

European Civil Justice Systems

A Model for Dispute Resolution in Europe

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Executive Summary

- Methods of resolving disputes have evolved from 'self-help' and relying on the courts, to encompass a range of approaches, from specific compensation schemes to ombudsmen, and from business codes of conduct to sectoral dispute boards – broadly described as 'alternative dispute resolution' or ADR. Many pathways combine direct negotiation between the parties with elements of mediation, conciliation, and arbitration. Some solutions are highly sophisticated, and many form integral and valuable components of regulatory and self-regulatory systems.
- Dispute resolution systems should be part of a society's approach to encouraging good behaviour and to preventing disputes and problems from arising in the first place. The best ADR mechanisms do not just lead to resolution of disputes but also deliver information, incentives, and pressure to maintain and improve performance standards.
- While 'due process' requirements for formality of procedure, evidence, and expertise are regarded as constitutionally essential for courts, some of these features can be relaxed in some dispute resolution systems in return for gaining benefits in costs and time. Other forms of governance usually balance the absence of such features.
- Given the diversity of the various forms of dispute resolution systems that are developing in Europe, it would cause considerable disruption to try to harmonize national systems (especially ADR schemes) into a single EU mould. However, EU policy should, at least in part, be driven by encouraging alignment of Member States' dispute resolution systems in a manner that encourages adoption of good practice, and consequently enables mutual recognition of different Member States' systems, as the basic techniques for cross-border enforcement.
- This policy brief proposes a model that combines all the different mechanisms into a flexible, integrated model for dispute resolution, which would form a way forward for policymakers, and may be adapted to the particular circumstances of each European country and EU level.

A Model for Dispute Resolution in Europe

Introduction

Every country has developed ways of resolving disputes. Methods range from simple voluntary agreements to civil litigation. As society has become more complex, and as some types of litigation have become more complex and expensive, there has been a trend in free societies towards developing means of obtaining justice outside the traditional court system. Alternative dispute resolution (ADR) systems have developed in a wide range of types, including ombudsmen, compensation schemes, business codes of conduct, complaint boards, and other pathways. An understanding of the variety and interaction of these different mechanisms is essential if policymakers are to strike the right balance in future. ADR systems offer significant opportunities for achieving redress and for supporting standards of behaviour.

In recent years, there has also been increasing focus on the best way of securing compensation for large groups of people who all claim as a result of a single event or set of circumstances (collective redress). However, the most familiar procedure for dealing with mass problems, US class actions, have been criticized in Europe as giving rise to excessive and costly litigation. Europe is seeking a different solution to mass problems, and ADR and regulatory techniques may offer suitable alternatives without the same risks.

This paper considers how alternative dispute resolution systems are developing in Europe, and proposes a way forward for policymakers that integrates all the different mechanisms into a flexible, overall model for dispute resolution, which may be adapted to the particular circumstances of each European country.

The paper is based on the findings of extensive research into dispute resolution and regulatory

systems. This current summary is intended for policymakers who face the need to make imminent decisions. Research is ongoing, and further insights are anticipated.

The background to dispute resolution: research findings

Every EU Member State has a legal system, courts, judges, and lawyers. Member States also have, to a greater or lesser degree, extensive and developed alternative mechanisms for resolving disputes without litigation. Those mechanisms are commonly referred to as 'alternative dispute resolution' or ADR systems.

It is important to realise that ADR is not a single mechanism but covers a wide range of solutions for resolving disputes, encompassing ombudsmen, compensation schemes, business codes of conduct, complaint boards, and other pathways. Mechanisms can be differentiated according to the decision-maker, in that, in some instances, decisions are imposed on the parties to a dispute by a third party (adjudication, whether by a court, arbitrator, or other person), whilst in others, the decision is reached between the parties (agreement, after negotiation, mediation or other assistance). Adaptability is one of the key features of most ADR systems for resolving disputes.

While there are many common features to ADR systems, solutions differ from country to country. The differences in the architecture of existing national legal and ADR systems reflect the wider national history and matrix of the courts, legal systems, regulatory structures, market features, social needs, and culture in the country concerned.

Dispute resolution solutions also show variation across different sectors of industry and society in each country. The main reason for this is that many

dispute resolution mechanisms are designed to operate, or do operate, as part of a wider system of regulation and access to justice. Regulatory mechanisms differ between sectors. Thus, it is the combination of regulatory and dispute resolution mechanisms that collectively influence behaviour in providing preventative and corrective forces (*ex ante* and *ex post*). Hence, it is misleading to view any particular dispute resolution mechanism in isolation. Any dispute resolution mechanism needs also to be considered in terms of its function within the wider context of how justice is achieved in the society within which it has evolved.

There are also new cross-border markets, such as internet retailing (e-commerce), where there are opportunities for new 'international' dispute resolution systems to be created (a *de facto* type of supra-national 'twenty-eighth system', in EU terms). Such approaches are similar to the development of international law and international dispute resolution institutions that have come into being, for example under the United Nations or World Trade Organization. Such supra-national dispute resolution pathways effectively overcome traditional problems that are inherent within existing law, including complex rules in national jurisdictions and the difficulty of enforcing judgments in other jurisdictions, by providing contract-based solutions.

Significant changes are occurring in existing systems. It is important not to underestimate the importance of unexpected change in making assumptions about how current systems should evolve. For example, the potential spread of Third Party Funding and contingency fees, which may be encouraged both by market forces and by governments seeking to save money, is set to have profound impact on litigation, and on the balance between litigation and other dispute resolution systems.¹ Similarly, many national dispute resolution schemes are in a state of rapid – often market-led – development.

Parameters for designing dispute resolution systems

ADR, the courts, and other techniques are all integral and interconnected parts of a country's dispute resolution system. They should not be seen as separate techniques. They are different, but connected, elements in a system for achieving justice and resolving problems. The dispute resolution system as a whole includes voluntary negotiation; regulatory action; private or government insurance schemes; codes of practice and voluntary (or self-regulatory) enforcement of certain rules of behaviour; ombudsmen and other government agencies; rules of natural justice and court supervision; as well as conventional litigation. Indeed, for many years in many countries the court has become not just a forum for litigation but also a means for overseeing other non-litigious routes to dispute resolution. That trend is set to continue. Hence, dispute resolution needs to be viewed holistically.

Dispute resolution systems should also be part of a society's approach to encouraging good behaviour and to preventing disputes and problems from arising in the first place. The best ADR mechanisms do not just lead to resolution of disputes but also deliver information, incentives, and pressure to maintain and improve performance standards. They apply to performance not just in the dispute resolution process but to conformity with the law and to (usually higher) standards of business or social practice. Hence, dispute resolution systems should be designed to play their part within wider regulatory structures, providing *ex post* lessons that can be used to influence future behaviour.

All dispute resolution techniques should be connected within an integrated system. This means that individual techniques need to be given specific functions and places within the general architecture, depending on function, and the extent to which they satisfy criteria such as cost, duration, effectiveness, efficiency, quality of outcomes, effect on future behaviour, and so on.

1. C. Hodges, S. Vogenauer, and M. Tulibacka (2010) *The Costs and Funding of Civil Litigation. A Comparative Perspective*. (Oxford: Hart Publishing). A policy brief summarizing these findings is available at: <http://www.fljs.org/uploads/documents/Hodges.pdf>.

Claims should be channelled into appropriate and proportionate pathways. This involves the sequencing and prioritizing of claim pathways. Different tracks and sequences might apply in different sectors of industry or society.

The first preference should almost always be for direct negotiation and voluntary resolution of disputes. Access to other, less appropriate, pathways – including the courts – would never be banned, and may be appropriate at an early stage, for example if a point of law is involved that should be decided by a court. But in most situations, immediate access to the courts would be less attractive for reasons of complexity, cost, and delay, and the desire to encourage restoration of sociable relations. Penalties might be imposed for resorting to litigation before other alternatives had reasonably been tried.

Whatever the approach taken to resolving a particular dispute, it must be appropriate in terms of quality, cost, and speed of outcome. Cost, efficiency, duration, independence, fairness, transparency, and stakeholder governance are all relevant factors. Minimum standards and oversight should be established for dispute resolution systems.

There is also scope for prioritization of dispute resolution. For example, certain sectors of industry have been shown to generate a higher proportion of disputes than others, IT/telecoms and financial services being current examples. It is sensible to prioritize such sectors in providing effective ADR systems.²

Implications for pan-European systems

It would cause considerable disruption to try to harmonize national systems (especially ADR schemes) into a single EU mould. The variations in national ADR schemes and in national court systems are too diverse to make this a sensible proposition. But some common, or minimum, parameters can be defined for dispute resolution pathways. Accordingly,

2. Good examples for ADR systems are the Stichting Geschillencommissie of the Netherlands, and the Consumer Codes Approval Scheme of the UK's Office of Fair Trading.

EU policy should, at least in part, be driven by encouraging alignment of Member States' dispute resolution systems in a manner that encourages adoption of good practice, and consequently enables mutual recognition of different Member States' systems, as the basic techniques for cross-border enforcement.³

The framework for a mutual recognition matrix already exists in the EU, with the national contact points and agencies under the ECC-NET,⁴ FIN-NET,⁵ and Consumer Protection Co-operation⁶ and SOLVIT⁷ networks. These provide frameworks that can usefully be expanded.

The range of techniques in the ADR landscape

ADR means different things to different people. Some experience ADR as an appendage to the court system, for example, court-ordered mediation. However, in its wider conception, it encompasses a wide range of different, overlapping, flexible, and developing techniques.

In practice, users may simply look for the available mechanism most suited to resolving the dispute in which they are involved. In this sense, they view the dispute resolution system as a whole and look at the available options. The range of dispute resolution pathways open to them is likely to include:

- direct negotiation;
- assistance of third parties;
- decisions by third parties.

3. Such an approach could cover wider markets than the EU countries and thus could encourage global solutions. However, some national or geographical blocks have radically different legal architectures and policies that create barriers to such international alignment or harmonization. For example, the US has a policy of prioritizing private enforcement and mistrusting public enforcement that is uniquely its own, whereas the EU has an architecture of building public regulation whilst maintaining private enforcement for specific complaints.

4. http://ec.europa.eu/consumers/ecc/index_en.htm

5. www.fin-net.eu.

6. Regulation (EC) 2006/2004 on consumer protection cooperation, [2004] OJ L364/1.

7. http://ec.europa.eu/solvit/site/index_en.htm

Each of these three approaches is likely to be found in different forms from country to country. They will be examined a little further in turn, in reverse order.

Decision by third parties: adjudication

The ultimate option in this category is always the court, given its ultimate position of power and authority in a state. However, the parties to a contract or dispute can also agree that some other third party can be given the power to adjudicate it and that, possibly subject to constraints such as court oversight, the decision will be binding on the parties. Various forms of arbitration are examples.

Decisions of courts, and of some arbitrators, are made public, and build up a body of interpretation of the law. Legal systems differ in their policy on the extent to which courts either make or apply statutory law (made by parliaments through democratic processes); the distinction may have less importance in practice in many states. But to the extent that decisions create a body of interpretation, they have normative and regulatory functions.

Assistance of third parties: representation, mediation, and conciliation

Independent parties may assist in resolving disputes in a number of ways.

- First, parties may appoint representatives (usually lawyers) to present their case or to negotiate.
- Second, intermediaries may assume an independent position between the parties, acting, for example, as channels of communication, or facilitating negotiation and agreements, or giving their opinions on the merits of a case in a non-binding manner that assists or influences outcomes.
- Third, regulators (public enforcement authorities, some ombudsmen, NGOs, trade associations, consumer associations, and others) can exert their power (legal, de facto, or reputational) to influence negotiations, voluntary solutions, and imposed outcomes. Such models are clearly linked to regulatory systems.
- Fourth, ombudsmen are traditionally empowered to provide scrutiny of governmental executive actions, to ensure that principles of good administration are observed. Their decisions are usually recommendations that are non-binding but highly influential. Other types of ombudsmen have developed which exercise statutory or private functions that may include a mixture of regulatory and dispute resolution features, and deliver decisions that are binding or not.
- Fifth, specific dispute resolution schemes exist for particular types of claim or injury. For example, every advanced state has a compensation scheme for injuries associated with use of vaccines. Nordic states have extensive schemes for compensation of injuries involving medical practice, and use of medicinal products (and so no litigation on those types of injuries).
- Sixth, dispute resolution boards exist in many countries. For example, in the Netherlands, a national Foundation *De Geschillencommissie*, has established around fifty boards, each covering a specific industry or societal sector. The advantage of such systems is that the procedure can be informal and fast, often incorporating day-to-day expertise of the sector that, in a court, would require more formal external proof, and hence be more costly. A similar model in the UK is for a regulator (the Office of Fair Trading) to establish a national quality template for dispute resolution schemes, and to approve the codes of conduct voluntarily adopted by different business sectors.

Each of these various techniques can provide democratic accountability and regulatory power through involving transparency of operation and outcomes and involvement of stakeholders such as regulators and consumers in oversight and governance structures. Many schemes outsource decisions to independent decision-making or advisory bodies, such as arbitrators or mediators, hence improving fairness.

Direct resolution of disputes

Encouraging people to try to resolve their disputes by direct negotiation before resorting to other dispute resolution systems is widespread. It would be contrary to the fundamental right of access to court justice [ECHR, art 6] to prevent access to the courts, but some courts impose cost penalties on people who should have tried direct negotiation or other dispute resolution techniques first. This is because there is empirical evidence that direct contact resolves the vast majority of complaints, and does so more cheaply and quickly than any other procedure.

Any business that trades on the basis of its reputation (from multinationals to small local businesses) are both amenable to market power and desire to provide standards of customer care that seek to identify and resolve issues as speedily and effectively as possible. Large businesses increasingly have 'customer care' functions and elicit feedback and resolve issues in ways that far exceed standards set by consumer protection law. Such systems clearly operate as regulatory and preventive mechanisms.

Ranges of variables

Every dispute resolution technique will have a different balance of the following features:

| Feature | A | B |
|-----------------------------------------------|------------------|------------------------------|
| Technique | Negotiation | Adjudication |
| Force | Advisory | Binding |
| Originator/sponsor | Private | Public |
| Norm applied: substance | Code | Law |
| Norm: procedure | Ad hoc | Fixed |
| Transparency of outcome | Confidential | Public |
| Force of outcome | Advisory/private | Binding |
| Technical expertise (other than legal) | Within the panel | External |
| Establishment | Ad hoc | Permanent |
| Funding | Ad hoc, private | Permanent: Public/Private |
| Cost to parties | Nil | Total |
| Loser pays | No | Yes/some |
| Abuse | No | Yes |
| Application | Individual | Collective/mass |
| Representation | Not required | Required |

Court systems tend towards the features listed in column B, though they may also have other features. Some ADR systems have the features of column A, others have those of column B. Overall, a huge range is seen across different models of dispute resolution. This gives significant user/consumer choice. It is the mix/blend of individual features in a specific dispute resolution technique that enables it to act in a way that is regarded as generally satisfactory by those who choose to use it.

The 'due process' requirements for formality of procedure, evidence, and expertise are regarded as constitutionally essential for courts. But relaxation of some of these features can be acceptable in some dispute resolution systems in return for gaining benefits in costs and time. Other forms of governance usually balance the absence of such features. For example, the dispute resolution pathways attached to business codes of conduct work best where all information is transparent, where specialized arbitration schemes are outsourced to independent operators, and where external stakeholders (such as regulators and consumers) are members of sanction-imposing self-regulatory boards.

Certain issues need to be decided by a court, since they involve issues of law, i.e., decisions regarding norms that are held to be binding on all in the society. Other cases can be resolved through less formal means, such as cases that simply involve fact-finding, or the application of fixed law to known facts, or cases that are just not very important. Where ADR systems apply rules that differ from law, such as business codes of practice, decisions can readily be made by tribunals or panels (i.e., not by courts).

Collective redress

The increased interest in finding solutions to mass problems has tended to focus exclusively on litigation and collective actions as the only available mechanisms. But other approaches can offer significant advantages over collective actions, and avoid some of the associated undesirable features and abuses.

Many existing dispute resolution pathways are capable of handling mass complaints. For example, regulatory, voluntary settlement procedures and customer care techniques currently deal with a significant number of mass issues. Mass complaints are most challenging when they arise in mass markets. Data indicates that financial and telecommunications products and services, utilities, general services, and medicines can give rise to mass problems. In those sectors, public regulatory authorities, compensation schemes, ombudsmen, and codes already handle significant numbers of problems, without recourse to the courts.⁸ These systems can be improved further.

There will be occasions when issues need to be decided by a court, for example when binding rulings on applicable law or on general effect of negotiated agreements⁹ are required, whereas other cases can be processed through less formal or administrative pathways.

It is wrong to assume, as many draft class action procedures do, that all types of collective dispute can be dealt with by first resolving the legal issues, and then considering the particular issues arising in individual cases. This is because individual cases (such as medicines and some financial products) are generally not similar, but turn on individual issues of reliance or causation. Thus a test case or decision on a preliminary issue will not provide a general precedent, or be an efficient procedure for resolving the totality of the claims.

Conclusion: evaluating dispute resolution options

There is a huge range of dispute resolution options and techniques. Many different variants are found in different sectors and countries. Hence, all available options should be considered and evaluated.

8. Good examples include the Nordic medical and drug compensation schemes, the UK Financial Ombudsman Service (which handles 100,000 claims a year), and the Danish Consumer Ombudsman.

9. A good example is the Dutch system of approving negotiated settlements, which will be binding on all those who do not opt out of the agreement.

In theory, every dispute resolution solution can be evaluated against standard criteria of accessibility, cost (overall cost, cost to individual users, who provides the funding), duration, independence, transparency, quality of outcomes, procedural fairness, and so on. However, data is not always available on all aspects for all systems, and drawing conclusions that are accurate and objective can be very challenging.

There is good evidence that:

- Direct negotiation is quickest and cheapest, where it can be done.
- Using the courts can be very slow and expensive in some types of case, and in some countries. Some civil law jurisdictions (for example Germany) have low-cost and reliable courts, and have therefore not developed the range of voluntary dispute resolution systems that exist in some other countries. In contrast, the courts and procedures in common law jurisdictions tend to be expensive.¹⁰
- Many ADR systems operate effectively, informally, cheaply, and quickly, and are attractive to users.
- Many consumers seek advice on whether they have a valid complaint. The key to speedy resolution is to ensure that such advice is adequate, unbiased, and, if there is substance in the complaint, leads to early adoption of an appropriate dispute resolution procedure. Such advice can be given by traders (customer care), regulators, independent advice schemes (Consumers Direct, Citizens Advice Bureau, as well as boards, codes and ombudsmen), or lawyers (expensive if not available pro bono or legal aid, and if not forced into the court track). In a significant number of cases, people are satisfied that they need take matters no further. If they should take matters further, the key decision is which track should be used. Given that multiple

10. C. Hodges, S. Vogenauer, and M. Tulibacka (2010) *The Costs and Funding of Civil Litigation. A Comparative Perspective*. (Oxford: Hart Publishing). A policy brief summarizing these findings is available at: <http://www.fljs.org/uploads/documents/Hodges.pdf>.

tracks exist, the key need at that point is for informed advice on track selection.

There is no single comprehensive dispute resolution model, or model for a standard ADR approach, and practice is developing. However, this policy brief identifies that a holistic approach needs to be taken to dispute resolution. It is no longer relevant to consider courts, advice, ADR, and regulation as separate streams: all need to be considered together as part of a holistic to dispute resolution. Future steps need to integrate the various elements: legislatures and governments (making policy and law), court tracks (applying law), regulators (making rules and encouraging virtuous behaviour), civil society organizations (applying governance and standards), and various bodies (resolving issues).

The demand for ADR is likely to increase. Policymakers should encourage identification and sharing of good practice on good dispute resolution parameters and tracks. Basic parameters can be identified to cover issues of fairness and independence in ADR tracks. Systems can be designed to have features that deliver appropriate independence and fairness whilst avoiding the procedural formality and cost of a judicial procedure. In particular, both customer care and code/ombudsmen systems provide models that can be developed further. Ombudsmen and code/board systems seem to be alternatives rather than complementary mechanisms.

Overall, a holistic approach towards dispute resolution offers considerable scope for delivering society's two key aims of law, namely preventing unacceptable behaviour from occurring and putting things right when it does occur.



The Foundation

The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

European Civil Justice Systems

The European Civil Justice Systems programme aims to evaluate all options for dispute resolution in a European state, and to propose new frameworks and solutions. It encompasses a comparative examination of procedural, funding, and other mechanisms within civil justice systems, including alternative dispute resolution systems. It aims to analyse the principles and procedures that should, or do apply, and to evaluate effectiveness and outcomes.

The programme also involves research into substantive EU liability law, notably consumer and product liability law, harmonization of laws in the European Union, and in particular the changes taking place in the new Member States of central and Eastern Europe.

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