



Helpdesk Research Report

Alternative dispute resolution for businesses in developing countries

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Question

Identify mechanisms (particularly innovative ones) for helping businesses to effectively resolve commercial disputes in developing countries.

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1. Overview

Alternative dispute resolution (ADR) includes any process for resolving a dispute other than adjudication by a judge in a statutory court (World Bank Group, 2011, p. 2). Modern commercial ADR is growing in importance worldwide, driven not by mainstream civil justice system reform but by businesses themselves seeking “commercially focused, tailor-made dispute resolution mechanisms... a business-based solution, operated in and by the private sector, for its own benefit” (World Bank Group, 2011, p. 4). While ADR processes can benefit from a supporting legal framework and integration with the court system, some processes can proceed fully independently of the courts, simply by agreement between the parties (World Bank Group, 2011, p. 6).

In comparison with litigation in court, ADR mechanisms typically offer lower cost, faster resolution, greater informality and flexibility, greater confidentiality, more control over the process, and a greater chance of preserving a harmonious relationship in the future (World Bank Group, 2011, pp. 4-5). ADR

- online dispute resolution opening up as a new area of activity, which is still in its infancy but which is likely to grow with the continued growth of online commerce.

2. Alternative dispute resolution mechanisms

ADR is sometimes thought of as a new phenomenon, originating as an alternative to modern court processes in the 1960s in the USA. However, the central idea of ADR as a way of resolving disputes through a consensual and negotiated process rather than a confrontational and adversarial one is deeply rooted in history, and ADR processes are often linked to ancient traditional processes (World Bank Group, 2011, p. 4; Fiadjoe, 2004, pp. 2-6). Modern justice systems are oriented towards fact-finding and deciding right and wrong, while traditional justice and modern ADR place more emphasis on repairing and maintaining relationships, and so are well-suited for parties that expect to continue to work together in the future (Diamond, 2013; Fiadjoe, 2004; World Bank Group, 2011, p. 5).

In **arbitration**, the disputing parties agree to settle their differences in a private process outside the court system by appointing a neutral third party to render a decision (World Bank Group, 2011, p. 10; Fiadjoe, 2004, p. 27). Arbitration is governed by national law and leads to a binding decision that is enforceable through the courts (World Bank Group, 2011, p. 10). Arbitrators are frequently chosen for expert knowledge of the industry concerned in the dispute (World Bank Group, 2011, p. 11). The process is flexible and adaptable. Parties typically commit to using an established arbitral organisation with a fixed set of rules which serves as a buffer between the parties and helps preserve neutrality, uniformity, and efficiency (Shah & Gandhi, 2011, pp. 233-234). The proceedings are less formal than litigation and aspects such as rules of evidence are more relaxed (Fiadjoe, 2004, p. 27). Arbitration is typically faster and cheaper than litigation (although this can depend on the complexity of the dispute and the willingness of the parties to cooperate). It offers the parties confidentiality, and may be more amicable than litigation (World Bank Group, 2011, pp. 10-12; Shah & Gandhi, 2011, p. 233; Fiadjoe, 2004, p. 28).

Mediation is an informal, consensual, and highly flexible process in which a neutral third party actively facilitates a negotiation process. The mediator helps the parties identify issues, solve problems, and explore alternatives, although the parties retain full control of the process. Mediators are selected for knowledge of the issues relevant to the dispute and are often senior lawyers, trusted members of a trade, or community elders. A mediated solution is mutually agreed but is not binding or externally enforceable. Mediators will refrain from suggesting solutions to the parties, but **conciliation** is a related process in which the neutral third party may give advice on settlement options and make proposals or recommendations. Mediation and conciliation are useful for complex disputes, when the parties are willing to negotiate, and when the parties are seeking to maintain (or repair) a long-term relationship. Because the process is consensual and flexible, however, parties can withdraw at any time, and the rules of procedure are not predefined which may result in less predictability. (World Bank Group, 2011, pp. 12-18; Fiadjoe, 2004, pp. 22-24)

Online dispute resolution (ODR) is a new approach in which standard ADR procedures like arbitration and mediation are carried out online (Albornoz & Martín, 2012, p. 6). ODR can be used for both domestic and international disputes, but is particularly suited to low-value disputes between parties located far enough apart that the cost of in-person appearances would be prohibitive, and to disputes arising from e-commerce transactions (Albornoz & Martín, 2012, pp. 7-8, 12-13). ODR can either use technology to help parties resolve a dispute by themselves fairly and transparently, or can facilitate communication which may involve a neutral third party (Fowlie, Rule,

& Bilinsky, 2013, p. 51). In *assisted or automated negotiation*, the technology guides the parties through a dispute resolution process by asking questions, providing prompts, or providing a system or bidding for compensation without the involvement of a human third party. In *online mediation or arbitration*, a more conventional ADR process with a human mediator or arbitrator is conducted over the Internet. Platforms for conducting these processes are operated by private companies such as Modria, CyberSettle, SmartSettle, Juripax, and the Mediation Room (Albornoz & Martín, 2012, pp. 9-12; Fowlie, Rule, & Bilinsky, 2013, pp. 51-52). ODR is being used to mediate commercial disputes in Latin America, including both business-to-business and business-to-consumer transactions. It appears to offer opportunities for quick and low-cost resolution of disputes, but there is not yet a clear legal framework for ODR, trust in online transactions is limited, and ICT infrastructure is weak (Albornoz & Martín, 2012). A UNCITRAL working group is developing international standards for online dispute resolution, both for business-to-business and business-to-consumer transactions (International Institute for Conflict Prevention & Resolution, n.d.).

Less widely used mechanisms for commercial ADR include:

- **Expert determination** involves an independent technical expert who is appointed to decide the dispute on technical grounds rather than through a negotiated process. The expert's decision is binding and there is no right of appeal. This approach is used for disputes involving valuation or disputes of a purely technical nature. (World Bank Group, 2011, p. 14)
- **Early neutral evaluation** also relies on an independent technical expert who carries out a preliminary assessment of facts, evidence, and/or legal arguments and expresses an opinion on the dispute. The expert's opinion is not binding, but gives the parties an independent evaluation of their relative positions and some guidance as to the likely outcome should the dispute proceed to court. It helps the parties clarify the issues at stake and assess their positions and prospects for resolution, can provide a basis for further negotiation, and can avoid further unnecessary stages in the dispute. (World Bank Group, 2011, pp. 14-15; Fiadjoe, 2004, p. 26)
- **Stakeholder dialogue** is a process related to mediation, in which the views of multiple stakeholders are sought, rather than just those of the disputing parties. It may be used where there are large numbers of interested parties, such as in the case of large-scale infrastructure projects or environmental protection cases affecting many people. (World Bank Group, 2011, p. 15)
- **Dispute resolution boards** are used infrequently, and mainly in the construction sector. They involve panels of impartial professionals formed at the beginning of a project and which stay involved throughout the duration of the project to help avoid and resolve disputes. Decisions are not necessarily binding but the overwhelming majority of disputes referred to such boards are resolved. (World Bank Group, 2011, p. 15)
- An **ombudsperson** is a type of arbitrator frequently used in the public sector, and for resolving customer complaints in regulated industries when other complaint-handling processes have failed. They are rarely used in business-to-business disputes but may be used in business to handle internal complaints from employees. Mediation is often offered as part of the process. (World Bank Group, 2011, p. 16; Fiadjoe, 2004, pp. 24-25)

These principal ADR processes are summarised in the table below:

ADR Processes	Role of the neutral	Nature of a dispute	Preserving relationship between parties
Adjudication-based – Arbitration – Adjudication ¹ – Expert determination	Providing a final and binding decision	Legal and technical questions prevail	Not important
Recommendation-based – Conciliation – Early neutral evaluation	Providing nonbinding recommendations	Factual questions prevail	Important
Facilitation-based – Mediation – Stakeholder dialogue	Facilitating dialogue, neither giving recommendations nor binding decisions	Factual questions prevail	Important
Hybrid processes – Dispute resolution boards – Ombuds processes – Mediation-arbitration/adjudication	Varies	Combination	Varies

Source: World Bank Group, 2011, p. 9

Types of disputes	ADR process
Employment/labor	Mediation, conciliation
Land rights	Mediation, stakeholder dialogue
Planning, and other potential disputes involving a plurality of stakeholders	Stakeholder dialogue, adjudication
Construction, and other projects that cannot afford disruption due to disputes	Adjudication, dispute resolution boards, mediation, expert determination
Complaints by customers against large organizations (banks, insurers, government departments) that may involve an ongoing relationship between the parties	Ombuds services, mediation
Debt collection (for example, non-payment of utility bills)	Streamlined adjudication, mediation
Information technology or similar disputes involving highly technical issues	Expert determination

Source: World Bank Group, 2011, p. 19

3. Models of delivery

Alternative dispute resolution can be delivered through public models (which are explicitly connected to the court system or other public bodies) or through private models (delivered by business associations or independently).

Public models rely on a minimum level of functioning and trust in the judiciary, and often involve judges or court officials in the process. They have been recommended where cultural values favour collectivism and deference to authority, where backing by a public institution is important for confidence, where enforceability is critical, and where one of the objectives of introducing ADR is to strengthen the justice system. **Court-annexed ADR** is closely controlled by the courts, and benefits from that relationship in that decisions are more readily enforceable and processes may be able to draw on court staff and infrastructure. However, it is less flexible than other models and depends on adequate resources being available within the judicial system. **Court-connected ADR** is linked to the court system but operates at arm's length, so courts may be less supportive and enforceability of agreements may be less certain.

These centres may accept cases presented directly rather than being referred through the court. (World Bank Group, 2011, pp. 20-23)

Private-sector ADR services are provided by a business chamber or an independent organisation. Private ADR models are indicated where going to court is stigmatised or associated with 'losing face', and they provide the greatest confidentiality for the parties. They tend to work well in free-market economies where the private sector is strong, cultural values favour individualism, trust in public institutions is low, and the justice system lacks capacity. However, legislation to provide a legal framework for private ADR is important. ADR services may be provided by chambers of commerce or other trade bodies, which have the advantage of being trusted partners for businesses with existing institutional frameworks. This model is especially appropriate for disputes between businesses from the same industry or business community, and it tends to be fast, efficient, and supported by easy access to expertise. There can be a risk of the chamber of commerce not being committed to sustaining the service, scope may be limited to handling disputes between members, enforcement can be uncertain due to lack of involvement from the judiciary, and processes can be dominated by the larger businesses. (World Bank Group, 2011, pp. 22-24)

Free-standing models are set up independently from both the courts and from business associations, as for-profit or not-for-profit organisations. They can provide services to a wide range of users, and can be flexible as they are independent from the rules of other institutions. However, enforcement of decisions may be uncertain due to the lack of connection to the judiciary, and financial sustainability is often a problem without reliable sponsorship if there is no history of paying for private sector dispute resolution (World Bank Group, 2011, p. 24).

Growth in international commercial arbitration has led to a strong trend of **harmonisation of national law** in this area (Fiadjoe, 2004, p. 93). Two international agreements are particularly significant in defining international best practice. The **United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration** is intended to be used by countries as an aid to harmonising legislation on arbitration. The Model Law covers all stages of the arbitration process, reflects international consensus on best practice, and is intended to be relevant in all legal and economic systems in use. Although it is designed for international arbitration, it is also applicable to domestic disputes and a number of states have used the Model Law as a basis for legislation governing such disputes. States are encouraged to implement the Model Law in national legislation with as few changes as possible in order to maximise harmonisation and international business confidence (UNCITRAL, 2008). The **Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)**, also called the New York Convention, establishes common international standards so that awards made through arbitration in one country can be enforced against parties in another country (UNCITRAL, n.d.; World Bank Group, 2011, p. 11)

4. Regional and country examples of ADR

Ghana

ADR has been institutionalised in Ghana since 1993. Customary law is officially recognised, and customary arbitration and mediation processes led by family heads, elders, tribal chiefs and queen mothers are commonly used, especially in remote areas (Nolan-Haley & Annor-Ohene, 2014, pp. 4-5). In 2010, Ghana passed new legislation which significantly enhances the role of ADR and contains several innovative features. It provides a comprehensive and flexible legal framework which takes into account modern

arbitration practice and modern information and communications technology (addressing, for example, the legal status of email), improves the process of appointing arbitrators, allows for combining arbitration and mediation, and makes processes faster and cheaper (Onyema, 2012; Sarkodie, 2011). It also includes mediation for the first time, codifying generally recognised principles and strengthening mediation agreements so that they are as enforceable as arbitration awards (Onyema, 2012). Most notably, it recognises customary arbitration and mediation practices, bringing them into the formal civil justice system for the first time in any African country (Nolan-Haley & Annor-Ohene, 2014, pp. 2, 5; Onyema, 2012, p. 101). The legislation recognises the diversity of customary practices and their voluntary and oral nature, and gives broad discretion to the parties and arbitrator: “the arbitrator is not obliged to apply legal rules of procedure but be guided by rules of natural justice and fairness” (Onyema, 2012, pp. 115, 122). The law also provides for the establishment of an ADR Centre to support ADR practice, although the independence of the Centre from government has been questioned by some (Adekoya, 2010).

As of 2014, 47 district and circuit courts are involved with the court-connected ADR programme and there are plans for mediation to be mainstreamed into all courts in the country by 2017 (Nolan-Haley & Annor-Ohene, 2014, p. 7). In 2012-2013, court-connected mediation programmes handled 4,918 cases, of which 46 per cent were settled; longer term data show 52 per cent of mediation cases were settled (Nolan-Haley & Annor-Ohene, 2014, p. 7). Research connected with the establishment of a new centre in central Ghana providing mediation services has indicated general satisfaction on the part of users. A large majority of respondents to a survey indicated that they were satisfied with settlements and felt that the mediation process was fair, respectful, did not impose too much pressure to settle, and provided ample opportunity to express their views. The researchers conclude that “the modern mediation provisions in the Act are perceived as legitimate” (Nolan-Haley & Annor-Ohene, 2014, pp. 9-13).

Nigeria

Nigeria has been a leader within Africa in adopting ADR. It was the first African country to adopt (in 1988) an arbitration law modelled after the UNCITRAL Model Law. The principal centre for international commercial arbitration is the Regional Centre for International Commercial Arbitration - Lagos (Kidane, 2011, pp. 379-380). The Centre’s rules enable parties to have complete flexibility on rules and procedures and contain unusually strong provisions for impartiality of arbitrators and for confidentiality (Kidane, 2011, pp. 380-381).

Nigeria is also the home of the first court-connected ADR centre in Africa, the Lagos Multi-Door Courthouse (MDC), established in 2002 (DFID, 2010, p. 8). There are now three MDCs in Nigeria, each independently managed but attached to their respective state High Courts in Kano, Abuja, and Lagos (DFID, 2010, p. 2). The MDCs use multiple approaches to dispute resolution, including arbitration, mediation, and early neutral evaluation (DFID, 2010, pp. 2-5). All three accept cases referred by the courts as well as “walk-in” cases that come directly to them, and all three handle a mixture of commercial, land, contract, and other cases, with the Lagos MDC also handling cases involving multinational companies (DFID, 2010, p. 2). The Lagos MDC is a public-private partnership between the State High Court and a non-profit organisation, the Negotiation and Conflict Management Group (DFID, 2010, p. 8). It handles only a small proportion of potential cases: between 2008 and 2010, it handled 888 cases, compared with more than 40,000 civil cases handled by the High Courts and Magistrate Courts, and more than 77,000 by the Citizens’ Mediation Centre (Onyema, *The Multi-door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC*, 2013, p. 9). Capacity constraints in the mainstream court system mean that civil cases can take 5 to 20 years, while arbitration through the Lagos MDC can take up to a year and mediation takes an average of three months (Onyema, 2013, pp. 5, 7). Between

2002 and 2011, 94 per cent of cases were settled by mediation and 6 per cent by arbitration, but only 30 per cent of the mediations were resolved, with the rest unresolved or withdrawn (Onyema, *The Multi-door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC*, 2013, p. 7). There is insufficient evidence to explain the low resolution rate of mediation, but Onyema suggests that some parties are compelled to choose mediation without having a true commitment to the process; there is a lack of familiarity with and trust in the process; mediation may be rushed; and there may be scope for adjusting processes to better relate to local conditions as well as conforming to international best practices (Onyema, *The Multi-door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC*, 2013, pp. 19-23).

India

In India, commercial arbitration has been well established since the 1990s. It is governed by the Arbitration and Conciliation Act 1996, which draws on the UNCITRAL Model Law and rules (Law Commission of India, 2014, p. 8). The Indian judiciary has been notably pro-arbitration in recent years (Pillai & Chaudhry, 2014) but arbitration processes experience long delays and high costs which have reduced the attractiveness of the process (Law Commission of India, 2014, p. 8). The Law Commission of India has proposed amendments to the Act to address several problem areas. These amendments include promoting institutional rather than ad hoc arbitration, encouraging trade bodies and commerce chambers to start private sector arbitration centres, publishing a model fee schedule to restrain escalation of costs, encouraging more flexible rules of procedure and the use of modern information technology, clarifying the relationship between the judiciary and arbitration, speeding up the appointment of arbitrators and resolution of challenges to awards, clarifying the scope of the Act in international arbitration, and allowing for arbitrators to award costs, among other changes (Law Commission of India, 2014, pp. 9-35).

Another approach to ADR in India is the system of Lok Adalats (“people’s courts” in Hindi) which are informal courts providing low-cost alternative dispute resolution services across the country. Traditionally, rural justice and dispute resolution was handled through informal tribunals called Nyaya Panchayats, made up of village elders. Under British colonial rule and after independence, the formal court system became the most common way of resolving disputes (Zainulbhai, 2011, pp. 248-254). Experiments with alternative dispute resolution drawing on the traditions of the Nyaya Panchayats began in the 1970s, leading to the establishment of the Lok Adalats. They were given statutory authority in 1987, which included enabling court cases to be referred to them and making their decisions enforceable and equivalent to civil court rulings, and were further strengthened and formalised in the 1990s (Zainulbhai, 2011, pp. 255-263). Lok Adalats were initially popular as a faster, cheaper, more accessible, and more collaborative alternative to the formal court system. However, their popularity has declined as they have been constrained by a lack of resources and have become increasingly formalised and adversarial, losing some of the advantages that distinguished them from the formal courts (Zainulbhai, 2011, pp. 263-268). Zainulbhai (2011, pp. 273-277) suggests that the Lok Adalat system could be strengthened by providing additional resources for staff and facilities (including making more use of modern information and communication technologies), accommodating variations in local traditional practices and increasing community involvement, involving a broader range of local people as adjudicators, encouraging mandatory referral of court cases, enforcing requirements for attendance and participation by the parties, and providing more information to participants.

Colombia

Conciliation (in which the neutral party may propose solutions) and mediation (in which the parties must propose the solutions) are widely used in Colombia for resolving commercial disputes. ADR mechanisms are described in the constitution, arbitration has been included in law since 1991, and conciliation has been included in law since 2001 although it was widely practiced before then. Civil and commercial disputes are required to go through a mandatory conciliation process before being filed in court (de la Campa, 2008, p. 1).

Colombia has one of the most sophisticated commercial ADR systems among emerging market countries. Mandatory conciliation has led to high efficiency, and has the advantage that parties are obligated to negotiate without fear that negotiation may be seen as a sign of weakness. Conciliators in Colombia must be lawyers, which is unusual compared with other jurisdictions that often allow other professions to serve as conciliators or mediators if trained appropriately. Conciliation services are provided free by public sector institutions (such as municipal government offices and university law faculties) which tend to handle smaller disputes, or for a regulated fee at private sector centres, most of which are attached to chambers of commerce and which tend to handle larger or more complex cases. (de la Campa, 2008, pp. 2-4)

Arbitration and conciliation are also used to resolve disputes between government and the private sector, which is unusual among emerging market economies. Although conciliations involving the state follow a slightly different process than purely private sector conciliations, and must be ratified by a judge, the process is much faster and cheaper than litigation: on average, a conciliation process involving the state takes 36 months while litigation takes an average of 14 years. (de la Campa, 2008, p. 11)

The Arbitration and Conciliation Center of the Bogota Chamber of Commerce has been operating continuously since 1983 and is financially self-sustaining. Arbitration and conciliation processes are similar to those in other countries. Serving as an arbitrator or conciliator for the Center is considered prestigious in the legal community and there is a waiting list to join. The number of cases handled is growing quickly and the settlement rate for conciliation is 77 per cent (in 2008), which is very high compared with similar programmes elsewhere, particularly for a mandatory process. About 90 per cent of settlements are self-enforced, with the remainder proceeding to litigation. Some unusual uses of conciliation are in debt collection and in resolving tenancy disputes, both of which were much more successful than litigation. The Bogota Chamber also provides training, research, capacity building of other ADR centres, and community mediation programmes. (de la Campa, 2008, pp. 5-11)

Asia-Pacific region

In the Asia-Pacific region, arbitration is growing in importance because of the general growth of Asian economies; the attractions of neutrality, flexibility, finality, and confidentiality; the greater ease of international enforcement of arbitral awards compared with court judgements; the increasing maturity of Asian arbitration centres; the willingness of Chinese entities to arbitrate outside China; and the fact that many Asian countries have updated their legal frameworks to reflect international best practice (Kwan & Oghigian, 2012, p. 14). A survey of companies and law firms in the region by the International Institute for Conflict Prevention & Resolution in 2013 found positive attitudes towards mediation with the principal reasons for choosing mediation being cost, speed, flexibility, confidentiality, and a less adversarial process (Trent, 2013).

Harmonising legal frameworks has been particularly important. India, Korea, Thailand, The Philippines, and Malaysia, as well as wealthier countries in the region, have all updated their legal frameworks for arbitration by adopting the UNCITRAL Model Law (Kwan & Oghigian, 2012, p. 14). Vietnam has also recently updated its legislation which has improved security and flexibility for foreign disputants, although the new law is not based on the UNCITRAL Model Law (Kwan & Oghigian, 2012, pp. 19-20). However, even where the Model Law has been adopted, courts may take a more or less positive approach to arbitration in different countries (Kwan & Oghigian, 2012).

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6. About this report

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