field is the recent approval of a new Law on Arbitration, this is Law 60/2003 of 23rd December on Arbitration (in force since 2004), which replaces the previous Law 36/1988 of 5th December on Arbitration. This new law is intended to establish a stable and well defined legal framework that can

help to definitively develop ADR mechanisms in Spain, basically as far as Arbitration is concerned.

Meanwhile, and as far as mediation/conciliation is concerned, the 'Consejo General del Poder Judicial' (General Council of Judicial Power) (the higher Judicial Authority in Spain) has suggested in several reports that mediation/conciliation should be encouraged as a tool to improve the functioning of Justice in Spain through the alleviation of judicial proceedings. In this sense, and in recent years, it is possible to identify an increasing trend to use this method as a means to avoid judicial or arbitration procedures, much more expensive in terms of time, financial and emotional resources.

In May 2001 there was agreement between the two most important political parties in Spain (Socialist and Popular Party), the 'Pacto de Estado para la Reforma de la Justicia' (State Agreement for the Reform of Justice). One of the results of this agreement refers to the need to foster judicial litigation through the development of more efficient formulae of arbitration, mediation and conciliation. One result of this agreement was the passing of new Law 60/2003 of 23rd December on Arbitration.

In addition to this, it is interesting to identify an increasing private supply of training courses and studies on the issue of mediation and conflict resolution revealing an increasing interest in society for this issue. Some of these courses have university status, basically post-graduate courses and are provided by several Spanish private universities. Finally, it is worth mentioning the key role that the Spanish Chamber of Commerce (through their arbitration courts) are playing to increase the use and perception of arbitration and other ADR mechanisms amongst the Spanish enterprises in general and SMEs in particular.

Sweden

Types of ADR

For a long time, alternative dispute resolution and ADR-organisations have been part of the Swedish legal system. It is generally accepted that ADR contributes to alleviating the workload of the Swedish courts. ADR has become a standard instrument of the Swedish judge, but has also developed outside the courts. One example of the many ADR-organisations with a legal statute is the Allmänna Reklamationsnämnden (National Council for Consumers' disputes). The decisions of the Council are non-binding recommendations. However, approximately 75% the (SME) entrepreneurs abide by the recommendations of the Council. The procedure by the Allmänna Reklamationsnämnden is free of charge.

Civil disputes

The Swedish Civil Code distinguishes two phases of a legal procedure. The förberedelsen (preparatory phase) and the oral huvudförhandlingen (litigation phase). During the preparatory phase, conducted under the leadership of the judge, a case is prepared for litigation. Another important objective of the preparatory phase is to explore possibilities of resolving the dispute by means of a förlikning (conciliation). If the parties opt for conciliation, then the judge will act as the conciliator. The judge-conciliator first consults both parties together, followed by an individual consultation. If the conciliation under the judge results in an agreement, the judge will formalise this agreement in the form of an official ruling. The majority of civil disputes that are brought before the

court are solved in this way (i.e. through conciliation). Apparently the disputing parties favour conciliation by a Swedish judge.

If the parties are unable to reach an agreement with the help of a judge-conciliator, the judge-conciliator can refer the parties to a mediator that has been approved by both parties. This mediator can focus on the interests of the parties (something the judge cannot do). When the parties find a solution to their conflict with the assistance of the mediator, they can request the judge to convert the mediation agreement into an official verdict.

Administrative disputes

The Swedish administrative procedures, contrary to the civil procedures, are written procedures. The general opinion therefore is, that ADR is not a suitable method for resolving administrative disputes.

Legal basis

Arbitration is firmly rooted in the Swedish legal system. It is not usual to incorporate an ADR clause in business-to-business contracts. Until now the rules and practices in mediation have not been formalised in Sweden. However, judges may propose mediation before the case is brought to court, and in some cases also appoint external mediators. Both judges and lawyers may be mediators. There is, however, no certification or formal requirements connected to the activity.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Stockholm Chamber of Commerce	Specialised commercial agency	Mediation

Relation between in-judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 1% or less/99%. ADR and judicial litigation are seen as complementary means to resolve disputes.

Role of the government

Stockholm Chamber of Commerce is the only institute that stimulates and implements ADR as a means to settle disputes.

Turkey

Types of ADR

In Turkey, the Commercial Courts of First Instance and the Execution Offices handle the majority of commercial disputes. Both these authorities have wide experience in handling complicated commercial disputes. However, in Turkey the parties to a commercial contract may also agree to refer or submit a possible future dispute to arbitration. They may do so by entering into an agreement (arbitration agreement) or by incorporating a provision (arbitration term) in the contract. In both situations, the important issue is that both parties are willing to refer and submit the dispute to arbitration. This submission should be reflected in the agreement in a clear and explicit manner without leaving any room for confusion.

Other than arbitration no other form of ADR is acknowledged in the Republic of Turkey.

Legal basis

On 30 September 1992, the republic of Turkey ratified the New York Convention of 1958. 'In accordance with the Article I, paragraph 3 of the Convention, the Republic of Turkey declares that it will apply the Convention on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting State. It further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law.'¹

On 21 June 2001, the Turkish Parliament enacted the Turkish International Arbitration Law No. 4686 ('Law No. 4686' or 'Law'). This new law, which had been on the agenda of the Ministry of Justice for the last few years, was finally enacted as one of the commitments of the Turkish Government to the International Monetary Fund and the World Bank. Law No. 4686 sets forth the rules applicable to arbitration proceedings:

- 1 Used for resolution of disputes arising from contracts containing a foreign element, which will be held in Turkey; or
- 2 Used for other arbitration proceedings outside or within Turkey if and when chosen by the parties or the arbitrators thereof.

The text of the law and its reasoning gives the clear impression that it was based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, although there are also a number of differences.

Choice of both domestic arbitration (under the provisions of the Turkish Civil Procedural Law No. 1086 ('Law No. 1086') and international arbitration (under the Turkish International Private Law and Procedures Law No. 2675 ('Law No. 2675')) have been available in many circumstances in the past. But disadvantageous provisions in both laws, and the application thereof by the Turkish courts, have limited the ability of parties to benefit from arbitration to a significant extent.

The new Law No. 4686 does not recognize arbitration held in Turkey as being purely local arbitration and provides for an alternative to the application of Turkish procedural laws (Laws 1086 and 2675) in arbitration proceedings within Turkey. The selection of Turkish procedural laws and/or the venue of the arbitration being in Turkey have been the criteria most frequently used by the Turkish courts in categorizing arbitration as local. Thus, the purpose of Law No. 4686 appears to be better conduct of arbitration in Turkey and consequently to encourage the flow of foreign investment into Turkey.

Organisations

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Trade Chambers	Professional Associations	Alternative forms of arbitration
Trade Exchanges	Professional Associations	Alternative forms of arbitration
Union of Chambers & Exchanges	Professional Associations	Alternative forms of arbitration
Art and Craftsmen Chambers	Professional Associations	Alternative forms of arbitration

¹ Source: http://interarb.com/vl/pages/Geographic_index/Asia/Turkey/

Relation between judicial dispute resolution and ADR

The ratio ADR/judicial adjudication is estimated to be approx. 10%/90%. This is arbitration only. ADR and judicial litigation are seen as complementary means to resolve disputes.

Since courts are overloaded, processes take too long. Therefore a functional ADR system in Turkey may be welcomed by SMEs, and also reduce the heavy load on courts.

Role of the government

Sometimes the government declares it is their intention to develop ADR regulations but as yet this has not been realized.

United Kingdom

Note: The United Kingdom has three different legal systems: England and Wales, Scotland and Northern Ireland. Each system has its own characteristics. The information on ADR in the United Kingdom in this section applies mainly to the situation in England. Some comments about the ADR situation in Scotland are presented at the end of this section.

Types of ADR

For some time it has been UK Government policy that disputes should be resolved at a proportionate level, and that the courts should be the last resort. Although ADR is independent of the judicial system, a judge can recommend that parties involved in litigation should first attempt to resolve the dispute through ADR. The court may also impose sanctions if it decides that one or more of the parties has/have been unreasonable in refusing to attempt ADR.

The UK courts will also take pre-litigation behaviour into account including whether or not an attempt has been made to use ADR. For some types of dispute, there are specific pre-action protocols to set out the steps parties are expected to take before starting judicial proceeding. For all other types of disputes parties are expected to follow the Practice Direction for pre-action Protocols.

Common types of ADR, used in the UK are:

- Arbitration such as the Association of British Travel Agents, a scheme to deal with problems in the travel industry, in particular with package holidays.
- Mediation is increasingly used in commercial, personal injury and clinical negligence cases. But that short list is not restrictive.
- Contractual adjudication

Less familiar methods include:

- Neutral Evaluation where a neutral third party provides a non-binding assessment of the merits of the case.
- Conciliation, which is similar to mediation but the third party, (conciliator) takes a more interventionist role.
- Expert Determination where an independent expert is used to decide the issue.
- Neutral Fact Finding is used in cases involving complex technical issues where a neutral expert investigates the facts of the case and produces a non-binding evaluation of the merits.
- Med-Arb (a mixture of mediation and arbitration) where parties agree to mediate but refer the dispute to arbitration if the mediation is unsuccessful.

- Ombudsmen such as the Parliamentary Ombudsman, the various Regulators like the Energy Regulator, Ofgen or the Rail Regulator.
- Mini-trial

Legal basis

The Civil Procedure Rules, introduced in 1999, place great emphasis on the fact that parties in a dispute should make every attempt to resolve cases without going to court. Judges are also strongly encouraged to facilitate that process.

Extract from a speech by the then Lord Chancellor, Lord Irvine, to the Faculty of Mediation and ADR in January 1999.

'In the UK the Centre for Dispute Resolution (CEDR) was launched with the support of the Confederation of British Industry in 1990 to promote ADR in dispute handling. CEDR pro-motes ADR, trains and accredits mediators and arranges mediations and they claim a 95 per cent success rate in resolving disputes. The Academy of Experts, although its main purpose is to promote the better use of experts, is also at the forefront in the development of ADR processes and was the first UK body to establish a register of qualified mediators. The British Association of Lawyer Mediators was set up in 1995 with the aim of promoting mediation in the UK and of the role of lawyers in mediation and the maintenance of high professional standards. The City Disputes Panel, was founded in 1994 to settle financial disputes in the financial services industry. Its panel-lists are dedicated to the resolution of financial disputes through mediation, evaluation, determination and arbitration. Also the use of ADR has been established in the UK in resolving family and divorce disputes, employment disputes, environmental disputes, and community or neighbourhood disputes.

The Government freely recognises that ADR has a significant part to play in the delivery of civil justice.'

Government departments and agencies have made the following commitments about the resolution of disputes involving them:

- Alternative Dispute Resolution will be considered and used in ALL suitable cases wherever the other party accepts it.
- In future Departments will provide appropriate clauses in their standard procurement contracts on the use of ADR techniques to settle their disputes. The precise method of settlement will be tailored to the details of individual cases.
- Central government will produce procurement guidance about the different options available for ADR in Government disputes and ADR might be best deployed in different circumstances. This will spread best practice and ensure consistency across Government.
- Departments will improve flexibility in reaching agreements on financial compensation, including using an independent assessment of a possible settlement figure.

At the moment these pledges do not apply to local government authorities or agencies

Promotion of ADR became a key strategic imperative for the Department of Constitutional Affairs (DCA) following the publication of the Government's 2002 Spending Review White Paper. The former Lord Chancellor's Department's Public Service Agreement (PSA) included a target to reduce the proportion of disputes resolved by resorting to the courts. In particular, two sub-targets have been set to reduce the number of allocated cases that are resolved by a civil trial. The key activities in the PSA Delivery Plan to achieve these targets are a range of initiatives to promote mediation.

There are two strands to the DCA work to meet the PSA3 target:

1. Initiatives are being developed that will help people resolve their disputes in the earliest possible stage so that they do not have to incur the costs and stress that may be involved in entering the judicial system.
2. For those people who feel it necessary to have recourse to court proceedings, mediation will be promoted as an alternative, faster method of resolving their dispute.

The following ideas are also being developed:

Court Mediation Schemes

A range of court-based and court-endorsed mediation schemes have been developed over recent years.

Automatic Referral to Mediation Scheme (ARMS)

An automatic referral scheme is being piloted at the Central London Civil Justice Centre. Under the scheme, a selection of appropriate cases allocated to the fast- and multi-tracks proceedings are automatically referred to mediation. The standard directives for court proceedings are suspended while a mediation appointment is arranged. Parties can opt-out of the scheme if they feel that pursuing mediation would be fruitless. However, the reasons for opting out will be recorded in the court register, and a party/parties that has/have refused mediation may find themselves subject to an adverse cost order at the end of a trial if the trial judge feels that a settlement could have been achieved earlier on.

The scheme commenced in April 2004 and will run until March 2005.

Mediation Advice Service

A civil mediation advisor has been appointed for a trial period by Manchester Combined Court Centre. The advisor is primarily available to talk to parties attending case management conferences at the court, but is also available to the general public. She does not actually mediate cases but discusses with and informs parties about the benefits mediation may bring to their case, and then sets up a mediation appointment with a local provider if they choose to try the process.

The scheme commenced in March 2004 and will run as a pilot until the end of December 2004. The scheme is currently being evaluated and a decision on its future will be made in the coming months.

Proportionate Dispute Resolution

The DCA is also developing a vision for Proportionate Dispute Resolution (PDR). PDR is about much more than ADR.

The vision for PDR is that people have access to the information and the range of services they need to understand their rights and responsibilities, avoid legal problems where possible, and where not, to resolve their disputes effectively and proportionately. This vision is a radical departure from the traditional approach to civil justice, which focuses first on courts, judges and judicial procedure, and second on legal aid to pay mainly for litigation lawyers.

Mediation, however, is not compulsory.

It is usual to incorporate an ADR clause in business-to-business contracts. The general consensus is that in the construction industry ADR clause in contracts is widely used. The construction industry uses adjudication as their preferred ADR method. Other industries do not yet seem to have adopted ADR so quickly.

Organisations

Numerous bodies are available in connection with dispute resolution e.g.:

- Centre for Effective Dispute Resolution (CEDR)
- Chartered Institute of Arbitrators
- Permanent Court of Arbitration - The Hague
- Academy of Experts
- The ADR Group
- Mediation UK
- The Law Society
- The Community Legal Service

In addition there are many commercial bodies providing ADR services including 'on-line' services.

<i>Institution</i>	<i>Status</i>	<i>Type of ADR</i>
Adjudication.co.uk	Adjudicator nominating body	Adjudication
Independent Lawyers		Adjudication
CEDR (Centre for Effective Dispute Resolution)	An independent non-profit organisation	Expert determination, mediation, mini-trial, neutral evaluation
National Mediation Helpline	Government supported independent pilot scheme involving DCA and the Civil Mediation Council	Mediation
The Academy of Experts	Professional body for Expert Witnesses both in the UK and around the world	Mediation
ADR Group	Private company, providing conflict management services	Mediation, neutral evaluation
ADR Chambers UK	Private company providing mediation, arbitration and neutral evaluation services	Mediation, mini-trial, neutral evaluation
The Chartered Institute of Arbitrators	Independent professional association	Mediation
In Place of Strife	Private company providing an independent panel of highly experienced and distinguished commercial mediators	Mediation
ACI (a commercial initiative for dispute resolution)	Private legal practice, law firm	Mini-trials, neutral evaluation
Solutions Mediation Centre Ltd	Private company	Mini-trials
Consensus mediation	private company	neutral evaluation

Relation between judicial dispute resolution and ADR

The DCA annual report 2003/2004, reported a significant increase in the use of ADR compared to the initial year when 49 cases were reported, in the period March 2002 to April 2003 when 619 cases were reported. The estimated saving was £17m to June 2003 (NB. This is a measure only of the cases that passed through the judicially directed system and accepted mediation as an option.).

ADR and judicial litigation are seen as complementary means to resolve disputes.

Interest in alternative dispute resolution (ADR) has been growing steadily among the Judiciary and legal profession over the last decade. A significant impetus came from Lord Woolf's Access to Justice report (1996) that identified the need for fair, speedy and proportionate resolution of disputes. Those principles are at the heart of the Civil Procedure Rules (CPR), which came into force in April 1999. The CPR included references to ADR in rules of court and introduced pre-action protocols, with their emphasis on settlement, even before judicial proceedings are issued. (Department of Constitutional Affairs)

However: DCA also note that there is a strong perception that anything that speeds up dispute resolution will reduce the amount of conventional legal work (thus competitive with the litigation process)

It has been suggested in more than one report that some opposition to ADR has resulted from the idea that if resolution is not achieved by ADR then the total cost of resolution will be increased, as recourse to the courts will be necessary.

Also some researchers suggest that the process of ADR can expose the parties' arguments, which could be damaging should the matter go to court if ADR failed.

On the 'consumer' side many parties are simply not aware of alternative methods of resolution, particularly those with smaller claims (perhaps SMEs)

Role of the government

The DCA has a Public Service Agreement (PSA) which is dedicated to reducing the proportion of disputes that are resolved in the civil courts

For some time, it has been Government policy that disputes should be resolved at a proportionate level, and that the courts should be the last resort. Under the Civil Procedure Rules, parties involved in litigation are encouraged to use Alternative Dispute Resolution (ADR) procedures, and in certain circumstances, a judge can recommend it. The court can also impose sanctions if it decides that one or more of the parties have been unreasonable in refusing to attempt ADR.

Scotland

Types of ADR

All forms of 'ADR' available in other parts of the UK (England, Wales and Northern Ireland) are also available in Scotland.

Legal basis

Scotland has ADR legislation:

- Civil Evidence (Family Mediation) (Scotland) Act 1995 :
http://www.opsi.gov.uk/acts/acts1995/Ukpga_19950006_en_1.htm

It is becoming normal for mediation clauses to be included in commercial agreements such as partnership document

Organisations

<i>Institution</i>
Core Mediation Ltd
Catalyst Mediation Ltd

Relation between judicial dispute resolution and ADR

Less than 5% of civil Court actions taken in Scotland result in a full hearing before a Judge (or Sheriff). The vast majority of litigation is settled extra judicially by the parties.

ADR and court litigation are seen as complementary means to resolve disputes. The Scottish Mediation Network is very clear that mediation is an additional option in the range of methods available for handling disputes. Mediation is not a mandatory option and has its place alongside the formal litigation process.

Role of the government

The Scottish Executive (devolved government in Scotland) is committed to 'encouraging' the use of ADR where it is appropriate. It presently funds a mediation service in Edinburgh Sheriff's Court available for Small Claims (under £750). Two new mediation pilots in Aberdeen and Glasgow Sheriff Courts are about to be set up for all levels of dispute. (<http://www.scotland.gov.uk/Topics/Government/SPD/17424/incourtmediationpilot>)

The Scottish Executive funds family mediation and neighbour mediation across the country. These are not geared specifically to SMEs but undoubtedly assist them as they assist their owners and employees.