

# Individual disputes at the workplace: Alternative disputes resolution



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*This report examines the use of alternative disputes resolution (ADR) as a means of settling individual workplace disputes before they go to a court hearing. It is based on national reports from the EIRO correspondents for 27 countries. The report begins with a broad definition of ADR, which involves the methods of conciliation, mediation and arbitration, further distinguishing between judicial and non-judicial forms of ADR. It goes on to examine the trends in ADR use and how workers gain access to such services. This is followed by an overview of people providing ADR services and a brief synopsis of social partner views on such procedures. In general, ADR appears to be most successful in resolving ambiguous and complex disputes. Attitudes towards ADR seem to be becoming more positive, with advocates viewing it as a more speedy and cost-effective alternative to court proceedings.*

## Introduction

### Defining alternative disputes resolution

All countries in the European Union (excluding France as no country report was received for this country) allow for individual worker disputes concerning alleged breaches of employment law to be heard in an appropriate court of justice – whether a specialist labour court or a civil court. The issue addressed by this comparative analytical report is the use of means seeking to resolve the problem before a full hearing takes place, that is, through alternative disputes resolution (ADR) procedures. A narrow definition of ADR is the use of third parties engaging in conciliation, mediation and arbitration prior to a court hearing. This can be action by a legal authority, often the court judge, immediately prior to a hearing in an effort to resolve the dispute. Alternatively, or in addition, it can involve the appointment of publicly-funded specialists, or private experts – either once an application has been made but before a court hearing is fixed, or before the claim has been made. These types of ADR linked to the judicial process are referred to as ‘judicial ADR’. In addition, some countries emphasise the role of the social partners in the workplace, or sometimes in the region or sector, in providing an avenue for a worker to resolve a dispute at the level of the works council or similar institutions aligned to collective bargaining. These are referred to as ‘non-judicial ADR’. Five distinct types of ADR are evident, as follows.

- **Conciliation:** In this type of ADR, the third party acts only as a facilitator by maintaining the two-way flow of information between the conflicting parties and encouraging a reconciliation between their antagonistic positions. The third party listens to each side, usually in person or sometimes by phone, and seeks to find an acceptable solution. Such solutions can include compensation or, alternatively, measures taken in the workplace. The conciliator does not make a judgement or suggest a solution, but works with the applicant and the employer to find an acceptable outcome, which is then recorded. In some countries, the law requires that before the matter can be heard in a labour court or tribunal, the applicant must use the services of a conciliator. If agreement is reached, it would be normal for the case to be withdrawn from the tribunal and registered as ‘settled’.
- **Mediation:** In this form of ADR, an impartial third party – the mediator – helps two or more people in dispute to attempt to reach an agreement. There are two types of mediation. One type is similar to conciliation, whereby the mediator meets the parties, or sometimes reviews written submissions, with a view to finding an acceptable solution and then issues a non-binding decision or recommendation. This is often done in writing. Such a process is similar to the well-established principles of mediation in collective labour disputes. The second type of mediation is referred to as ‘relational mediation’, based on the principles of collaborative problem-solving, with the focus on the future and rebuilding relationships, rather than on apportioning blame. The mediator guides the parties towards finding their own solution by getting them to explore different and new ways of thinking and acting. This approach has its origins in family mediation. Relational mediation is usually conducted without representatives or lawyers being present and no written decision is issued.
- **Arbitration:** In this case, the third party hears the case presented by each person and makes a binding ruling on the outcome.

- Labour inspectors or ombudsmen: Some countries use specialist experts known as labour inspectors and/or ombudsmen – as seen in Hungary, the Netherlands, Norway and Romania. Private companies sometimes appoint ombudsmen to deal with individual disputes inside their workplaces – as is the case in Ireland. In some countries, the ombudsman is appointed by the state to deal with particular types of disputes, such as discrimination.
- Non-judicial ADR: These alternative means of ADR involve the social partners engaging in joint efforts to resolve the problem through negotiation, problem-solving and/or the use of grievance and disciplinary procedures. In this instance, the case is heard, a decision is made and there is often the chance of an appeal – all within the workplace or at the level of the sector and/or region.

### Complexity of ADR

Some countries use both types of ADR, including Ireland, Italy, Luxembourg and the United Kingdom (UK). Other countries have a long tradition of reliance on the social partners through collective agreements and/or works councils for non-judicial ADR, with the use of judicial ADR being very limited – as seen in countries such as Austria, Denmark, Germany and Sweden. In certain countries, a distinct form of non-judicial ADR in the workplace is the use of bipartite conciliation commissions, sometimes called Labour Disputes Commissions. These commissions can be found in Estonia, Latvia, Lithuania and Poland.

In no country is one method relied on to the exclusion of others. A clear finding of this analysis is the complexity of provision and the use of multiple methods of ADR at the level of the workplace, sector or region and linked to the courts. The distinction between conciliation and traditional forms of mediation is often difficult to draw.

This complexity often makes it hard for the **EIRO national centres** to provide a rounded picture of ADR. All of the respondents reported on judicial-based ADR but some paid less attention to non-judicial arrangements – perhaps, in part, because these were taken for granted. What is also clear is that the type of ADR arrangements in use is strongly influenced by the wider arrangements for structuring of the employment relationship within each country. These arrangements reflect the historical development of the institutions of industrial and employment relations over many decades.

Elsewhere, declining levels of trade union membership and the emergence of non-union sectors with no tradition of collective bargaining have led, in some countries, to the emergence of new approaches to ADR. A good example is Ireland, where foreign-owned multinational companies have pioneered non-judicial forms of ADR in their establishments, wishing to downplay the more union-led forms of ADR that have operated in that country for many years. Moreover, Ireland is a good example of other types of complexity, where ADR for particular issues takes a different route from ‘normal’ disputes. In this case, separate legislation is in place establishing ADR for discrimination cases and involving the creation of specialist institutions such as a Rights Commissioner. This is also evident in Austria, where disputes on both disability and apprenticeships are dealt with using special procedures.

It is hard to capture and summarise all of the complexity of ADR while, at the same time, linking the emerging patterns to the social, economic and legal historical context of each country. In general, there is little concrete data on the extent of ADR usage or on recent trends. This is usually because these types of data are not collected, which is itself a reflection of the relatively low priority given to ADR in many countries. Moreover, eight countries have different arrangements for dispute handling in the public sector, especially the civil service, from the private sector – namely, Austria, Cyprus, Denmark, Finland, Germany, Italy, Malta and the Netherlands. These special arrangements are not reviewed in this report.

In addition, some 15 countries have introduced new laws or procedures since 2000 to provide alternatives to court proceedings – namely, Belgium, Bulgaria, the Czech Republic, Finland, Hungary, Italy, Luxembourg, Malta, the

Netherlands, Norway, Portugal, Romania, Slovakia, Slovenia and the UK. In four countries – Finland, Portugal, Romania and the UK – these measures have involved the establishment of specialist mediation bodies or processes. In seven countries, these innovations are attributed to the need both to reduce the cost of court or tribunal cases and to speed up the process. The time between an application being made to a court and its subsequent resolution can take months and, in a few cases, over a year.

### Structure of report

The first part of this report sets out to establish patterns of ADR usage – initially, by looking at judicial ADR and then by examining non-judicial ADR. This is followed by an analysis of trends in the use of ADR in the few countries where data exists, along with an overview of how workers gain access to ADR services. Rather more attention can be given to the type of people who provide ADR services, how they are paid for this activity, and their involvement in subsequent court proceedings if ADR has not been successful and the case proceeds to a hearing. The views of the social partners towards the potential of ADR are then considered, followed by some concluding remarks.

### Patterns of ADR usage

Marked differences are evident in the extent to which ADR is used to deal with individual disputes. Table 1 provides a general overview by listing the countries with extensive use of ADR, whether judicial or non-judicial. The accompanying column lists those countries where ADR has not been developed or where its usage is minimal or not fully established.

Table 1: *Extent of ADR use, by country*

Countries with low use of ADR	Countries with medium/high use of ADR
Belgium (BE)	Austria (AT)
Bulgaria (BG)	Cyprus (CY)
Czech Republic (CZ)	Germany (DE)
Estonia (EE)	Denmark (DK)
Finland (FI)	Ireland (IE)
Greece (EL)	Italy (IT)
Hungary (HU)	Malta (MT)
Latvia (LV)	Norway (NO)
Lithuania (LT)	Spain (ES)
Luxembourg (LU)	Sweden (SE)
Netherlands (NL)	United Kingdom (UK)
Poland (PL)	
Portugal (PT)	
Romania (RO)	
Slovakia (SK)	
Slovenia (SI)	

Source: *EIRO national centres, 2009*

Countries with a relatively high use of ADR are referred to in the subsequent text by the main form of ADR used where explanations for high use of ADR may be found. Of interest here are the 16 countries in Table 1 that are listed as having relatively low levels of ADR activity. It is hard to discern clear patterns to explain this paucity of ADR arrangements. In some countries, especially the new Member States in central and eastern Europe, new forms of labour legislation, such

as a labour court, and associated activities have either not been developed or recent initiatives have yet to take root – as is the case in countries such as Bulgaria, the Czech Republic, Romania and Slovenia. Alternatively, where such procedures have been initiated, there is a reluctance to use them, as observed in the case of Poland (see box below).

### Reluctant use of ADR arrangements – Poland

In Poland, various avenues are open for the use of ADR – including out-of-court settlements, court supervised settlements, the use of a mediator and/or arbitration linked to the court. Despite these arrangements – and while there were about 180,000 labour law cases brought before the civil courts in 2008 – ‘the number of disputes resolved by ADR is negligible; the social partners speak of about a dozen cases a year, the majority of them settled before the conciliation commissions’ (Polish EIRO national centre, 2009). How can this be explained? The national centre suggests that ‘the largest obstacle to propagating ADR in Poland is constituted in reluctance on the part of employees, who are unwilling to trust methods other than court proceedings. Trade unions are in favour of ADR, the employers are ambivalent and the government thinks it has done enough in establishing a mediation council for use in a wide range of civil court cases. In order to bring about change, there will be a need not only for involvement of the social partners, but also for a change in the mindsets of employees and employers alike. Such change may be difficult to achieve, given the generally low trust in public institutions among Poles’ (*ibid*).

## Types of ADR in use

### Conciliation

Seven countries have established procedures whereby a dispute is considered by a specialist third party before it comes to court. These countries are Cyprus, Ireland, Italy, Malta, Norway, Spain and the UK. In some cases, this procedure is compulsory in the sense that the court needs to be satisfied that attempts have been made to resolve the matter before a hearing commences. In other instances, there is an expectation that the aggrieved worker will use the alternative route. By definition, these countries have a high use of judicial ADR.

Three countries are selected to illustrate the way forms of compulsory conciliation operate – namely, Norway, Italy and the UK (see box below). This also allows for the complexity of arrangements to be appreciated.

### Examples of compulsory conciliation

In Norway, most cases must be brought before the Conciliation Board, which helps the parties achieve a simple, swift and cheap resolution of the case. In addition, there is a Dispute Resolution Board, which deals with cases particularly related to the Working Environment Act, such as working time, flexible working, and entitlements to absence. Under the Dispute Act, which regulates conciliation, the option also exists to use mediation as a further step. This can be either through out-of-court mediation, where the mediator is agreed by the parties, or through judicial mediation by the judge or by a legally qualified person on the courts’ list of mediators.

In Italy, recourse to the judicial authorities for the resolution of a labour dispute must be preceded by a mandatory attempt at conciliation – referred to as ‘administrative conciliation’. This takes place before a special board instituted by the relevant Provincial Labour Directorate. If the judge ascertains at the beginning of the court procedure that no attempt has been made to use conciliation, the proceedings may be suspended and the parties ordered to use the procedure. The administrative difficulty in setting up a conciliation hearing, especially in the public sector where different rules apply, can lead to lengthy delays. Alternatively, a worker may give written permission to a trade union to attempt ‘trade union conciliation’ in the workplace. If the outcome is registered with the labour directorate, it is deemed valid. In non-union organisations, the equivalent process available is called a ‘transaction’, ending in a written agreement or decision. Issues relating to the payment of wages can be dealt with by ‘monocratic conciliation’ at the

Provincial Labour Directorate prior to a formal intervention of the labour inspector at the behest of the worker. A recent development, introduced in 2004, is a form of non-judicial ADR where the management and trade union can request a certification of the working relationship, presumably showing the quality of procedures for handling grievances and disciplinary matters.

In the UK, each application by an individual worker to an **Employment Tribunal** is referred to a conciliation officer at the Advisory, Conciliation and Arbitration Service (**Acas**). Proportionally, the largest volume of cases (42%) concern unfair dismissal. Unusually, and indeed perhaps uniquely, the conciliator will only rarely hold a hearing in an effort to resolve the matter. Instead, they usually prefer to deal remotely with the employer (or a legal representative) and the worker (or the worker's representative such as a trade union officer or lawyer) by phone or email. Generally, the conciliator seeks agreement on compensation rather than reinstatement, given that most applicants have left their employment before applying to an Employment Tribunal. If the case comes to a hearing, the tribunal has, since April 2009, the power to vary a financial award by up to 25% if either the applicant or the employer has failed to follow Acas guidance – the latter was issued in 2009 as a code of practice on the operation of disciplinary and grievance procedures. Thus, ADR in the UK covers both the narrow definition of judicial ADR concerning the role of a third party and the broader definition of non-judicial ADR through the encouragement of workplace procedures. In addition, 'pre-claim conciliation' is being pioneered – in this instance, when Acas knows of a dispute, usually as a result of someone calling their telephone helpline, the parties are approached to explore the possibility of finding a resolution before an application is made to an Employment Tribunal. Relationship-based mediation is also increasingly being used in an effort to deal with problems of bullying, harassment and the breakdown of relationships while the aggrieved worker is still in employment.

However, not all conciliation is compulsory. For example, in Hungary and Germany, conciliation is linked to court proceedings (see box below).

#### Conciliation linked to court proceedings

In Hungary, some labour court judges are using the first court hearing to explore the possibility of a settlement, and the 'real' hearing only occurs if this fails. The Hungarian EIRO national centre reports that 'it is not uncommon that the parties conclude an agreement at the first hearing, during the pause in proceedings or at a later stage. The parties and their lawyers are well aware of uncertainties, as well as the time-consuming and costly nature of disputes settled by court'.

In Germany, the labour courts have exclusive jurisdiction over virtually all legal conflicts between the employer and employee arising from the employment relationship. Labour court proceedings aim to be simple, speedy and inexpensive. Every case brought before the labour court begins with a conciliation hearing heard by the chairperson acting alone. The purpose of this approach is to achieve an amicable settlement, usually a compromise between the parties, before recourse to a formal hearing. The parties may also agree to mediation at this stage.

#### Mediation

Mediation is growing in use, and a number of the countries developing new forms of ADR in the 2000s have begun to use either court-based or private forms of mediation. Overall, 19 countries had arrangements for mediation – Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, Germany, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Norway, Portugal, Romania, Slovakia, Slovenia, Spain and the UK. Most mediation takes the traditional form, whereby the third party hears both sides and seeks to find an acceptable resolution before issuing a non-binding decision or recommendation, usually in writing. In some cases, the mediator reviews written submissions. A variety of methods are



used to initiate mediation. Mediation can be offered or arranged by the courts and/or operated outside the judicial system (see box below).

### **Court-based mediation – the Netherlands and UK**

In the Netherlands, there are no specialised labour courts and labour law is complex, especially when distinguishing between the public and the private sectors. Individual labour disputes may be settled by mediation in two ways: on the parties own initiative or through referral by a judge. The Dutch government encouraged the use of mediation in the civil courts in 2007 with the provision of legal aid. Mediation can be implemented before the court hearing or take place during it, the latter being referred to as ‘court annexed mediation’. Overall, the number of mediations recorded by the Mediation Monitor rose from 830 cases in 2005 to 3,364 in 2007. However, this still represents a small proportion of the total number of cases coming before the district courts. About three quarters of the mediation initiatives are completed, presumably to the satisfaction of the applicant. Individual labour disputes constitute just over one third of the total number of mediations – the others encompassing family, commercial and environmental disputes. The mediators are private individuals who should conform to certain standards laid down by the Netherlands Mediation Institute (**NMI**). In some cases, legal aid may be available. It is usual for the costs to be paid by the employer, although no statutory rules are in place concerning such payments. If the dispute is successfully resolved, the details are laid down in a special contract where the parties refrain from further litigation.

In the UK, a recent development has been to encourage Employment Tribunal judges to offer a form of ‘judicial mediation’ in trying to get the parties to reach a settlement before a full hearing of the tribunal. In practice, this can often amount to ‘early neutral evaluation’, where the judge suggests what may be the outcome of a full hearing with a view to influencing the views of the parties.

Alternatively, the social partners – including the government – can establish a mediation forum or commission to provide voluntary mediation services (see box below).

### **Mediation established by law – Slovakia**

In Slovakia, mediation legislation was adopted in 2004 to reduce the burden on the civil courts. It should be noted that there is no special labour court in Slovakia. The legislation regulates the performance of mediation, its basic principles and organisation, as well as specifying the outcomes. Labour disputes coming under the scope of the country’s Labour Code are amenable to mediation. The mediation is voluntary and has to be paid for by the parties. The mediators have to be suitably qualified and registered with the Ministry of Justice (Ministerstvo Spravodlivosti Slovenskej Republiky). Once an application is made, either by the individual worker or through the trade union, the employer and the worker are required, in a written statement, to confirm their willingness to use mediation and must agree on the name of the mediator. The mediator, at the end of the hearing, proposes a solution to the dispute in writing. If this is accepted by both parties, it is binding on them and can be accepted as an out-of-court settlement by the courts. While there are no data on the use of mediation, a steady decline in labour disputes going to court – totalling about 50% in the period between 2004 and 2008 – ‘allows the assumption that the application of the mediation method in resolving individual labour disputes contributed to a radical decrease in the number of such disputes dealt with by the civil courts’ (Slovakian EIRO national centre). It also contributed to the fall in the average litigation time of those cases still going to court – that is, from 17.56 to 14.07 months between 2004 and 2008.

### **Mediation established by the social partners – Portugal**

The Portuguese government is committed to encouraging the use of ADR in order to reduce the burden on the courts, including the labour court. In 2006, a tripartite protocol was signed creating a Labour Mediation Service (Sistema de Mediação Laboral, **SML**). Initially operating in the metropolitan areas of the capital city Lisbon and Porto in northern Portugal, it was extended in 2007 to all areas of the country. The SML can deal with virtually all types of individual



disputes. The scheme has some unique features. To get access to mediation, the aggrieved worker or the employer applies to the SML, which will then contact the other party and appoint a mediator from a list of suitably qualified persons on the SML list. The SML may also provide a room, although it is up to the parties to choose a location. It is also possible for a judge at the labour court to ask for the SML to intervene if the parties before the court agree. While the SML pays the cost of the mediation, each party is required to pay a fee of €50. Mediators receive a fixed honorarium of €100 if the mediation fails, or €120 if it succeeds and €25 if it does not proceed. Once a mediation hearing has started, time limits on making a claim to the labour court are suspended. So far, 18 employer organisations, 29 companies and 26 trade unions have joined the SML, which is still only in the early stages. As the Portuguese EIRO national centre outlines: 'This implies that they commit themselves to encourage mediation among their affiliates and that companies include in individual worker contracts a clause that commits both parties to consider, in case of conflict, to make use of the SML.'

'Relational mediation' can be found in Finland, the UK and, in a modified, form in Ireland. The latter country also provides an example of private mediation along relational lines adopted by some employers, especially foreign-owned multinational companies. A similar role is played by ombudsmen appointed within the company. The examples in the box below are chosen to illustrate how relational mediation operates in practice.

#### **Relational mediation – Finland and the UK**

In Finland, the Finnish Forum for Mediation (Suomen Sovittelufoorumi, **SSF**) was established in 2003 following negotiations with the social partners. The SSF suggested that mediation was particularly suitable for dealing with cases of workplace bullying. The role of the mediator is to act as 'a facilitator by maintaining the two-way flow of information between conflicting parties and encouraging a rapprochement between their antagonistic positions ... to be an active listener and inquirer' (Finnish EIRO national centre). The main type of incidents dealt with are 'bullying, inappropriate management, "gossiping behind someone's back", muteness and ignoring' (ibid). These are all symptomatic of breakdowns in interpersonal relationships, where relational mediation can be especially effective. The mediators are private individuals who often have their own consultancy company. They are usually paid by the employer. There is no link between the use of this type of relational mediation and the labour courts. As is typical in this type of mediation, the worker is not accompanied at the hearing, which is probably better described as 'an event'.

In the UK, Acas, along with a number of private sector providers, offer mediation services for a fee, especially in the case of 'employment disputes', such as accusations of bullying, harassment and the breakdown of interpersonal relationships. These are usually problems which have yet to reach the stage of being, or about to become, cases for an Employment Tribunal but are internal disputes at work. This type of mediation involves the mediator helping two or more people in the dispute – which can be between workers or between a worker and manager – reach an understanding through collaborative problem-solving. The focus is much less on the causes of the dispute and the allegations of blame than on finding future means to work together or coexist in relative harmony. A growing number of large employers, such as the major police forces, provide trained internal mediators to help resolve problems. In such cases, the mediator will be a trained manager from another location or department who is not involved in the dispute and is called in to help resolve the problem. In some instances, senior employee representatives, usually trade union based, have been trained as mediators. Where relational mediation is used, the strong preference is for the mediator to deal with the people involved directly without any intermediaries or accompanying individuals. The use of relational mediation was actively encouraged in a UK government report in 2008. The early experience of relational mediation by Acas indicates a success rate of over 90%.

### Modified relational mediation – Ireland

In Ireland, disputes concerning discrimination or victimisation are dealt with by the **Equality Tribunal**, established in 1999 as a quasi judicial, independent body. Initially, equality officers conducted investigations into complaints and recommended legally enforceable remedies. In recent years, however, the tribunal has emphasised the use mediation in place of investigations. The mediation process ‘involves direct negotiations between the disputing parties. Mediation is guided by the principle of self-determination and is completely voluntary and informal and does not involve written submissions. Agreements are not published and the parties are given a cooling off period before being asked to sign an agreement. There is no assumption in this type of relational mediation that there is “middle ground” where a compromise can be found’ (Irish EIRO national centre). Mediation is three times quicker than the alternative of a formal investigation, on average, lasting six months as opposed to 18 months.

A distinctive characteristic of relational mediation that may be noted is that it is particularly suited to dealing with ‘in work’ disputes where the applicant is still an employee. The aim of this form of ADR is to rebuild effective working relationships. Other types of mediation and conciliation often take place after the person has left employment. The function of these types of ADR may be more concerned with establishing rights and agreeing forms of compensation than with resolving disputes to enable the employee to continue in the same job or organisation.

### Arbitration

Arbitration is where a third party makes a binding decision on the application made by an aggrieved worker. This form of ADR is listed in 14 countries – Austria, Cyprus, the Czech Republic, Denmark, Ireland, Italy, Luxembourg, Norway, Poland, Portugal, Slovenia, Spain, Sweden and the UK. Often, little detail is provided on arbitration in the EIRO national centre reports. This is indicative of the fact that arbitration is always used as a last resort and that much more attention is given to the earlier stages of conciliation and mediation. Even as a last resort, arbitration is not often used. In Cyprus, the Czech Republic, Italy, Luxembourg and Slovenia, the use of arbitration for individual worker disputes depends on it being written into appropriate collective agreements between employers and trade unions. For example, in Italy, one national industry-wide collective agreement (*contratto collettivo nazionale del settore*, CCNL) allows for the establishment of an Arbitration Committee to deal with particular disputes, with the arbitrators drawn from a panel of possible members. In the Czech Republic, the possible use of arbitration is a recent innovation incorporated into the Labour Code in 2007, although the legal status of this has not yet been determined (see box below for further examples).

### Use of arbitration – Cyprus and Slovenia

In Cyprus, arbitration is the final and fourth step in a procedure established under the country’s Industrial Relations Code. The first two steps allow for non-judicial ADR in the workplace – first, at the level of supervisor and then, if not resolved, by higher authorities in the workplace. The third stage, if required, is a referral of the worker to the Ministry of Labour and Social Insurance (Υπουργείου Εργασίας και Κοινωνικών Ασφαλίσεων, **MLSI**) for mediation. This must be completed within 15 days. If a settlement is not reached at this stage, the complaint is referred to binding arbitration. It is the responsibility of the MLSI to appoint a mutually acceptable arbitrator within one week of the special request from both parties and to provide administrative support to the arbitrator – thus, access to arbitration is by mutual agreement only. The MLSI issues the arbitrator’s decision 15 days after the last arbitration meeting, or within three days in the case of dismissals. Since the Labour Code is not legally binding, arbitrators’ decisions have no legal standing, although no decisions have been challenged thus far in the courts.

In Slovenia, the use of arbitration is regulated by the Employment Relationships Act 2007. An arbitration procedure to settle individual labour disputes may be incorporated in collective agreements. The agreement will specify the composition of the arbitration body and determine the procedures to be used. Arbitration needs to be concluded within 30 days after an eight-day period following an application to allow the employer to cease the alleged violation and/or fulfil the obligations. If the arbitration award is not reached within 90 days, the employee has the right to take the matter to a labour court.

In some countries, the use of arbitration depends on the decision of the parties to the particular dispute. Thus, in Spain, it is up to the worker (or, with permission, the trade union) and employer to choose to use mediation or arbitration. There is no information available to indicate how often arbitration is chosen; nonetheless, the emphasis placed on mediation allows for a tentative conclusion that the use of arbitration is rare. In Sweden, if a case comes to the labour court – and most do not because of the success of non-judicial ADR (see below) – it is possible to use arbitration in place of a full hearing. The Swedish EIRO national centre notes that ‘about 400 to 450 cases are reported to the labour court annually and the number of judgements made is about 150 due to the high level of amicable settlements by arbitration at the court’. Sweden is the only case of judicial-based arbitration.

In the UK, in 2001, a special arbitration scheme for dealing with claims concerning unfair dismissal and flexible working was established by Acas as an alternative to applications to an Employment Tribunal. The procedure was designed to be informal but the decision of the arbitrators was legally binding. However, this procedure is rarely used and receives less than 10 applications a year. It may be indicative of a general view and experience that arbitration is too rigid a method of ADR, lacking the flexibility and exploration of alternatives that conciliation and mediation offer prior to the involvement of the courts.

### **Labour inspectors**

Some countries use a labour inspector and also, at times, an ombudsman to provide forms of ADR. The term ‘labour inspector’ often relates more to the nomenclature used in the country, as translated by the national centre, and less to a distinctive type of ADR. In practice, many labour inspectors provide the usual range of conciliation and mediation services already outlined. Much will depend on the powers of the inspector, as well as their inclination, to engage in this type of work. Examples of labour inspectors can be found in Luxembourg, Greece and Estonia (see box below).

#### **Labour inspectors’ role in ADR**

In Luxembourg, the Labour Inspectorate (Inspection du Travail et des Mines, **ITM**) has had responsibility, since 2007, for preventing and resolving individual employment-related conflicts. If an issue goes to court, it can take over a year to be heard. It was hoped that the new law would speed up settlements. The labour inspectors are meant to provide ADR through tripartite conciliation and mediation. However, the EIRO national centre reports that ‘I am not aware that it is actually exercising this role. The ITM is traditionally rather inactive in seeking solutions and tends to offload its legal obligations onto the trade unions and the courts’.

In Greece, there is no specialist labour court. Employment issues are dealt with by the civil courts, but it can take a year for district court cases to be heard. Reliance is therefore placed on the local labour inspectors (SEPE). The inspectors are authorised ‘to intervene in a conciliatory manner in order to resolve any individual or collective labour disputes that may arise and to enforce administrative sanctions’ (Greek EIRO national centre). In practice, once a complaint is made, the labour inspector will convene a three-party meeting between the inspector, employer and employee. Problems arise, according to the EIRO national centre, when the question of enforcement of decisions is considered: ‘What is happening, in practice, is that the SEPE seldom issues fines and, when it does, they are usually very small and not effective as a deterrent and, in many cases, it merely refers the matter to the courts’. As a result, ‘the mechanisms to resolve individual labour disputes in Greece have proven to be extremely inadequate’.

In Estonia, labour dispute committees (LDCs) are established with the local branches of the country’s Labour Inspectorate (**Tööinspektsioon**). LDCs have three members – including two drawn from nominations by the employer organisation and trade union confederation. The Estonian EIRO national centre does not state who the chairperson of the committee is, but presumably it is the labour inspector. In total, there are 11 LDCs in Estonia, with four situated in the capital city of Tallinn. LDCs are independent, extra-judicial dispute resolution bodies and are the most common form of ADR used in this country. They were introduced in 1996 because of the time delays occurring when applications were made to the courts.

### ADR provided by social partners

Some countries listed as having a high level of ADR (see Table 1) have low rates of judicial ADR – this is because ADR takes place at an earlier stage before the issue has been taken to the labour or civil court. A total of four countries, with long-established patterns of cooperative working between the social partners and an underlying reliance on ‘corporatist’ values and behaviours, place particular emphasis on non-judicial ADR – namely, Austria, Denmark, Germany and Sweden (see box below).

#### Social partner involvement in ADR

In Austria, while ADR does not figure prominently in the country’s legal system, it is well established through the operation of trade unions and especially the Chamber of Labour (Arbeiterkammer, **AK**); membership of the latter is compulsory for all private sector employees. In the case of an individual labour dispute, the employee concerned will initially contact the works council for advice – or where there is no works council, they will contact the trade union or AK. In the majority of cases, either the trade union or AK will try to intervene in order to avoid the need for formal litigation in the courts. In most instances of such informal intervention, a settlement out of court can be reached once AK or the trade union has managed to confer with the employer. This intervention can include the use of forms of conciliation or mediation. In large companies where there is a framework of co-determination, the works council and management can conclude an agreement institutionalising procedures for conflict resolution. For some types of disputes – such as those concerning gender issues, work-life balance and performance management – a third party may be called on to conciliate or mediate. In addition, there are two particular areas in the employment field where the law provides for out-of-court conciliation or mediation. These relate to disability issues and the termination of apprenticeships.

In Germany, all employees have the right to have their grievances heard by the works council. It is then possible for a company-level arbitration committee to be established. In practice, in most cases where a works council exists, an employee might first address the council; the works council would then seek to resolve the matter with management, sometimes using informal mediation. Where there is no works council, the trade union would seek an out-of-court agreement with the employer. In cases of individual dismissals, the works council must be consulted. Recent evidence shows that only 12% of forced dismissals resulted in court cases.

In Sweden, individual disputes are mainly solved bilaterally between the social partners at company and/or sector levels, and are regulated by collective agreements. One analysis estimates that about 90% of individual disputes are dealt with at the establishment or company level by local trade union representatives and the employer in bilateral discussions. If the local negotiators are unable to resolve the matter, experts from the central staff of the trade union and the employer organisation will get involved, taking over the negotiations or assisting in conflict resolution. Only when the matter remains unresolved will it be taken to the labour court. The Swedish EIRO national centre explains that ‘the logic of the Swedish system is that disputes should be taken care of within the channels of dialogue and negotiations that exist and are regulated by the Co-determination Act and the parties’ collective agreements’. Once a case does arrive at the labour court, the latter will seek to resolve it by negotiation or arbitration before the formal hearing. The success of this mixed system of action by the social partners before court proceedings can be gauged by the small number of applications to the labour court (between 400 and 450) and the small number of judgements (about 150). Special arrangements exist for discrimination cases, where an ombudsman can take a case to the labour court – however, even here, preference is given to allow the trade unions to deal with the matter rather than taking it to the labour court.

A particular form of non-judicial ADR implemented in central and east European countries is the use of labour dispute commissions (LDCs). These LDCs are not dissimilar to the collective bargaining based ADR used in Sweden, where individual disputes are resolved between the two parties, management and the trade unions or the employees at the place

of work. One possible difference is that, in Sweden, a long-established relationship usually exists between management and the trade union at the place of work, which is capable of exploring avenues of compromise and agreement. LDCs, which are either standing bodies or have to be specially established when a complaint is lodged, can be found in Estonia, Latvia, Lithuania and Poland. Usually, they have an equal number of employer and employee representatives. In Poland, for example, a conciliation commission has to be established in the workplace and must seek to achieve a settlement within 14 days, once an employee has made a request for one. The experience of Lithuania raises questions about how successful two-party ADR, without an independent third party, can be (see box below).

#### LDCs – Lithuania

In Lithuania, most individual disputes, with the exception of employment termination cases, have to be handled by an LDC. These commissions are either standing institutions in the workplace or have to be specially set up once an application has been received from an employee. The LDCs, which are governed by the country's Labour Code (2003), must have an equal number of employer and employee representatives. The commission chairperson rotates between the two sides at every meeting. The trade unions have no formal role in the LDC. All cases of individual disputes must be heard by the LDC before going to court, and the courts will refuse to hear a case if the LDC has not met. The Lithuanian EIRO national centre indicates that 'successful dispute resolution at the LDC is quite rare in practice'. This is because there are only two parties, with no third party such as a mediator to help them find a way to resolve the dispute. In these circumstances, employees may be afraid to oppose the employer. As a result, many cases are decided against the employees. The EIRO national centre outlines: 'According to the social partners, especially the trade unions, the practice shows that LDC members very rarely manage to agree at the commission and most disputes nonetheless finally appear in a court . . . The LDC is often a mandatory formality preceding referral of the dispute to a court'.

## Trends in ADR growth and its success rate

Data on trends in ADR were unavailable in 14 national reports. Therefore, it was not possible to produce summary tables – essentially, for three reasons. Firstly, where non-judicial ADR is emphasised, it takes place within the workplace or employing organisation and is beyond the scope of published statistics. Secondly, in the many countries where judicial ADR has yet to be fully developed or is considered to be of marginal importance, it is often the case that regular data collection methods have yet to be established – as seen, for example, in Portugal and Romania. Thirdly, where data are available, the information is usually only partial in recording one type of judicial ADR and not others. In some cases, especially with regard to mediation, the data provided by EIRO national centres covers all types of mediation provided by the civil courts, including that used in family or commercial disputes, rather than being specifically restricted to labour disputes. Of the remaining countries where some trends are observable, although often without supporting statistics, the great majority report growing use of ADR and, in some cases, substantially so, as seen in Malta. Only one country reports a decline in ADR use – namely, Cyprus.

It is too soon to assess what impact the recession has had on the number of cases being dealt with through ADR. Where comments were made, they implied that a growth in claims going to court related to the termination of employment were beginning to be seen. Generally, however, it was too soon for detailed evidence to emerge. In the UK, it was noted that there has been 'a rapid and sustained increase in the number of cases going to conciliation in the second half of 2008/9. In the main, these were in the areas of unfair dismissal and redundancy pay, and an 80% growth [was recorded] in the number of claims concerning a failure by the employer to inform and consult employee representatives in redundancies' (UK EIRO national centre). In Denmark, an increase has been observed in the number of people claiming unfair dismissal – 'especially people with high seniority or the dismissal of shop stewards and safety representatives, who, according to the collective agreements, have special rights in connection with dismissals' (Danish EIRO national centre).



While trend data on the growth in ADR are not available, it is possible to use data from some countries to give an indication of how successful conciliation has been in these Member States at least. Table 2 shows the results for judicial ADR in three countries using a three-fold classification of cases settled by conciliation, or withdrawn from or heard in court. The large number of withdrawn cases is particularly interesting. It is often the case that, once a conciliation process begins, the applicant, or sometimes the employer, will choose not to proceed and will unilaterally withdraw. This is often because the early process of discussion with the third party will lead to a more realistic assessment of the chances of success if the matter were to go to court, or to a more sobering appraisal of the financial and emotional cost involved in pursuing it further.

Table 2: *Success rate of judicial ADR in three countries, %*

% of cases submitted to a labour court	Germany (2007)	Greece (2008)	UK* (2008)
<b>Settled at conciliation</b>	51	48	43
<b>Withdrawn from court</b>	31	23	31
<b>Heard in court</b>	18	29	27

\* Figures for UK exclude Northern Ireland.

Source: *EIRO national centres, 2009*.

Partial data are also available from a few other countries. In Italy, for example, the proportion of cases dealt with and resolved by administrative conciliation was about two thirds of the total number, excluding those not dealt with. As explained earlier, delays in establishing conciliation boards can lead to cases being abandoned or waiting to be dealt with for long periods, especially in the public sector. Overall, the Italian EIRO national centre estimates that half of individual disputes are resolved at the conciliation stage. In Malta, cases relating to the termination of employment are dealt with under a specific procedure operated by the Department of Industrial and Employment Relations (DIER). In 2008, DIER dealt with 357 claims, of which 149 (36%) were settled out of court and 64% were referred to the court. Finally, in Spain, conciliation provided at regional level in the ‘autonomous communities’ succeeded in resolving 58% of cases; the remaining 42% of cases had to be considered by the courts.

One omission from these data is the number of cases withdrawn at the conciliation stage. It may be that this number is subsumed within the overall success figures. If a case is withdrawn at this stage, it can be argued that ADR in some, or even many, cases has achieved a successful outcome, since it has saved time in the courts and some other form of resolution may have taken place. In Slovakia, for instance, the decline in the number of labour disputes being heard in the civil courts is attributed to the growing use and success of the 2004 Mediation Act. In the UK, the success of the state-funded conciliation service is primarily measured by the number of employment tribunal hearing days saved: in 2005–2006, the net cost of individual conciliation conducted by Acas was GBP 24 million (about €27 million as at 14 January 2009), while the estimated benefit to the public purse in saved hearing days was GBP 153.9 million (€173 million), constituting a benefit ratio of 6.4.

It is hard to judge the success of mediation. Moreover, as noted earlier, it is in any case difficult to draw a clear distinction between conciliation and mediation. One estimate regarding mediation in Ireland, undertaken by the Equality Tribunal, reports a success rate of 60%.

This limited statistical evidence from six countries regarding the success of judicial ADR underlines the importance of seeking to settle matters before they become embroiled in court proceedings. The most optimistic estimate from these data is that judicial ADR processes lead to a reduction in the number of labour court or tribunal hearings in about two thirds of applications. At the very least, this represents a substantial reduction in public cost, and all the evidence



suggests that the time taken to deal with a case in conciliation is greatly reduced compared with lengthy court cases in many countries.

The success rate of non-judicial ADR – through the use of formal discipline and grievance procedures, often strongly encouraged by the state and/or the social partners – along with the role of the partners themselves in bilateral negotiations, has been noted in the previous section. In this context, it is worth noting that the UK is the only country which explicitly links the effective operation of workplace procedures to the outcome of court cases. This means that judicial and non-judicial ADR are formally connected. If the employer, or the applicant employee, is judged by the tribunal not to have followed the Acas Code of Practice on discipline and grievance handling, which has legal standing, the compensation award can be increased or decreased by up to 25%.

## **Types of disputes dealt with by ADR**

There is insufficient information to establish a detailed categorisation of the subject matter of disputes being dealt with through ADR processes. Judicial ADR is almost inevitably restricted to those employment rights established in law and where an alleged breach can lead to an application to the courts. This means that the most common types of disputes are those related to the employment contract – for instance, concerning issues such as the non-payment of wages, hours of work, holidays and flexible working. In Greece, for example, 43% of cases dealt with by the Labour Inspectorate concern the delay or non-payment of wages, while 20% relate to work contracts, 17% to the non-payment of holiday pay, and a further 6% to bank holiday pay. Just under 3% of cases concern excess working hours, while 11% of cases are classified as ‘other’. It should be noted that, in Greece, discrimination cases are dealt with separately.

The termination of employment or claims of unfair dismissal are quite often dealt with by ADR processes, being reported in 11 countries. In the UK, such disputes constitute 42% of issues dealt with by conciliation, whereas in Italy and Germany, they represent 15% and 12% of these cases respectively. This reflects the extent to which dismissals are protected by law.

Detailed statistics are available in the UK, showing not only the relative volume of cases by subject but also whether they were resolved by conciliation or eventually heard by an Employment Tribunal. This enables an assessment of the areas or topics of dispute that are more, or less, likely to be resolved by ADR. Accordingly, cases concerning failure to pay wages – including redundancy pay, the minimum wage and other breaches of contract – have a lower success rate of about 30%–40% than those dealing with allegations of mistreatment, discrimination and unfair dismissal. In the latter types of case, the conciliation success rate is over 50%, where success is measured by the parties agreeing the outcome. Using as a broader measure of success the proportion of applications that get to the tribunal stage, mistreatment and discrimination cases are again the topics least likely to be heard at a tribunal: only 9% of gender discrimination, 13% of disability discrimination, 14% of age discrimination, 21% of racial discrimination and 23% of unfair dismissal cases get to this stage. If this trend is generally applicable – and some national centres do indeed note how ambiguous or unclear areas are particularly amenable to ADR – then it does lead to a tentative conclusion that ambiguous, multi-faceted and complex cases with competing sources of evidence and views are more amenable to resolution through ADR than factual matters – such as whether a dismissal was unfair or if discrimination took place. It was noted earlier that relational mediation is especially suited to dealing with problems in the workplace concerning a breakdown of interpersonal relationships.

Four countries have special procedures for dealing with equality issues. Spain, Sweden and Greece have an equality ombudsman, while Ireland has established an Equality Tribunal. As noted earlier, in Austria, issues concerning disability and the dismissal of apprentices are dealt with under specific legal procedures. In Denmark, matters arising in the area of the working environment are dealt with under a special procedure overseen by the country’s Working Environment Authority ([Arbejdstilsynet](#)).

### ADR and the worker

The most common practice for the aggrieved individual worker to access ADR is to apply directly to the appropriate ADR mechanism in place in their country. Where the person is a trade union member, the union will often assist in the application process. Normally, trade unions will not provide this service to non-members, who are required to join to avail of trade union support. In countries with well-established systems of non-judicial ADR – such as Austria, Denmark, Germany and Sweden – the trade unions, or similar bodies such as AK in Austria, handle matters in bilateral negotiations or in the works council. In some cases, especially those involving mediation, the employer may initiate proceedings but only with the agreement of the employee – as seen, for example, in Luxembourg and Finland.

In some countries, the worker is required to have tried to resolve the matter by using the internal company grievance and disputes procedures and conciliation first before applying to the court. In others, there are no restrictions. Competing logics are sometimes at work here. On the one hand, it may be deemed highly desirable, as in the UK, for internal procedures that meet certain prescribed standards to be used first to encourage early resolution before matters become formalised and often rigid. This is the logic of non-judicial ADR. It is often harder to resolve an individual dispute once an application has been made to a court, and it is frequently the case that, by this stage, the individual has resigned or been dismissed from employment in the company that is party to the proceedings. A total of 12 countries place an emphasis on the need for in-company procedures to have been used or exhausted before a claim can be considered by a court. How enforceable is this stipulation is a matter of debate. In Denmark, where the system of dispute resolution by the social partners has been established since 1910, a dispute cannot be considered by the courts until the ‘standard rules for handling industrial disputes’ have been exhausted and failed to resolve the matter.

On the other hand, it is often a fundamental right for an individual to be able to make a claim to a court concerning breach of statute law or what is sometimes called a ‘conflict of right’. Some 10 countries have no restrictions on applications to a labour or civil court, and thus to judicial ADR. In the Netherlands, it was noted that it is often the case that there are no internal company procedures for grievance and disputes – a similar scenario was also observed in Slovakia.

In most cases, the aggrieved worker will be accompanied or represented in ADR processes. However, this is not a universal practice. In some non-judicial ADR activities at the workplace, the worker’s case may be presented by the trade union, as seen in Sweden. In Lithuania, the conciliation commission (LDC) will normally have a written submission from the worker, although in some instances the employer may invite the employee to attend. A similar situation exists in the Czech Republic. In relational mediation, as in Finland and the UK, accompaniment is discouraged since the aim is get those attending to speak freely and explore their feelings and emotions in a non-confrontational way. In the UK, conciliators rarely hold hearings but conduct the interchange between the parties by ‘phone or written means’. Moreover, there is a legal requirement for employers in the UK to have written procedures for handling discipline and grievance matters – this includes a right for the individual to be accompanied by a trade union representative, even in an organisation where unions are not recognised.

In the many countries where a worker can be accompanied, this is undertaken either by a lawyer and/or a trade union official. The Irish EIRO national centre observed that a lawyer may be too expensive for the individual worker and this is probably true elsewhere. As noted earlier, in some countries, non-union employees may be able to get legal aid – as seen, for example, in Sweden. In Luxembourg, the worker can generally be accompanied, although the employer must give their consent. Moreover, in dismissal cases in organisations with 150 or more workers, and in cases of sexual harassment or bullying in Luxembourg, the worker has the absolute right to be accompanied. In Spain, perhaps uniquely, in autonomous proceedings at the regional level in cases of mediation, each party can appoint their own mediator. Nevertheless, this sometimes leads to the situation where a mediator is too close to the person or party they are mediating for, ‘which ends up diluting their possibilities of finding an outcome to the conflict which is objectively beneficial for both parties’ (Spanish EIRO national centre).

At the end of the judicial ADR process, whether prior to or during a hearing, a question will arise over whether the applicant must withdraw the case from the court if the ADR is successful. For a claim to be successfully resolved through ADR, and then for the worker to continue to take it to the court, raises the problem of ‘double jeopardy’. Employers may be inhibited from settling the matter at ADR for fear of it being re-opened and thus incurring further expense, while the worker may believe it to be possible to get a better outcome, especially compensation through the court. The attraction of ADR is that it is generally quicker and cheaper for the parties than a court hearing. In practice, most countries either make it mandatory for the claim to be withdrawn – as is the case, for instance, in Norway, Romania, Spain and the UK – or for the general practice to apply that once an agreement is reached, the case should be withdrawn. In Slovakia, the written decision of a mediator is deposited in the court. The advantage of a mandatory withdrawal is that the agreement will usually be registered and that it is likely to be legally enforceable in the event of a failure to apply it. This may not apply where withdrawal of the case, once settled by ADR, is voluntary, as noted in Luxembourg.

### **Funding of ADR services**

In general, the state provides conciliation services and some forms of mediation. It is usual in these circumstances for the costs of service provision to be met using public funds. If lawyers are used, it is up to the parties to pay their own legal fees. In Lithuania, while the ADR itself is free, if the employee loses then the costs incurred by the employer must be paid by the worker or the trade union. In Portugal, a fixed fee is paid by both the employer and the employee, or the trade union, to use the services. Where there is a fee, it is often the employer who pays – as seen in Hungary and Ireland, where some forms of ADR are privately provided, especially in multinational, often non-union companies. It is nearly always the case that where mediation is provided by private individuals or companies, a fee must be paid, although this will usually be borne by the employer. In Romania and Slovakia, the cost is divided equally between the employer and the trade union if they are taking the case on behalf of the individual. In Norway and Spain, the award of costs forms part of the eventual settlement. In some circumstances, legal aid can be provided to individual workers in the Netherlands and Sweden, especially if they do not belong to a trade union and have a low income.

The award of costs, fines or compensation payments by the courts can inhibit the use of ADR. An interesting development in Denmark concerns the growing number of cases being taken to court, as more lawyers work for the trade unions. The Danish EIRO national centre reports that lawyers are not themselves members of the trade union and they wish to resolve the cases according to the letter of the law. Therefore, they are not open to compromise in the same way that trade union secretaries were. Moreover, the trade union will receive a proportion of the fines or compensation payments from employers on behalf of the members – a development which ‘is good publicity in a time of declining membership’. In Italy, the trade union retains between 5% and 10% of any compensation awarded to the individual worker. Elsewhere, in the UK, a new development has been the growth of ‘no-win, no fee’ legal practices. This can lead to fewer conciliated settlements if the lawyer believes that the worker’s case can be won in the tribunal and the compensation awarded will exceed that offered at the conciliation stage. Particularly in cases of equal pay between men and women, this has significantly reduced the scope for ADR activities and resulted in a higher number of cases going to tribunal.

### **Experts in conciliation, mediation and arbitration**

The provision of ADR by the state or its agents in Greece, Ireland, Italy, Latvia and the UK normally means that experts in conciliation (sometimes called labour inspectors) are civil servants; thus, it is presumed that appropriate training is provided. In Greece, the Economic and Social Council (Οικονομική και Κοινωνική Επιτροπή, **OKE**) has been vociferous in suggesting that the labour inspectors have insufficient autonomy and that one month’s training is inadequate. Moreover, it is unclear whether any specialist training is provided or required for judges who provide conciliation, as is the case in Hungary, Luxembourg and the UK.

The growth of mediation, not just in labour matters but also concerning areas such as family and commercial issues, has led to the development of specialist centres in recent years. In some countries, the authorities such as the courts and/or the Ministry of Justice (or equivalents) hold lists of approved mediators – as is the case, for example, in Belgium, Cyprus, Greece (for ombudsmen), Portugal, Romania and Slovenia. It is often the case that certain minimum standards are set down to ensure that the quality, experience and sometimes legal knowledge of those on the list are appropriate. Other countries such as Hungary, Latvia, the Netherlands and Poland have mediation centres sometimes established as private practices. In Poland, there are approximately 30 mediation centres, which are ‘theoretically competent to carry out mediation in employee disputes. The mediators must complete training in accordance with guidelines drawn up by the Social Council for Alternative Dispute and Conflict Resolution affiliated to the Ministry of Justice (Polish EIRO national centre)’. In this instance, as is commonly the case, costs are agreed at the outset and are divided equally between the parties.

In addition, independent experts operating as private individuals unconnected with any centre or central list operate in at least 10 countries and probably even more since they are sometimes unknown to national centres. Some concerns have been expressed about the quality and independence of such people. The growth in private, third-party ADR provision in Ireland is particularly notable (see box below).

### **Private third-party ADR provision – Ireland**

The Irish EIRO national centre reports that ‘over the last five years, the use of private independent third parties, usually individuals, has grown. Many of these independent figures consist of former managers, trade union officials and staff from state-run, third-party bodies . . . Factors encouraging this include speedier access, a growing non-union sector and the possibility that the particular expert may be more suited to the needs of the dispute in question’. In addition, a number of companies use internally provided ADR drawn from their own staff to undertake the roles of ombudsman, mediator, and members of a peer review or management review panel and arbitrator. This has led to calls for a new protocol to be adopted to guide the operation of independent mediation and arbitration. The Mediators’ Institute of Ireland (MII) has developed an ‘organisational and workplace chapter’ to disseminate professional standards.

In countries with a strong emphasis on non-judicial ADR undertaken within the workplace or at regional or sectoral levels, those involved in ADR include: managers, employer organisation members, employee representatives, or full-time trade union officials normally handling collective bargaining. It is not known if special training is provided for their roles in ADR.

It is generally considered that conciliation and mediation must be undertaken in private to be successful. The skill of a conciliator and a relational mediator involves getting the parties to consider alternatives and brokering a settlement. It is usually considered that this can only be effectively done in confidence. What is said by each party and the conciliator, often in private with the other party not being present at ‘side meetings’, must be confidential – otherwise the people involved will be inhibited for fear of public disclosure in court. This raises the question of whether the ADR expert can be called as a witness by either side if the case goes to court. In nine countries, there is a stipulation that the conciliator/mediator cannot be called as a witness. In contrast, eight countries allow for this possibility – although in Luxembourg, for example, the expert would be able to withhold confidential information. In Ireland, while it is theoretically possible for the expert to be called as a witness, this does not happen in practice. Where ADR ends in a written decision, as in arbitration, or a recommended solution, as in some forms of mediation, this may be lodged in the court.

## Attitudes of social partners and national governments to ADR

The position of the social partners and government in each country towards ADR is very much conditioned by the success, or otherwise, of the existing, sometimes long established, methods of dealing with individual worker disputes. Since there is no common starting point and a variety of approaches to ADR exist, the particular policy initiatives vary between countries. However, some general patterns are evident.

Firstly, in 17 countries there is clear, often recent, growth in the use of ADR and/or strong support for such a development by the social partners and government (Table 3).

Table 3: *Countries where ADR use is growing and/or where there is strong government/social partner support*

Country	ADR development
<b>BE</b>	ADR is encouraged by one political party and new legislation is adopted; social partners support 'more humane and cheaper' ADR
<b>BG</b>	Social partners propose obligatory conciliation and legal changes; no action taken by government
<b>CY</b>	Emphasis on workplace non-judicial ADR; government wants better workplace procedures for disputes
<b>CZ</b>	Support for ADR from social partners and government but little growth
<b>ES</b>	Emphasis on non-judicial ADR in workplace/regions; growing use of ADR
<b>FI</b>	Growing use of ADR; a joint committee of social partners was due to report on the use of ADR by the end of 2009
<b>IE</b>	Employers are pushing for private, innovative, non-adversarial methods of ADR; trade unions are in favour of ADR, provided they have a role; the government has its own effective methods
<b>IT</b>	Government support for ADR due to lower costs and a reduction in court cases; the social partners are also in favour
<b>LU</b>	ADR is encouraged by the government and social partners; a conciliation service and mediation are developed in 2007, however implementation has been slow
<b>LV</b>	Government is in favour of mediation and legislation was adopted in 2009; however, the social partners want a specialist labour court and ADR is not used much in practice
<b>MT</b>	Non-judicial ADR at workplace is encouraged by all parties; more resources/ training are to be provided for state conciliators
<b>NO</b>	Emphasis on pre-court mediation by lawyers, although concerns have been expressed about costs
<b>PT</b>	A 2006 protocol was signed by all parties establishing a labour mediation service
<b>RO</b>	New laws were adopted in 1999 and 2008 establishing mediation endorsed by the tripartite Economic and Social Council (Consiliul Economic și Social, <b>CES</b> )
<b>SI</b>	Mediation was due to start in labour courts in 2009; the social partners agree on lists of mediators
<b>SK</b>	New law adopted in 2004; the employers are in favour of ADR due to lower cost, quicker and early resolution of disputes; trade union support for ADR will help enforcement of law at the workplace
<b>UK</b>	Growing use of conciliation; new emphasis on non-judicial ADR at workplace; experiments underway in pre-claim conciliation and relational mediation; the social partners give strong support for conciliation

Source: *EIRO national centres, 2009*

In contrast, in 10 countries, attitudes are neutral, or there is no pressure for change in relation to ADR (Table 4).

Table 4: *Countries with neutral attitude to ADR and/or where there has been no change in practice in recent years*

Country	ADR development
AT	Employers not interested in ADR and see it as a waste of time and not enforceable; trade unions would approve of ADR growth, but government is not interested
DE	Non-judicial ADR is well established and social partners see no need for change; however, government wants mediation but not in relation to labour matters
DK	Tradition of 100 years of non-judicial workplace ADR, which is considered more efficient, leading to fewer costs, and closer to the individual; therefore, there is no pressure for change
EE	Non-judicial ADR at workplace but the trade unions are in favour of other types of ADR; the employers are not interested, while the government remains neutral
EL	Trade unions want better, faster, more comprehensive ADR; the employers want stringent legal preconditions; the government remains inactive
HU	Court process is seen as expensive, slow and insecure, so in theory ADR is welcomed; however, the government does not appear to be interested, and the social partners remain inactive in its promotion
LT	Social partners want a labour court; however, the government says it is too expensive and has no focus on ADR
NL	Social partners remain neutral about ADR; the government wants mediation but not, as yet, in relation to labour matters
PL	Low level of interest in ADR from the government and employers, but the trade unions are in favour; citizens have low trust in institutions, except in the courts
SE	Historical emphasis on non-judicial ADR supported by all parties; however, views differ on the future shape of the country's labour law

Source: *EIRO national centres, 2009*

A second trend is where the social partners agree on the direction of ADR in their country, although it is rare for this to be enshrined in an agreement. In most cases, the government also shares the views of the social partners, although at times such support has yet to be translated into action. This government support is often attributed to the fact that ADR, especially judicial ADR, is attractive for reasons of cost and efficiency rather than for the pursuit of social justice. Trade union support for ADR is generally universal, as it is seen as being closer to the individual worker in dispute, quicker and cheaper, and helps enforce rights at work. Where some doubts are expressed – as is the case in Ireland, Italy and the UK – these relate to whether certain types of ADR, such as relational mediation in the UK or private sector employer initiatives in Ireland, exclude trade union involvement or will do so in the future.

## Commentary

Rather than restricting ADR to judicial processes, a broad definition of ADR is the more helpful, covering non-judicial as well as judicial forms of ADR. This broad definition allows governments and the social partners to focus on areas where the resolution of individual worker disputes can be advanced. There is a 'ladder' of ADR activities from the workplace to the courts, as the following steps show.

- Step one – action is taken to ensure the avoidance of disputes at work through encouraging the most appropriate procedures for handling grievance and discipline and, by implication, improving management practices and behaviours.
- Step two – non-judicial ADR occurs at the workplace and/or higher levels, where management and trade unions, or other representatives, meet to seek to resolve individual disputes. A conciliator or mediator may be involved at this stage, depending on national preferences. This step can include relational mediation.



- Step three – as part of a pre-court application or hearing, ADR is provided by a third-party expert in conciliation and mediation. Arbitration can be applied at this stage if the parties agree.
- Step four – ADR is adopted in the courts, either immediately before a hearing or during it, with conciliation or mediation usually provided by the judge or a lawyer.

Although ADR can take place at all stages, the clear intention is to try to resolve the matter as soon as possible. In general, the earlier the matter is dealt with, the easier it is to resolve the issue and the cheaper the process.

The use of ADR is growing across Europe but, within each country, starting from a different position and in the context of different traditions in employment relations. Using what limited evidence there is, an optimistic estimate is that two thirds of judicial ADR interventions are successful. There are no data on the success rate of non-judicial ADR – nonetheless, the low level of labour court cases in Sweden, for example, points to a potentially high success rate.

Some types of individual worker disputes are more amenable to resolution through ADR than others. ADR would appear to be most successful where the matter considered is ambiguous, multi-faceted and complex, with competing sources of evidence. Questions of ‘unfair’ dismissal, discrimination in its various guises and relational matters such as bullying fall into this category. In contrast, factual disputes concerning alleged failure by the employer – for instance, regarding the payment of wages, granting of holidays or provision of equipment – are less amenable to resolution through ADR, but by no means irresolvable.

ADR used prior to a court hearing which has proved unable to resolve the dispute to the agreement of the parties can still be deemed successful. The act of discussing the issue with an experienced third party can, for example, lead a party to withdraw either because they realise that the chances of success in court are low or due to the realisation of the financial and emotional costs of a court proceeding, a process which can take many months. Thus, ADR has an educational role as well as a quasi-judicial one.

It is hard to draw a clear distinction between conciliation and traditional mediation involving the third party suggesting or recommending a means to resolve the problem. It would appear that long-established, state-funded ADR bodies tend to use the term ‘conciliation’. On the other hand, recently established, often private persons or companies prefer to use ‘mediation’.

Relational mediation is not well established but seems to be an area where interest in the possibility of its use is growing in a few countries. The four distinctive characteristics of relational mediation are that:

- it is applied to disputes where the worker is still in employment;
- the issue is likely to concern interpersonal relationships and allegations of mistreatment, such as bullying;
- the process of mediation is non-judgemental and based on joint searches for ways forward;
- the worker and manager, or workers involved in the dispute, will not usually be accompanied in the mediation event.

The growth of mediation as a private practice and its anticipated growth raise questions over the need for entry or qualification standards, along with training and some form of protocol establishing canons of good practice. This is already occurring in some countries.

Regarding arbitration, by definition, this practice is used as a last resort since the arbitrator makes an award and decides the outcome. As such, arbitration nearly always follows attempts at conciliation or mediation. Provided that the parties agree in advance to abide by the outcome, arbitration can be used as an alternative to a court case. The evidence in this report seems to suggest that it is not a popular form of ADR – arbitration can be too inflexible and has little advantage over a court hearing, except perhaps in terms of speed.

There is some evidence to suggest that attitudes to the use of ADR in individual labour or employment disputes are becoming more positive. In the last 10 years, 15 countries have seen initiatives of some sort in ADR. Trade unions are generally in favour of ADR, while employer organisations in most countries now support it and governments increasingly view ADR as a cost-effective and speedy alternative to court proceedings. It is suggested in some quarters that lawyers and judges are less enthusiastic about ADR, while others contend that it is the judges who are pioneering forms of pre-hearing mediation. All of these findings suggest that there is likely to be an increased take-up of ADR in the future.

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**EF/10/06/EN**

