

Alternative Dispute Resolution Workshop

Workshop Report

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The World Bank

Room MC4-800

1818 H Street, NW

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The World Bank and USAID <http://www.info.usaid.gov/> held a half-day workshop on Alternative Dispute Resolution (ADR) on January 6, 2000. Dianna Chigas and David Fairman of the Conflict Management Group (Cambridge, Massachusetts)

<http://www.cmgroup.org/> presented the practitioner's perspective on ADR with analysis from five country case studies. Deborah Hensler of Stanford Law School discussed empirical research on ADR in the U.S. court system. Judge Nan Shuker of the Superior Court of the District of Columbia presented on her experience with ADR in Washington, D.C. courts and in African countries. The session was moderated by Rick Messick of the World Bank Poverty Reduction Economic Management Public Sector group <http://www.worldbank.org/publicsector/>.

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ADR: A Practitioner's Perspective

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(See the [Alternative Dispute Resolution Practitioners Guide](#) produced by Conflict Management Group for USAID's Center for Democracy and Governance).

<http://www.info.usaid.gov/democracy/techpubs/adr/>

ADR refers to a range of methods and techniques for resolving disputes, including unassisted negotiation, non-binding third-party intervention (conciliation or mediation), and binding arbitration. The Conflict Management Group reviewed and analyzed ADR experience in developing countries and developed guidelines for determining whether to initiate, and how to design, ADR programs. Their analysis stems in part from five case studies of ADR programs. In each case, field researchers spent between five and ten days on the site, interviewing a range of stakeholders of the program, including public officials, users of the program, and academic and NGO experts familiar with the operation.

Five Case Studies

In *Bangladesh*, a broad NGO-led community mediation program, supported by USAID and Asia Foundation, mediates over 5,000 disputes a year. The program is based on a revised model of traditional *shalish* community-based mediation, using mediators selected and trained by NGOs. The program was developed independently from the court system and with a minimal government role. With high satisfaction and settlement rates, the project is viewed as a success. In addition, it appears to provide greater access to justice for women than either the formal court system or unassisted *shalish* mediation.

In *Bolivia*, arbitration and conciliation programs for commercial disputes in three Bolivian cities were reviewed. USAID supported these programs, implemented in partnership with chambers of commerce, as part of the U.S. anti-narcotics agenda. The initiative aimed to increase the efficiency of narcotics case-processing by reducing the backlog in other kinds of court cases, but the design of the program appears to contribute only indirectly to this stated objective. In addition, it met with limited success in reducing commercial court backlog; when initiated, there was no law in place to give court sanction to arbitration awards, keeping demand for arbitration services low.

In *South Africa*, CMG reviewed the Industrial Mediation Services of South Africa (IMSSA), an NGO resolving industrial labor disputes. IMSSA's work was especially important before the transition to a post-apartheid government, when it enjoyed particular legitimacy as a result of its independence from the legal system and government. The case load continues to increase, while the program now serves as a model for the government's new Commission for Conciliation, Mediation and Arbitration.

In *Sri Lanka*, a large-scale community-based mediation and conciliation program is funded by the government and aid agencies. Initiated in 1990 to reduce court backlog

and increase access to justice for the economically disadvantaged, it comprises 218 mediation boards which mediate between 250,000-300,000 cases a year at the village level. Mediators are usually respected members of the community chosen at the local level but approved by a national commission. It is considered a highly effective national effort complementary to the formal court system, with high rates of compliance and reduced court delay.

In *Ukraine*, a network of trained mediators and volunteers in four cities operates to resolve commercial and civil disputes. The program is funded partly by USAID, as part of its broader objective of facilitating the country's transition to a market economy. The program has faced significant cultural and legal obstacles, including a general skepticism toward third-party dispute resolution. Another obstacle has been a legal provision that mandated that parties deciding to mediate must withdraw their case from the formal court system, losing their initial filing fee. In spite of these problems, the program has been effective in mediating labor disputes, including some major mining strikes.

Key Findings

Based on their research, Conflict Management Group concluded:

- ADR programs can play a positive role in support of judicial reform: they can reduce the cost and time required to resolve disputes.
- ADR programs face important limitations. They cannot substitute for the reform of corrupt or grossly inefficient judicial systems; they cannot establish precedents or establish rights; and they cannot reverse long-standing discrimination, although they can help increase access to justice for traditionally disadvantaged groups.
- ADR programs can be established beyond the court-annexed and community-based programs. They can also be used for specialized needs, such as dispute resolution within a government ministry to mediate land disputes.

Several questions remain to be addressed. One is the issue of whether ADR programs supply "second-class justice" compared to what might be possible if broader legal reforms were undertaken. For example, would ADR divert political energy from promoting the rights of women or poor or minority groups in society?

Factors in Considering an ADR program

An initial *needs assessment phase* should evaluate the current scope of access to justice and the barriers to access. Existing barriers to access might include illiteracy, social and cultural norms, geography, costs of legal representation, additional costs incurred in a corrupt system (bribery), discrimination against women or minorities, and the inefficiency of courts.

Clear goal identification is necessary so that the design of the program fits the intended objectives and target populations, particularly since undertaking ADR may involve trade-offs with other important social goods. In Bangladesh, for example, the need for reform of the formal court system was acknowledged, but the decision to proceed with ADR was

made nonetheless in order to address an acute and immediate need for greater access to justice.

ADR may be appropriate in cases where costs limit access, where court delays or complex procedures limit the effectiveness of the courts, or where geography hinders access to formal justice. It is inappropriate where the real need is to protect individual or group rights, or when legal standards need to be established, particularly if there is a power imbalance between the parties involved.

Issues to consider before initiating an ADR program include both *background factors* (which are largely beyond the scope of program design) and *design factors* (which can be directly affected in the design and implementation of the program).

Six Background Conditions:

1. *Political support:* Key stakeholders who will be designing, using, and holding accountable the program should be supportive, or at least unlikely to block the program's success.
2. *Adequate human resources:* A potential supply of trained or trainable mediators must be available.
3. *Sustainable financing:* While ADR programs tend to be cheap, particularly those on the community level, national efforts still require resource commitment.
4. *Support of cultural and institutional norms:* Education, consultation and outreach to potential users may be required to overcome discomfort based on societal norms.
5. *Relative parity in the power of potential users:* If the "BATNA" (best alternative to a negotiated agreement) is widely uneven for the two sides, the more powerful party may seek to resolve the conflict outside the ADR framework. But in certain cases, the sanction of community norms can bring even relatively powerful actors to cooperate in a community ADR context.
6. *Adequate legal foundations:* Legal foundations may or may not require that ADR decisions have legal sanction. The closer disputes are to the commercial sector, labor, and highly legalized sectors of the economy, the more important that agreements have legal standing.

Program Design Considerations:

1. *Participatory design process:* Key stakeholders—potential users and managers of the program, or others who might potentially be in a position to interfere—should be consulted. At the same time, consultation should not be so broad-based as to allow capture of the program by hostile parties.
2. *Neutrality of third parties:* Mediators who are perceived as impartial should be selected.
3. *Monitoring, oversight and retraining:* Monitoring and evaluation efforts should solicit feedback from the users themselves—a requirement that many existing programs have yet to meet.
4. *Education and outreach:* Where ADR is not well-established, local presentation strategies are required to educate participants.

Empirical Research on ADR Programs

Deborah Hensler

Stanford Law School

Professor Deborah Hensler's research concentrates on the impact of ADR in U.S. courts, not in legal and judicial reform in developing countries. In the United States, compared to modernizing economies, the introduction of ADR is a component of court reform, intended to increase efficiency by saving time and money. U.S. ADR and court reform programs assume that the fundamentals of the justice system are in place.

In the United States, ADR has primarily meant engaging attorneys or parties in efforts to resolve their disputes with less litigation and less adversarial process, through conciliatory mechanisms using mediation or a variant of mediation. ADR exists as mediation or non-binding arbitration within the U.S. court system; there are also separate possibilities for binding arbitration outside the court system.

While ADR proponents often take as their starting point the premise that efficiency is a key objective, it should be understood that increasing efficiency is neither universally desired nor desirable at any expense. Sometimes, efficiency has uneven benefits for two sides: for example, a company interested in deterring individuals from filing complaints will prefer inefficiency in dispute resolution. In addition, increasing efficiency may, in certain cases, result in a decline in fairness.

Before undertaking ADR, court reformers should first identify the specific problem they seek to address. The needs assessment process should solicit the views of non-elite groups: in the United States, unfortunately, court reform efforts are typically lawyer-driven, based on a problematic assumption that lawyers can represent the full set of users' perceptions. Furthermore, it should be recognized that ADR programs are not free—they usually require an expansion of funding or a diversion of funding from other resources. Therefore, the introduction of ADR should supply enough value to justify the investment.

The Popularity of ADR in U.S. Courts

ADR programs have spread extensively in the United States. Many state and federal district courts require disputants to attempt advisory arbitration before they are allowed to proceed to judge and jury trial. Other states have comprehensive programs, sometimes referred to as “multi-door courthouses,” in which disputants are advised on the variety of options they have in seeking to resolve a dispute.

Despite this significant spread in ADR, little empirical data on court efficiency exists that would permit rigorous quantitative assessments of its impact. ADR expansion has been based on qualitative assessments—lawyers and litigants appear to like ADR—rather than hard figures showing improvements in efficiency or other performance indicators. Therefore, courts considering reform programs should undertake pilot data collection in the short run, while in the long run there is a need for a comprehensive database system for monitoring court reform outcomes.

Initial Assessments of ADR Impact

Most existing empirical studies on arbitration, using data collected from the past decade, have found that arbitration programs actually tended to *increase* the time it took to resolve disputes, and tended not to have any effect on cost. Yet these same studies found that in the views of litigants, arbitration appeared to be more fair and satisfactory than the formal court procedures. One explanation is that non-binding arbitration did not reduce costs and time because in the United States, most cases are settled rather than brought to trial. However, litigants perceived ADR to be more fair and open than settlement process, which seemed to consist of back-room deals between lawyers.

Compared to the data on arbitration, even less data exists on the impact of mediation programs. But the limited data now available from the Civil Justice Reform Act evaluation show similarly modest results for mediation. In that evaluation, comparisons between courts that adopted mediation programs and others that did not revealed no statistically significant difference in the average time to disposition or in cost.

While introducing ADR along with other reforms (tightly enforcing schedules, relaxing evidentiary standards, etc.) may produce efficiency gains, it is unclear how much improvement can be attributed specifically to ADR. The conclusion is that based on current data, ADR does not necessarily reduce costs, but that in meeting community and litigant preferences, it may satisfy objectives other than cost.

Court systems contemplating reform should undertake pilot and experimental programs to test variations in program features. Even evaluating a small sample of real ADR cases may provide important information, and additionally promote lawyer and user “buy-in” to the reform process.

As a final note of caution, it should be borne in mind court reform in the United States may not have direct relevance to judicial reform in countries that are modernizing their legal systems. U.S. ADR efforts involves fine-tuning the judicial system, not rethinking it. One should not expect large effects from any institutional tinkering that does not address actors’ incentives. ADR is not a panacea, and cannot substitute for fixing a fundamentally flawed court system.

Comments of Judge Nan Shuker
Superior Court of the District of Columbia

Data for court reform in foreign countries is minimal, but on the local level, the D.C. Superior Court evaluated its experience with reform. It found that both before and after the introduction of ADR and case management, 6-7% of cases went to trial. However, cases were settled earlier after the institution of ADR and case management. (Ironically, this greater efficiency led to a higher case load, since federal malpractice cases then began to be filed in that court).

Introducing ADR without case flow management can make court delay even worse. In Tanzania, the initial introduction of ADR led to more delay, creating another level of procedure; ADR events were adjourned on the court calendar just like other procedures. In Ghana, ADR was instituted after strong data collection that pinpointed the sources of delay in that court system.

Judge Shuker noted the difference between establishing ADR inside and outside of the court system. In certain countries, external ADR may not reduce court delay at all, but may meet other objectives, such as providing access to justice where the alternative is no access at all.

Discussion

Issues for Further Consideration

The impact of ADR on formal justice system reform: Does developing ADR outside of the formal court system diminish the impetus for court reform, which might be the real need for a society? (Judge Shuker). In response, David Fairman (CMG) noted that introducing informal ADR mechanisms may lead to greater activism among the disenfranchised for access to the formal legal system. Thus even external ADR programs may eventually stimulate reform in the formal courts. For this to occur, the program design should take into account the need for dialogue between the informal and formal systems.

ADR role in the protection of women's rights: One participant suggested that formal, urban courts, while inefficient, are more progressive in pushing for recently-gained legal rights for women, compared to informal mechanisms that are more susceptible to traditional social norms. Traditional dispute resolution methodologies should be adopted on a contextual basis, with attention to the programs' impact on women. Rick Messick noted that in cases where social norms are the root of the discriminatory treatment, ADR cannot completely level the playing field, but it provides an option for disputants who would otherwise find no redress at all.

The relationship between ADR and development: In countries with limited resources, is there a trade-off between financing ADR and financing other important development objectives?

Mandatory versus voluntary ADR: In the United States, many contractual agreements call for binding arbitration and provide that cases will never come into court. It is now a source of controversy, one participant noted, because consumers or employees may be required to agree to such provisions without understanding that agreement or having a real option to reject it. Another observation was that in the United States, mandatory mediation programs have greater usage than voluntary programs, because one party's suggestion to initiate voluntary mediation might signal a weak position or an unwillingness to litigate. Another participant noted that in the D.C. bar, mandatory mediation in certain areas (e.g. in the medical malpractice bar) is widely accepted; the parties have the option of pursuing litigation if mediation fails, but mediation enjoys high success rates and is also familiar to, and accepted by, lawyers.

Power disparities in mediation: The question of the impact of power disparities between disputants surfaced repeatedly during the workshop; do ADR mechanisms favor a more established and powerful party? Judge Shuker suggested that in mediation, a judge can compensate to some extent for power disparities between the parties, whereas in court the rules of evidence and procedure restrict the judge's freedom to empower the weaker party.

ADR in civil law vs. common law countries: One participant suggested on the basis of anecdotal evidence that in civil law countries, there is greater resistance to empowering mediators to issue binding decisions.