

70763

ALTERNATIVE DISPUTE RESOLUTION GUIDELINES



Investment Climate Advisory Services of the World Bank Group



With funding from FIAS, the multi-donor investment climate advisory service

in partnership with



Alternative Dispute Resolution Guidelines

Investment Climate Advisory Services of the World Bank Group



With funding from FIAS, the multi-donor investment climate advisory service

in partnership with



© 2011 The World Bank Group
1818 H Street, N.W., Washington D.C., 20433

All rights reserved
First Printing: June 2011

This information, while based on sources that the World Bank Group considers to be reliable, is not guaranteed as to accuracy and does not purport to be complete. The findings, interpretations, and conclusions expressed in this work are those of the authors and do not necessarily reflect the views of the Board of Executive Directors of the World Bank or the governments of the countries which they represent. The information in this work is not intended to serve as legal advice.

The World Bank Group does not guarantee the accuracy of the data included in this work and accepts no responsibility for any consequences of the use of such data.

The denominations and geographical names in this publication are used solely for the convenience of the reader and do not imply the expression of any opinion whatsoever on the part of the International Finance Corporation, the World Bank, or other affiliates concerning the legal status of any country, territory, city, area, or its authorities, or concerning the delimitation of its boundaries or national affiliation.

Rights and Permissions

The material in this publication is copyrighted. Copying and/or transmitting portions or all of this work without permission may be a violation of applicable law. The World Bank Group encourages dissemination of its work and will normally grant permission to reproduce portions of the work promptly.

For permission to photocopy or reprint any part of this work, please send a request with complete information to the Copyright Clearance Center Inc., 222 Rosewood Drive, Danvers, MA 01923, USA; telephone: 978-750-8400; fax: 978-750-4470; online at: www.copyright.com.

About the Investment Climate Advisory Services of the World Bank Group

The Investment Climate Advisory Services of the World Bank Group helps governments implement reforms to improve their business environments and encourage and retain investment, thus fostering competitive markets, growth, and job creation. Funding is provided by the World Bank Group (IFC, MIGA, and the World Bank) and over 15 donor partners working through the multidonor FIAS platform).

Cover photo credits: (left to right): Dmitriy Shironosov/Shutterstock, OtnaYdur/Shutterstock, corepics/Shutterstock, Eric Miller/World Bank.

Acknowledgments

The publication of these guidelines was made possible due to generous support of the Government of Luxembourg through its contribution to the trust fund supporting the activities of the World Bank Group's Investment Climate Advisory Services. The development of the guidelines was done in partnership with the Center for Effective Dispute Resolution and Conflict Management International, both based in London.

The primary authors of these guidelines are Carl Mackie, James South, William Marsh, Nadja Alexander, Oliver Lorenz and Gina Lee Barbieri. The preparation of the publication was led by Lada Busevac and coordinated by Rita Maria Benitez from the World Bank Group.

We are also grateful to the following individuals for their feedback and guidance on the content of the publication: Donna Stienstra (Federal Judicial Center), Markham Ball (University of Pennsylvania Law School), Akvile Gropper (CIC ADR Global team, WBG), Nina Pavlova Mocheva (CIC ADR Global team, WBG), Marie-Laurence Guy (CSBGF, WBG), Laura Anne Watson (CSABI, WBG), Sonali Hedditch (CIC, WBG), Soneath Hor (CIC, WBG), Navin Salim Merchant (CIC ADR Global team), Igor Matijevic (CIC ADR Global team), Scott Adams (CCAVP, WBG), Karen Sarah Cuttaree (Doing Business Project, WBG), Heike Gramckow (LEGJR, WBG), and Marialisa Motta (CICRA, WBG).

The guidelines were edited by Grace Morsberger. Patricia Ellen Steele provided priceless input on the content preparation, editing, and production throughout the process. Datapage and District Creative Printing Inc. (DCP) were in charge of production, including typesetting and printing, respectively.

Abbreviations

ADR	Alternative dispute resolution
AFCR	Albanian Foundation for Conflict Resolution and Reconciliation of Disputes
AoM	Association of Mediators of Bosnia and Herzegovina
CAMC-O	Commercial Arbitration, Mediation, and Conciliation Center of Ouagadougou (Burkina Faso)
CAM Santiago	Santiago Chamber of Commerce
CCMA	Commission for Conciliation, Mediation, and Arbitration (South Africa)
CEDR	Centre for Effective Dispute Resolution
CEMA	Euro-Mediterranean Mediation and Arbitration Center (Morocco)
CIMAT	Tangiers International Mediation and Arbitration Center
CPC	Code of Civil Procedure
CRCICA	Cairo Regional Center for International Commercial Arbitration (Egypt)
CTO	Commonwealth Telecommunications Organization
EC	European Commission
FIAS	Facility for Investment Climate Advisory Services
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IFC	International Finance Corporation
ILO	International Labor Organization
KCDR	Karachi Center for Dispute Resolution
MIGA	Multilateral Investment Guarantee Agency
NGO	Nongovernmental organization
OECD	Organization for Economic Co-operation and Development
SEED	Southeast Europe Enterprise Development program
SPB	State Bank of Pakistan
UNCITRAL	United Nations Commission on International Trade Law
WIPO	World Intellectual Property Organization

Using the Guidelines

Many countries in which the IFC provides advisory services rank poorly in the areas of contract enforcement and an efficient judicial system. This has a negative effect on the business climate and increases the risks for businesses. A number of studies and assessments (Doing Business, Investment Climate Assessments, Enterprise Surveys, and other analytical studies) have shown that efficient access to justice is key to the investment climate agenda for emerging market economies. ADR has proven to be an effective approach to enhancing access to justice.

ADR is also embedded in the day-to-day operations of the World Bank Group's institutions: the International Centre for Settlement of Investment Disputes (ICSID), the IFC, the Multilateral Investment Guarantee Agency (MIGA), and the International Bank for Reconstruction and Development (IBRD, World Bank). IFC and World Bank credit agreements contain clauses that refer to the amicable resolution of disputes and promote the use of mediation in all investment-related disputes.

Against this background, as part of its strategy to improve the business environment in the Balkans, IFC began to implement commercial ADR in response to demand from client countries in that region. Recent successful IFC ADR projects in many other regions provide an encouraging basis on which to further develop a common methodology and core approach to IFC ADR interventions. Hence these guidelines, which may be used by various stakeholders, from IFC staff looking to implement an ADR project to stakeholders partnering with IFC. In designing these guidelines, a balance was sought between providing sufficient detail and background for the concepts being discussed, and offering a usable diagnostic tool for ADR project managers.

Throughout this publication, criteria and indicators are set out to help readers answer key questions pertaining to the use of ADR in their countries. These criteria and indicators are not intended to provide definitive answers, but rather to offer guidance on the issues that should be considered for any potential ADR project and the relative importance these factors play. All proposed ADR interventions should be assessed individually and on their own merits. To achieve this purpose, the guidelines offer:

- an assessment of lessons learned in ADR reform, and consequent good practice;
- a detailed discussion of the various issues to be considered in ADR interventions;
- a wide range of structural options for ADR interventions;
- case studies that provide practical examples; and
- a series of diagnostic tools.

While these guidelines are neither prescriptive nor exhaustive, readers developing ADR in the private or public sector may find them useful in outlining various options in the planning and implementation of ADR interventions.

Table of Contents

ADR Guidelines Executive Summary	1
Purpose	1
Approach	1
Definition, Background	2
Chapters 2 – 6	2
Chapter 1: Introduction	4
What is Alternative Dispute Resolution?	4
From Judicial System Reform to Enhancing the Investment Climate	4
Chapter 2: Selecting the Appropriate Alternative Dispute Resolution Process and Model	8
Selecting the ADR Process	8
Selecting the ADR Model	20
Chapter 3: Assessing the Need for and the Viability of an ADR Intervention	27
Factor 1: Needs Assessment—The Time and Cost of Litigation as a Business Consideration	27
Factor 2: Economic Development—Strength and Organization	29
Factor 3: Political Stability and Continuity of Government	31
Factor 4: General Respect for the Rule of Law	31
Factor 5: Legal Framework to Support ADR	32
Factor 6: Settlement Culture within the Court System	32
Factor 7: Stakeholder Involvement	33
Chapter 4: Practical and Logistical Considerations for Alternative Dispute Resolution Interventions	35
The Interface between the Dispute Resolution Process and the Legal System	35
Triggering Mechanisms	39
Ensuring Professional Quality Management and Standards	41
Sustainability of ADR Initiatives	43
Gauging the Nature and Scope of an Intervention by Assessing the Existing Level of ADR Development	44
Additional Considerations—Gender Inclusiveness of an ADR Intervention	46
Chapter 5: Private Sector Approaches to Alternative Dispute Resolution	48
Advantages of Private Sector Involvement	48
Types of Private Sector Involvement in ADR	49
Access Points and Agents for Private Sector ADR Initiatives	51
Implementation of Private Sector ADR Initiatives	55
Best Practice Guidelines for Private Sector Interventions	55
Chapter 6: Monitoring and Evaluation	59
Importance of Output, Outcome and Impact Indicators	59
Impact Models	59
M&E Sequencing	59
Monitoring Tools and Data Collection	60
References	61
Annex 1: Glossary of Terms	63
Annex 2: Assessing the Need and Viability of an ADR Intervention (Checklists to Chapter 3)	64
Annex 3: Practical and Logistical Considerations for ADR Interventions (Checklists to Chapter 4)	65
Annex 4: Example of Model ADR Clauses (International Chamber of Commerce)	67
Annex 5: Example of Model Mediation Clause and Model Arbitration Clause (Generic)	68
Annex 6: Model Mediation and Arbitration Clause (Chartered Institute of Arbitrators)	69

Annex 7: Recommendations for Drafting an Arbitration Clause, Based on the UNCITRAL Model Clause (Markham Ball)	70
Annex 8: Descriptions of ADR Centers	77

Boxes, Figures and Tables

Boxes

Box 1.1: General Indications for ADR vs. Formal Litigation in Court	5
Box 1.2: Complementary Benefits of ADR	7
Box 2.1: Arbitration within OHADA Treaty	11
Box 2.2: Conciliation in South Africa	14
Box 2.3: Adjudication in the United Kingdom's Construction Industry	14
Box 2.4: The Office of the Compliance Advisor/Ombudsperson (CAO)	15
Box 2.5: The Hong Kong Airport (Chek Lap Kok) Conflict Management Model	16
Box 2.6: The English Housing Ombudsman	17
Box 2.7: Med-Arb in New Zealand	17
Box 2.8: Multi-Door Approach to Dispute Resolution	21
Box 2.9: Court-annexed Models	23
Box 2.10: Court-connected Models	24
Box 2.11: Business Chamber-connected Models	25
Box 2.12: Free-standing Models	26
Box 3.1: Backlog in Bangladesh	27
Box 3.2: Judiciary Latin America	28
Box 3.3: Enforcing Contracts in Doing Business 2011	29
Box 3.4: Economies in Transition	31
Box 3.5: Legislative halt in Ukraine	31
Box 3.6: Backlog in India	32
Box 3.7: Mediation in Tonga	32
Box 3.8: Legislative halt in Pakistan	33
Box 4.1: Inter-American Development Bank in Latin America	35
Box 4.2: Comparing Common- and Civil-law Systems for ADR	35
Box 4.3: Review of Civil Procedure Rules in Hong Kong	36
Box 4.4: Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008	37
Box 4.5: The UNCITRAL Model Laws	38
Box 4.6: Triggering Mechanisms in Mediation	39
Box 4.7: Ineffective Triggering Mechanisms for Mediation	40
Box 4.8: Multiple Professional Codes	42
Box 4.9: Raising ADR Funding in Bangladesh	43
Box 4.10: ADR Coordination and Collaboration in Hong Kong	44
Box 4.11: Construction Industry Arbitration Council (CIAC)	45
Box 4.12: Identifying Sector "Champions" to Advocate for ADR	46
Box 4.13: Pro-bono Mediation for Women Litigants in Pakistan	47
Box 5.1: The United Kingdom Financial Services Authority	50
Box 5.2: ADR Legislation in New Zealand Industry	50
Box 5.3: The International Trademarks Association (INTA)	51
Box 5.4: Early Dispute Resolution Systems	51
Box 5.5: Leveraging the Mediation and Arbitration Center of Bogota's Chamber of Commerce	53

Box 5.6: International Points of Access for ADR	54
Box 5.7: Checkpoints in Deciding for or Against a Private Sector Initiative	56
Box 5.8: Questions in Profiling Participants in an Industry	57
Box 5.9: Areas of Dispute in Australian Franchising	58
Box 5.10: Dispute Resolution in the Solomon Islands	58

Figures

Figure 1.1: Illustrating Key Access Points for ADR Initiatives	6
Figure 2.1: The ADR Landscape	20
Figure 3.1: Fastest Courts in Eastern Europe and Central Asia	30
Figure 5.1: Access Points for Private Sector ADR Initiatives	52

Tables

Table 2.1: Key Considerations When Choosing an ADR Process	9
Table 2.2: Use of Sociocultural Aspects of Conflict Culture for ADR Process Selection	19
Table 2.3: Use of Conflict Typology for ADR Process Selection	19
Table 2.4: Court-annexed Model: Advantages and Disadvantages	22
Table 2.5: Court-connected Model: Advantages and Disadvantages	23
Table 2.6: Chamber-connected Model: Advantages and Disadvantages	24
Table 2.7: Free-standing Model: Advantages and Disadvantages	25
Table 4.1: Types of Rules Frameworks	38
Table 5.1: Important Industry Sector Considerations for ADR Initiatives	57
Table 6.1: Data Collection	60

ADR Guidelines Executive Summary

Purpose

Enforcing contracts and resolving disputes is part of the daily business in the private sector. World Bank Group (WBG) studies and reports such as the annual Doing Business report, Investment Climate Assessments, and Enterprise Surveys¹ reveal that efficient access to justice plays a key role for businesses. A well-functioning justice infrastructure is a part of the World Bank Group's investment climate agenda. Alternative dispute resolution (ADR) has proven a valuable pillar in enhancing access to justice, bringing rapid and less costly consent-based dispute resolution to businesses in many emerging economies.

The purpose of this publication is to guide its users through various considerations, policy and practice related, when setting up a system for alternative dispute resolution. It highlights and draws upon experiences of many countries, and summarizes the experience of IFC and World Bank in introducing ADR within the investment climate reform agenda. This publication sets out defining and describing the field and private sector reach of ADR, its origins and core principles, providing detail on technical aspects of ADR typology, regulation and implementation of ADR initiatives in various institutional and jurisdictional contexts. The ADR guidelines make use of checklists and case examples to guide the decision making of both policy-makers and project managers, addressing both the preparation and implementation of an ADR intervention. One chapter is specifically devoted to ADR initiatives originating in, and mobilizing support from, the private sector.

Approach

Following a definition and delimitation of ADR, the Guidelines set out to explain the mechanics of alternative dispute resolution by presenting the different rules frameworks through which it functions, i.e. ADR

processes such as mediation and arbitration. On this basis, we explore various ways to implement ADR, for instance through court-annexed and free-standing ADR models. Not all processes are typically combined with all types of models; for example, while mediation can take place within the formal court system and arbitration can be administered on a purely private basis, both processes can be offered through a chamber of commerce. Only the context of a country specific jurisdiction allows the practitioner to identify the most effective approach.

Dispute resolution is inextricably linked to the notion of justice, litigation between businesses being no exception. Success of ADR interventions relies to a large degree on the thorough understanding of the socio-cultural and economic context of the jurisdiction the ADR intervention targets. This is why the mechanics of the justice system, pre-existing legislation, prevalence or absence of the rule of law, types of disputes and settlement culture are crucial factors to consider when gauging the potential of ADR. The identification and motivation of stakeholders, existence of reform champions, diverging and converging interests in the reform process must be known to the decision-maker designing the intervention and, at a later stage, the project team implementing an ADR intervention.

Already in assessing the potential ADR could provide in a specific jurisdiction, both the public side (justice administration, preexisting legislation) as the private sector, economic context (in which the potential beneficiaries operate) must be given consideration. And although ADR is frequently implemented as a component of public sector justice reform projects, private sector centered ADR initiatives present a number of advantages: industry awareness, participant "buy-in", as well as greater flexibility in service provision, as well as a more predictable case flow. They offer a more flexible, but often swifter implementation cycle; at the same time, also because only a minimum of public sector engagement is necessary. The guidelines devote an entire chapter to the specific motivations and considerations of implementing a private sector ADR initiative.

1. Enterprise Surveys and Doing Business are different approaches to benchmarking the quality of the business environment, see enterprisesurveys.org and doingbusiness.org. Investment Climate Assessments (ICA) uses the data from these reports.

Definition, Background

ADR is commonly defined as any process or procedure for resolving a dispute other than adjudication² by a judge in a statutory court.³ The consensual nature of either opting for dispute resolution or deciding the outcome of a dispute by the parties is a cornerstone element of ADR. Because it encompasses a large number of different methods for dispute resolution, we draw upon a set of general indicators, as well as some historical background to equip the reader with a tangible conceptual understanding of alternative dispute resolution.

Achieving equity, efficiency and expertise outside formal, established courts through alternative means is not a recent idea. Early forms of conciliation and amicable settlement at the roots of modern-day ADR already reveal its primary motivation—realizing equity between two fighting parties. Seeking compromise by moderating contradictory or competing interests reflects the human preference for reconciliation over confrontation. In avoiding open dispute—and the often violent consequences of coercive force in executing a judicial decision—disputing parties tend to recognize the advantage of pursuing commonalities rather than differences. This is often helped by the technical, expert-based nature of alternative dispute resolution. More efficient, ADR also enjoys economic advantages over formal court proceedings, being typically more expeditious and less costly than court proceedings.

Chapters 2 – 6

The delivery of ADR services can take place in a number of different settings and under various sets of legal and procedural rules. **Chapter 2** explains the different processes and models to deliver ADR: arbitration, mediation, conciliation, to name the most frequently used processes – and implementation models such as court-annexed or chamber-connected. ADR covers a broad spectrum of processes, from formal proceedings involving a judge to private proceedings facilitated by

a neutral third party and taking place, for instance, at a company's headquarters. Different processes are governed by different rules, which in some processes, parties themselves may set or can influence. Whichever the setting, several core principles universally apply: non-bias and impartiality of the neutral third party, confidentiality, guarantee of fairness and uninterrupted access to justice.

At the same time, ADR facilities can be integrated into the ordinary courts, or chambers of commerce but also be run as a profit-making, private enterprise. We distinguish models by their proximity to the traditional or formal public courts or other public actors into public and private models. We distinguish between court-annexed, court-connected in the public sphere, and chamber-connected and free-standing models in the private sphere of ADR services. In addition, chapter 2 describes the concept and mechanism of mandatory mediation, as well as the topic of enforcing decisions reached through ADR.

To effectively inform a policymaker's decision making, Chapter 2 situates ADR processes and models in their institutional context and enumerates their advantages and disadvantages. We discuss selection criteria such as the degree of interdependence with the formal legal system, the economic context, as well as considerations of infrastructure and financial sustainability. A systematic approach to the selection of process and model, along sociocultural criteria as well as case typology is illustrated by accompanying tables and case studies for further reference.

The theoretical underpinnings and practical considerations for ADR interventions are at the heart of chapters 3 and 4.

Chapter 3 addresses the pre-project analysis of an ADR intervention. To begin, the Guidelines dress a (non exhaustive, non descriptive) list of factors, critical in assessing the need for ADR, relying on an economic, cost analysis of commercial litigation from a private sector view. We then identify parameters likely to indicate

2. Here, the term adjudication refers to litigation in the formal court system, as opposed to alternative modes of dispute resolution. Adjudication, however, is also used to describe a number of processes, under the umbrella of alternative dispute resolution, that closely resemble the formal court process, being involuntary and adversarial, typically with win-lose outcomes.

3. Lukasz Rozdeiczak and Alejandro Alvarez de la Campa, *Alternative Dispute Resolution Manual – Implementing Commercial Mediation* Washington, D.C.: The World Bank Group, 2006.

the chances for success of an ADR intervention: factors determining the potential of ADR in a specific country context are the level of economic development, i.e. the strength and organization of the private sector which the ADR intervention targets; political stability and continuity of government and the legal framework to support ADR, but also less quantifiable aspects such as general respect for the rule of law and settlement culture within the existing court system.

In **chapter 4**, again drawing on IFC experience, the Guidelines outline success-critical factors in the implementation of an ADR intervention. The interface between the dispute resolution process and the formal legal system is discussed in detail. Here, we distinguish between the basic enabling framework, provisions supporting and promoting the use of ADR, internal rules framework for ADR as well as ADR referral legislation and matches available legislative mechanisms with the level of rule-making required in a specific country context. Triggering mechanisms i.e. targeted rules and recommendations to promote use of ADR is another important aspect of implementation, explained in detail. Equally important for successful interventions are considerations for maintaining professional quality management and standards, as well as the sustainability of ADR. As reform interventions intervene at different stages of ADR implementation, requiring different tools for analysis, chapter 4 concludes with a guide to assess the existing level of

ADR development. It also contains a section on gender inclusiveness.

ADR is often introduced within the wider scheme of court reform, or otherwise emanates from a public agency's desire to introduce efficiencies into dispute resolution facilities. Yet, an ADR initiative can emanate from and be implemented by, almost exclusively, the private sector.

Chapter 5 explains the advantages of an ADR intervention originating in a specific industry or trade, provides key considerations and access points for introducing an ADR initiative from within an existing business community with minimal reliance on public sector involvement.

Chapter 5 makes use of the example of international organizations, treaties, trade bodies and industry associations such as chambers of commerce and underlines the crucial role these institutions can play to promote the use of ADR. The chapter contains private sector specific implementation advice and a list of standard practices, and draws on a list of geographically and industry diverse examples.

The Guidelines provide basic information on project monitoring and implementation in **chapter 6** and include a comprehensive annex, listing technical terms, checklists summarizing issues discussed in assessment and implementation chapters, model mediation and arbitration agreements, as well as a number of typologically and geographically diverse ADR center descriptions.

Chapter 1: Introduction

What is Alternative Dispute Resolution?

The origins of ADR predate, and spread beyond the original geographic boundaries of Western civilization.¹ Early forms of conciliation and amicable settlement, at the roots of modern-day ADR reveal its primary motivation—to realize equity between two fighting parties. Seeking compromise by moderating contradictory or competitive interests reflects the human preference for reconciliation over confrontation. In avoiding open dispute—and the often violent consequences of coercive force in executing a judicial decision—disputing parties have long recognized the advantage of pursuing commonalities rather than differences. This pursuit and the process that brings parties together have always been a point of honor for parties and arbitrators alike. The consensual nature of either opting for dispute resolution or deciding the outcome of a dispute by the parties is a cornerstone element of ADR.

The aspect of attenuating the common courts' backlog is not new, either. In 400 BC, Athens instituted the position of a public arbitrator to relieve the overburdened courts and provide more rapid relief for those cases the disputing parties believed could be solved outside the formal path of justice. While the option of arbitration was voluntary, exercising the office of the arbitrator was considered a civic obligation, sanctioned with loss of citizenship.

The idea of bringing technical expertise to bear on disputes was apparent in predecessors of modern-day ADR, particularly in the traditionally senior role of the neutral third party. The law merchant, commercial law born amid the mercantile revolution of the Renaissance who functioned on special privilege outside the courts exclusively within the commercial realm, exemplifies this role. Today, this role is reflected by the more technical seniority of the specialist mediator, facilitator, or arbitrator.

As ADR began to slowly spread around the world—first, in common-law countries such as the United States, the United Kingdom, Canada, Australia, and New

Zealand—consideration turned to whether ADR could benefit developing- and emerging-market countries. Since then, many ADR projects have been initiated either as part of much larger projects (justice reform programs, for example) or as discrete, stand-alone ADR projects with a primary focus on introducing ADR into a given jurisdiction.

Since the early 2000s, IFC has been at the forefront of developing ADR in emerging economies and has developed extensive experience in considering whether ADR should be implemented in any one country and, if so, what sorts of models should be considered. The implementation of these projects has helped to identify, through experience, the positive and negative drivers to developing ADR in any given country. (See box 1.1.)

From Judicial System Reform to Enhancing the Investment Climate

The many benefits of alternative forms of dispute resolution have been written about extensively since the first ADR programs emerged in the United States following the political and civil conflicts of the 1960s. The most basic of these were saving costs and time, giving control of the dispute back to the disputants, and avoiding the destructive litigation process. Some view ADR essentially as an alternative method for delivering the “justice” for which the state is responsible. Although ADR boasts greater informality, flexibility, speed, and party control, in this view ADR represents simply an extension of the justice menu available to parties in the court system.

Modern commercial ADR does not derive from this thinking at all. It is rooted in the desire of businesses (themselves regular litigants) to find more commercially focused, tailor-made dispute resolution mechanisms that do not suffer the excesses and failings of the courts. A wholesale departure from the court system was sought by the early developers of ADR, not an alternative recourse within it. ADR was viewed as a business-based solution, operated in and by the private sector, for its own benefit.

Since then, and for understandable reasons, structural connections with the courts have been inevitable and

1. Jerome T. Barrett and Joseph Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement* (San Francisco, Calif.: Jossey-Bass, 2004).

Box 1.1: General Indications for ADR vs. Formal Litigation in Court

There are certain general indicators that make disputes more likely to benefit from ADR as opposed to formal litigation through the courts.

ADR is generally indicated/suitable when:

- The parties are willing to negotiate and share a mutual future interest.
- The legal framework does not provide a final solution or a commercially tailored, resilient resolution of the conflict.
- A relationship must be preserved or a long-term relationship (involving family, neighbors, business associates, a partnership, a lengthy contract) needs to be carefully terminated.
- Multiple proceedings or conflicts exist between the same parties.
- The case requires confidentiality or a need for separate discussion.
- More parties are stakeholders to the conflict than process parties alone.
- There is a need to limit costs.
- There is a desire for a less formal process.
- Quick resolution to the dispute is desired.

ADR is generally not indicated/suitable when:

- There is a need for a precedent or public ruling (for example, matters of legal status).
- There is an excessive power imbalance, or at least one party cannot defend itself.
- Health problems of one party inhibit participation in mediation.
- A party exhibits interest in delaying tactics or pure “fishing expeditions.”
- Negotiation is seen as a sign of weakness, or is used to please the referring organization or party.
- One or more parties cannot trust the other to abide by any agreed settlement.

often valuable. The courts are where the disputes are. However, a byproduct of this has been the reframing of ADR processes as essentially a part of the judicial system and hence ADR implementation as a feature of judicial reform. This view can risk overlooking the business perspective, and it minimizes the role that the private sector can play.

ADR reform initiatives, especially donor-funded efforts in emerging markets, have frequently developed under the assumption that introducing or improving ADR processes will enhance a country’s judicial system. Donor-funded and other interventions are structured around improvements to state court systems, citing reduced delays and greater access to justice as typical expected benefits. Naturally, it is hoped that the business will benefit from the reforms as a user of the

courts, through faster and cheaper access to consensual resolutions, the consequent release of capital. But that is often the extent of private sector involvement—as the intended user and beneficiary of public sector reforms. Few, if any, donor-related ADR projects contemplate a more significant role for the private sector in the design, delivery, or even ownership of ADR initiatives.

This approach is perhaps not surprising, given that the courts are usually the most significant repositories of disputes in a country. Indeed, ADR interventions to date have generally been based around centralized judicial reform programs. This is an effective model in its own right. Centralized mediation reform has made a significant contribution to many judicial systems and to the businesses that use them.²

2. The release of around \$100.1 million in tied-up capital through, for example, mediated settlements arising from court-based mediation in the Balkans [not all Balkans ADR programs are for court-based mediation, in fact most of them are not] from 2004 to 2009 indicate the significant potential of ADR. IFC, *Giving Mediation a Chance, Advisory Services in ECA* (Washington, D.C.: The World Bank Group 2009).

Crucially, however, court-connected mediation reform represents only *one* aspect of the contribution that ADR can make. If full value is to be extracted from ADR interventions, the role of the private sector must be more fully explored and exploited. Indeed, as one expert points out: “The real ‘alternative’ to our existing adversarial, court-centered approach to dispute resolution lies in not merely inventing or applying more techniques within the existing court system, but in fostering the emergence of a privately ordered system of nongovernment institutions and processes.”³

Viewed in these terms, it is obvious that ADR can be an integral part of business-support initiatives in a wide range of ways and contexts. It dovetails effectively with, and contributes significantly to, any agenda focused on enhancing the effectiveness of a given business sector, reducing costs, improving business and contractual relationships, and establishing corporate and commercial best practice.

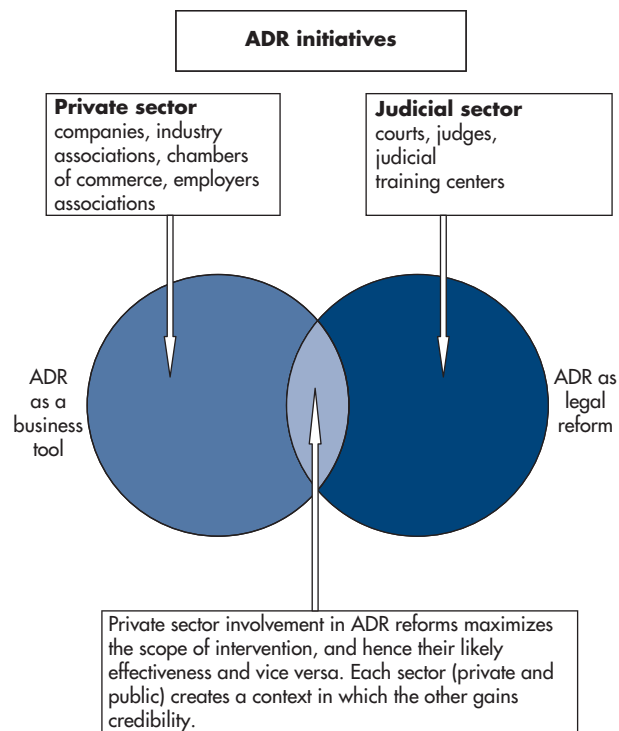
Some types of ADR processes such as mediation can be (and often are) fully independent of any court system or underlying legislation. Many take place pursuant to contracts between the parties and without reference to or connection with the state court system. In some cases, there may need to be a minimum legal framework governing the process in the country in question (for example to protect the confidentiality of the discussions in mediation). In the case of arbitration, which is a more formal ADR mechanism, a minimum enabling legal framework as well as enforcement mechanisms should be in place. Other than that, there is no underlying obligation to connect such ADR activity to the court system. Indeed, to do so is to limit its application.

Figure 1.1 indicates the scope for ADR interventions to operate either as a business tool or as an aspect

of legal reform. It also highlights the overlap between the two.

Effective interventions should consider which model offers scope for maximum impact in a given context. The overlap between the public and private sectors is critical. This space offers each sector the scope to enhance ADR implementation within the other. (See box 1.2.) However, ADR can still be effective when focusing exclusively within either a private or public sector context.

Figure 1.1: Illustrating Key Access Points for ADR Initiatives



3. Arthur Pearlstein, “The Justice Bazaar: Dispute Resolution through Emergent Private Ordering as a Superior Alternative to Authoritarian Court Bureaucracy,” *Ohio State Journal on Dispute Resolution* 22, no. 3 (2007).

Box 1.2: Complementary Benefits of ADR

Individual benefits. ADR has addressed the many and varied challenges faced by individual disputants. On an individual case level, the different ADR processes provide redress more inexpensively and quickly than mainstream court processes. Some types of ADR such as mediation return decision-making control to the disputants rather than giving it to a third party.^a Mediation also reduces the need for enforcement proceedings to ensure one party complies with an agreement, since the parties enter into their settlement agreements consensually.

Private sector benefits. ADR enhances private sector development by creating a better environment for business. It lowers the direct and indirect costs that businesses incur in enforcing contracts and resolving disputes, including transactional costs that could otherwise divert company resources. Also, depending on the process, ADR can reinforce negotiation-based methods of doing business.

Institutional benefits. ADR can assist good public sector governance by reducing the backlog of disputes before the courts and improving the efficiency of the court system. It provides citizens with better access to justice through a greater choice of dispute resolution methods. The court system can enjoy an enhanced reputation in providing more effective resolution to disputes through ADR.

Finally, the causes and effects of the individual, private sector, and institutional benefits of ADR are intrinsically linked. If the civil justice system is reformed to provide better access, then the transactional costs to business will be reduced, thereby improving the business environment. If the overall business environment is improved, this will inevitably result in individual benefits for parties who are faced with a commercial dispute.

It is important to note that although the primary purpose of introducing ADR might be to support private sector development, its entry does not necessarily have to be through the private sector. The same purposes might be achieved, and even more sustainably so, by providing ADR through the courts.^b (Various models for providing ADR services are discussed in Chapter 2.)

a. For more information on these benefits of mediation, see Karl Mackie, David Miles, William Marsh, and Tony Allen, *The ADR Practice Guide*, 3rd ed. (West Sussex, England: Tottel, 2006).

b. There are many examples of court-based ADR projects designed to improve the business environment, for example, IFC projects in Bosnia and Herzegovina and Pakistan. (See annex.)

Chapter 2: Selecting the Appropriate Alternative Dispute Resolution Process and Model

The delivery of ADR services can take place in a number of different settings, using different ADR models, and under various sets of legal and procedural rules. The term ADR can cover a broad spectrum of processes, from formal proceedings involving a judge and closely resembling judicial proceedings taking place in a court, to purely private proceedings facilitated by a neutral third party and taking place, for instance, at a company's headquarters.

These various processes are governed by different rules, which in some cases may be set or influenced by the parties involved. In designing an ADR intervention, practitioners should consider both the ADR process to be adopted and the modality to be used in driving the intervention.

Part I of this Chapter provides an overview of different ADR processes and outlines their advantages and disadvantages.

Part II describes the different models for ADR implementation.

Terminology: For the purpose of definition, **ADR process**, the term used in this publication, should be understood as a set of rules that govern the parties' dealings (or proceedings) in resolving their dispute. The term **ADR model** refers to the specific implementation of such a set of rules, within a court system or beyond it. Processes and models can, and often do, co-exist in a given jurisdiction, and while not every process can be implemented randomly through every model, a number of possible combinations between process and model warrant their separate presentation.

Selecting the ADR Process

A number of different processes fall under the ADR umbrella, each having their specific benefits and drawbacks. Beginning with the most widely used processes, mediation and arbitration, this chapter also includes more specialized processes, such as dispute resolution boards and ombudsman processes. It does not aim to be an exhaustive list (there are many variations of processes),

but it provides a basis for examining how these processes can be applied in an ADR intervention. This chapter also provides criteria to assist the practitioner in determining which process may be suitable for a particular jurisdiction's conditions.

Classification of ADR Processes: Advantages and Disadvantages

The role of the third-party independent, or neutral, offers a useful classification of the three primary types of ADR processes: adjudication-based processes, recommendation-based processes, and facilitation-based processes, as well as combinations thereof. The most frequently used ADR models are mediation, a facilitation-based process, and arbitration, an adjudication-based process.

The more general considerations that influence the decision on process choice, in addition to the nature of the issues in dispute (for example, law, expert evidence, or credit), include the attitudes of the parties involved, the benefits of involving other persons in the ADR process, and, of course, the cost of each ADR process to the parties.

Of equal importance are the state of progress of any applications made to the courts or tribunals that may impact decision making, the authority of all participants to settle, and any other formal or material impediment to reaching a solution using ADR. When ADR processes are categorized by the role of the neutral person in the process, the following types of ADR can be differentiated:

Adjudication-based

In adjudication-based processes, such as arbitration, expert evaluation, or adjudication, the role of the neutral is to make a decision for the parties after some form of hearing or decision-making process. That decision is binding on the parties either by consent or through force of law. Adjudication-based models such as arbitration and adjudication require enabling legislation to allow for an alternative judicatory forum (other than the courts) and to give effect to the decisions, such as arbitral awards.

Adjudication-based processes are most suitable when there is a need for finality within a short time frame, but the parties have no relationship interests or are otherwise unable or unwilling to negotiate.

Typically, the dispute is related to the legal interpretation of an evidentiary or factual issue, and there has already been a complete investigation and gathering of evidence.

Recommendation-based

In these processes, the neutral makes suggestions to the parties on how the dispute should be resolved. Although the parties are free to reject these recommendations, the neutral's position and influence can be highly persuasive. Examples of recommendation-based processes are conciliation and early neutral evaluation. As the role of the neutral in providing suggestions is more limited in recommendation- and facilitation-based processes, there may be less need for a legislative framework, depending on the legal system of the subject country.

Facilitation-based

Mediation and stakeholder dialogue fall in the category of facilitation-based ADR. In these models, the neutral

has no formal role in the substantive decision making on how to resolve the dispute as that responsibility rests with the parties themselves. The neutral's role is to set up the process, merely facilitating the parties' communication and decision making. This is also the case with dispute resolution boards, and ombuds processes, although these are of a more dual nature, combining facilitation and adjudication-based processes. (See table 2.1.)

Specific ADR Processes

Whether one measures by absolute case numbers or the amount of funds released, arbitration and mediation are by far the most popular and widely used ADR processes. They are presented in more detail below, along with other, more specialized ADR processes.

Arbitration

Frequently used for large-value, international disputes, arbitration is not defined either in international conventions or in the UNCITRAL Model Law, and rarely in domestic legislations.² Its main characteristics are:

Table 2.1: Key Considerations When Choosing an ADR Process

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

1. See footnote 2.

2. See UNCTAD International Commercial Arbitration Module at http://www.unctad.org/en/docs/edmmisc232add38_en.pdf. Some authors attempt to provide definitions using the main characteristics of arbitration, see e.g., Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 2d ed. (London: Sweet and Maxwell, 1991), 3: "[T]wo or more parties, faced with a dispute which they cannot resolve for themselves, agreeing that some private individual will resolve it for them and if the arbitration runs its full course ... it will not be settled by a compromise, but by a decision."; W. Michael Reisman, W. Laurence Craig, William Park, and Jan Paulsson, *International Commercial Arbitration* (Boston: Foundation Press, 1997), xxviii: "a contractual method for the relatively private settlement of disputes."

- its consensual nature—arbitration is a mechanism for the resolution of disputes in which parties must agree to settle their differences;
- it is a private procedure—the decision-makers are non-governmental and the procedure is not part of the state court system;
- it is a flexible procedure—the parties agree on the procedural rules to be used; and
- it is a binding award—arbitration leads to a final and binding determination of the rights and obligations of the parties.

Types of arbitration

Institutional and ad hoc arbitration. Institutional arbitration is arbitration that takes place within an institution and is conducted in accordance with its procedural rules. Most arbitration organizations have only one set of arbitration rules. Differentiation in procedure arises out of the organizations' specializations. However, some arbitration organizations have different rules for different types of disputes.³ Parties often choose to submit their dispute to an arbitration institution because of its pre-established rules and procedures; administrative assistance offered by institutions with a secretariat or a court of arbitration; availability of lists of experienced arbitrators, often listed by field of expertise; assistance with appointment of arbitrators; physical facilities and support services to encourage reluctant parties to proceed with arbitration; and an established format that has proven workable in prior disputes. Some disadvantages of institutional arbitration are the associated administrative fees for services and facilities and the fact that the institution's bureaucracy may result in delays and added costs.

Ad hoc arbitration takes place without any reference to an arbitration institution. There are many reasons why two parties may decide to engage in ad hoc rather than institutional arbitration. A major reason is that arbitration involving a limited amount of money may be less expensive and cumbersome as an ad hoc arbitration. The parties may also choose ad hoc arbitration because they are unable to agree on an arbitration institution.⁴ The main limitation of ad hoc arbitration is that, while the parties may expect to resolve any dispute in a friendly manner when concluding a contract, if a dispute arises they are usually less inclined to cooperate and even to commence arbitration without an established institution to oversee the process and ensure compliance.

International commercial⁵ and domestic arbitration. Arbitration is governed by the law of the state in which it takes place. Every arbitration taking place within a state can thus be viewed as a domestic arbitration. However, many countries differentiate between international and domestic arbitration.⁶ International commercial arbitration is similar to domestic arbitration in most respects, but it has several characteristics that distinguish it: it often involves parties from different jurisdictions; the subject matter of the dispute is international; or a substantial part of the commercial obligations are conducted outside of the state in which the parties have their place of business.⁷

There are a number of international and regional centers that administer international commercial arbitrations, such as the ICC International Arbitration Court, the London Court of International Arbitration, the Hong Kong International Arbitration Centre, and the American Arbitration Association. (See box 2.1.)

3. For example, the American Arbitration Association has different sets of rules for commercial disputes, consumer disputes, employment disputes, labor disputes, as well as the rules for certain state programs. See http://www.adr.org/arb_med, (last visited 15 December, 2010).

4. See UNCTAD International Commercial Arbitration Module at http://www.unctad.org/en/docs/edmmisc232add38_en.pdf.

5. Regarding the "commercial" nature of arbitration, a note to the text of the UNCITRAL Model Law states: "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."

6. See "Arbitrating Commercial Disputes," in *Investing Across Borders 2010*, Washington, D.C.: World Bank Group, www.investingacrossborders.org (last visited 4 March 2011).

7. Article 1 (3) of the UNCITRAL Model Law stipulates that arbitration is international if: (a) the parties to an arbitration agreement have their places of business in different states when that agreement is concluded; or (b) one of the following places is situated outside the state in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Box 2.1: Arbitration within OHADA Treaty

The Organization for the Harmonization of Business Law in Africa (Organisation pour l'Harmonisation en Afrique du Droit des Affaires, OHADA), the common legal framework for francophone countries in Sub-Saharan Africa, adopted rules on arbitration in 1999 that are directly applicable in all OHADA member states. The OHADA Uniform Arbitration Act contains provisions on the constitution of the arbitration court, the arbitral hearing, constitution of the arbitration court, the arbitral hearing, the award, the petition against the award as well as the enforcement of awards.

Source: <http://www.ohadalegis.com/anglais/reglitionohadagb.htm>

Investor-state arbitration. Arbitration plays a large role in the resolution of disputes between investors and the government. Such resolution can be based on a bilateral investment treaty, a national investment code, or a contract between a foreign investor and a host government. In international arbitration involving governments, institutions such as ICSID handle investor-government disputes.⁸

Who are the arbitrators?

Arbitrators, in addition to being neutral to the dispute, are frequently chosen for their expert knowledge of the specific industry concerned in the dispute. A sole arbitrator or a panel, according to the parties' requirements, may

conduct the arbitration process. Many countries' laws require parties to choose an odd number of arbitrators and have special rules on the procedure to select arbitrators.⁹

Arbitration and the courts, enforceability of arbitration awards

Although many modern arbitration laws limit court intervention in arbitration proceedings, arbitration bears a close relationship to the domestic courts at certain stages of the arbitration process—such as the enforcement of interim measures and arbitration awards and assuring the appearance of witnesses at the request of the arbitrators. Accordingly, it is important that national courts support arbitration as a means of resolving commercial disputes.¹⁰

Arbitration awards are enforceable through the formal court system. Many jurisdictions require a so-called *exequatur*, a separate decision by the statutory court of execution that declares the arbitral award executable, and puts state power to enforce execution on the non-complying award-debtor.¹¹

The need to recognize and enforce arbitration awards rendered in one country in the courts of another country led to the creation of an international framework under the auspices of the United Nations Commission on International Trade Law (UNCITRAL), set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹²

Advantages and limitations

The main advantages of arbitration over litigation or other types of ADR are the confidentiality and flexibility of the arbitration proceedings, selection of arbitrators,

8. ICSID is an autonomous international institution, established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, with over one hundred and forty member states. See <http://icsid.worldbank.org/ICSID/Index.jsp>

9. For example, Article 7 of the Czech Arbitration Act provides that "(1) The arbitration agreement should usually determine the number of, and the persons of, the arbitrators or, else, state the manner, how the number of, and persons of, the arbitrators could be determined. The final number of the arbitrators shall be always odd. (2) If no provision in accordance with paragraph (1) of the present Article is found in the arbitration agreement, each party shall be at liberty to appoint one arbitrator of its own. These appointed arbitrators shall then select the presiding arbitrator (president of the arbitral tribunal)."

10. Markham Ball, "The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration," *Arbitration International* 22, no. 1 (2006): 73–93.

11. On enforcement of arbitration awards, see Gary Born, *International Commercial Arbitration*, 3rd ed. (The Netherlands: Kluwer Law International, 2009).

12. The Convention, adopted on 10 June 1958, was prepared by the United Nations prior to the establishment of UNCITRAL. The Convention is widely recognized as a foundational instrument of international arbitration and requires courts of contracting states to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions. The Convention entered into force on 7 June 1959, and as of October 1, 2009, 142 of the 192 United Nations Member States have adopted the New York Convention.

and enforceability of the arbitration awards.¹³ Arbitration permits the parties to choose persons with specialized knowledge to judge their dispute. Judges in state courts are less likely to acquire the same degree of expertise in the technical aspects of the transactions that come before them as are the lawyers who represent the parties and who may later serve as arbitrators in similar transactions. For example, in construction arbitration engineers or architects as well as lawyers may serve as arbitrators.¹⁴ Another advantage, which can also be seen as a limitation, is the fact that arbitration awards are generally not subject to appeal on the merits. This ensures a speedier and less costly process to reach a final decision, but it can be impossible to amend errors made by the arbitrators in the application of the law.¹⁵ Arbitration is also considered to be a faster and cheaper dispute resolution mechanism compared to litigation, although this largely depends on the complexity of the particular dispute and the willingness of the parties to cooperate in the process.¹⁶

There are limitations to arbitration as well. It can become highly complex and may therefore require interim measures against a party. Arbitrators also depend on the courts for enforcement and in some jurisdictions it may be difficult to enforce an arbitration award.¹⁷

Mediation

Definition

Very frequently used to resolve various types of disputes, mediation is a flexible process, conducted in confidentiality, in which a neutral person actively assists parties in working toward a negotiated agreement of a dispute or difference. Ever-evolving,¹⁸ mediation owes much of its recent use within traditional court frameworks to *Access to Justice* by Lord Woolf,¹⁹ generally acknowledged as a catalyst for the renaissance of ADR in civil procedures in the UK and many common-law countries. Mediation is one of the most frequently used ADR mechanisms worldwide.²⁰

Advantages and limitations

Mediation may be the appropriate process when a matter is complex or likely to be lengthy and the parties want to keep the dispute confidential. While this is also true for a number of ADR processes, mediation relies particularly on the willingness of parties to engage in negotiation. When the issue at stake involves more than two parties and commercial considerations are important, mediation can provide a solution. Mediation also allows extra-legal aspects to play a role in resolving the dispute, so, for example, when an apology, concession, or explanation from one party could further resolution or when otherwise

13. PriceWaterhouseCoopers and Queen Mary University. In a 2006 survey, conducted by PriceWaterhouseCoopers, more than 150 international companies cited flexibility, enforceability, privacy, and selection of arbitrators as the 4 most important advantages of international commercial arbitration as a dispute resolution mechanism.

14. See UNCTAD International Commercial Arbitration Module at http://www.unctad.org/en/docs/edmmisc232add38_en.pdf.

15. Appeal within arbitration institutions is not unknown but is largely confined to certain trade association arbitration organizations. Since trade association arbitrations often involve standard form contracts or the trade association rules, the value of arbitral decisions as precedent are of great importance to the trade concerned. The Rules of Arbitration, European Court of Arbitration, Article 28, provide for an appeal to a second instance.

16. Many arbitration rules provide for an expedited procedure for smaller claims, see, for example, art 42 of the Swiss Rules of International Arbitration. The expedited procedure calls for a shortened time period, one-arbitrator tribunal, and no more than one hearing for oral arguments and the examination of witnesses and oral argument.

17. However, a 2008 survey of companies, conducted by PWC and Queen Mary University, informs reveals that there is a high degree of compliance with arbitral awards. Of the participating corporate counsel, 84 percent of the participating corporate counsel indicated that, in more than 76 percent of their arbitration proceedings, the non-prevailing party voluntarily complies with the arbitral award; in most cases, according to the interviews, compliance reaches 90 percent. Compliance is highest in the re-insurance, pharmaceutical, shipping, aeronautics, and oil and gas industries. See PWC and Queen Mary University (2008).

18. Jacqueline Nolah-Haley, "Mediation: The 'New Arbitration'," *Harvard Negotiation Law Review* 17 (2012), forthcoming.

19. Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996).

20. *Doing Business 2011*, a report on the ease of contract enforcement worldwide, included a study of ADR, based on a sample of 140 economies, according to which 21 percent of surveyed economies have introduced or modified existing provisions for commercial mediation within the last five years. Court-annexed mediation, i.e., mediation in the courthouse, is at the parties' disposal in 35 economies (25 percent), court-referred mediation in 15 economies (11 percent), and mediation in free-standing institutions such as chambers of commerce, and, in the case of Uruguay, notary chambers, in 58 economies (41 percent). The breakdown takes into account multiple mentions. IFC, *Doing Business 2011* (Washington, D.C.: The World Bank Group, 2010).

flexible options beyond the reach of a judgment need to be explored.

Mediation is counter-indicated when there is no ability to negotiate or the conflict has escalated too much. (The latter, however, is a point that can easily be misjudged.) When mediation has failed previously, or there is an impending lapse of limitation from a formal legal perspective, mediation will not move a case further to resolution. In jurisdictions where mediation is part of the procedural code, the applicable law will set out referral criteria for eligibility for mediation. Among them are the level of contention in dispute, the need for finality of the decision, and whether a matter is of public interest in principle (cf., chapter 4).

Who are the mediators?

Parties select mediators for their specific qualities and skills based on their particular dispute: whether it is international or domestic, and whether it is related to a particular area/sector such as insolvency, construction, or intellectual property. Mediators are often senior lawyers, trusted members of a given trade, or community elders. The mediator usually acts as a *facilitator* who helps parties to overcome their differences, guiding them in identifying issues, engaging in joint problem-solving, and exploring creative settlement alternatives. Depending on the nature of the dispute, parties may require the mediator to go beyond this role and act as an *evaluative mediator*, providing factual and even legal evaluation of the case; yet, parties retain full control of the decision to settle and the terms of resolution.²¹

Agreement and its enforcement

The interest-based nature of mediation, manifested in the settlement agreement, makes enforcement in most cases unnecessary. If both parties have agreed on an outcome that they think will work, they are more likely to stick to the terms of their agreement. If a party does refuse to comply with the terms of the settlement, there are two ways to enforce a mediation agreement:

- A settlement agreement is legally a contract. Any party can file a motion in court to make the other

party perform its duties under this contract. The court will decide, however, how much weight to give the contract. An additional test of legality may need to be carried out.

- If mediation took place upon a court referral, the referring court can turn the settlement into a court order, which can then be enforced directly through the court.
- A law that guarantees enforceability.

Mediation institutions

Mediation, similar to arbitration, can be conducted privately (*ad hoc*) or by a specialized institution. The advantages and disadvantages of both are discussed in the arbitration section above. There is a growing number of domestic institutions that administer mediations and maintain a roster of certified mediators that parties can choose from. Some institutions administer mediations in special subject-matters, such as the World Intellectual Property Institution for intellectual property disputes, the Grain and Feed Trade Association (GAFTA) for commodities and shipping disputes, and the American Arbitration Association for construction industry disputes.

Commercial ADR in Colombia

Starting in 2001, civil and commercial disputes must go through a mandatory conciliation process before being filed in court. Conciliation and arbitration systems have been established by law, and article 116 of the Constitution refers to ADR mechanisms. Conciliation and arbitration are the two most frequently used ways of resolving disputes outside of the court system. The conciliation process in Colombia is very similar to mediation, that is, the process by which a neutral third person (the conciliator) facilitates the resolution of the dispute by helping the parties reach a mutually acceptable solution. Commercial ADR in Colombia is used not only by the private sector to resolve commercial disputes between private sector firms but also for commercial disputes between private sector firms and the state or state-owned companies. Article 59 of Law 23 (1991) states that the government can use ADR mechanisms (arbitration and conciliation) to resolve disputes with the private sector.

21. See the definition provided by the Centre for Effective Dispute Resolution (http://www.cedr.com/CEDR_Solve/services/mediation.php). See also Michael McIlwrath and John Savage, *International Arbitration and Mediation, A Practical Guide* (The Netherlands: Kluwer Law International, 2010).

Box 2.2: Conciliation in South Africa

Often, conciliation-based approaches are part of dispute-specific reforms in labor law, for example, and therefore require a specific legal framework. In South Africa, The Commission for Conciliation, Mediation and Arbitration (CCMA) is an independent dispute resolution body established under Labor Relations Act 66 of 1995 to resolve labor disputes. In the Labor Relations Act, which governs the operations of the CCMA, conciliation includes mediation, fact finding, and making a recommendation to the parties (which may include an advisory award). Parties refer their disputes directly to the CCMA and do not approach a court until such time as the CCMA has dealt with the dispute. There is no system of court-referred mediation in South Africa at present.

Source: <http://www.ccma.org.za/>

Conciliation

Appearing frequently in labor- and family-dispute contexts, the terms conciliation and mediation are sometimes used interchangeably. It has been argued that the two are variations of the same process, with conciliation being more evaluative than its facilitative cousin, mediation.²² Although both processes involve the neutral in convening meetings of the parties to help them agree on a resolution, in conciliation, unlike in mediation, the conciliator is free to make recommendations to the parties on possible ways to settle the dispute. Conciliation is well-suited for situations where there is a conflict in expert opinion or evidence but the parties want confidentiality and advice on possible settlement options. (See box 2.2.)

Adjudication

Adjudication is similar to arbitration in that the neutral makes a binding determination for the parties. Frequently

used for industry-specific disputes, for example, construction disputes, the main differences are that adjudication proceedings tend to be less formal, have fewer procedural rules, and are designed to deliver quick decisions. (See box 2.3.)

Expert Determination

Rarely used, expert determination relies solely on evidence by a technical expert. It involves a process in which an independent third party, acting as an expert, rather than a judge or arbitrator, is appointed to decide the dispute. There is no right of appeal and the expert's determination is final and binding on the parties. Expert determination is particularly suited to disputes of valuation or those of a purely technical nature across a range of sectors.

Early Neutral Evaluation

Early neutral evaluation is a preliminary assessment of facts, evidence, or legal merits where parties agree on the nature and impact of the issue and would like to see them evaluated. In the case of documents this can be done without requiring the presence of the parties. Due

Box 2.3: Adjudication in the United Kingdom's Construction Industry

In this case, adjudication was introduced by statute into the highly contentious construction industry. Disputes were having a major impact on construction projects, hindering cash flow and project completion, until they were resolved. Thus, the chosen ADR process had to bring a sense of closure. Mediation could not guarantee resolution in every case. Adjudication was selected because it offered closure, and it was considered more acceptable to the construction industry in general. The choice of process was arrived at as a result of extensive industry-wide consultation, which was important in securing buy-in for the process.

22. Karl Mackie, David Miles, William March, and Tony Allen, *Commercial Dispute Resolution: The ADR Practice Guide*, 2nd ed. (London: Butterworths, 2000), p.12.

to its specific technical nature, it is rather infrequently used. This process is designed to serve as a basis for further and fuller negotiations, or at the very least, to help parties avoid further unnecessary stages in litigation. The parties appoint an independent person, often a retired judge or senior lawyer, who expresses an opinion on the merits of the issues specified by the parties. Although the opinion is non-binding, it provides an unbiased evaluation of the relative positions and guidance as to the likely outcome should the case be heard in court.

Stakeholder Dialogue

This process could be considered a subset of mediation, in that it is a facilitated process of decision making and view seeking. (See box 2.4 for examples of stakeholder dialogue.) Frequently used in disputes with large numbers of interested parties, its distinguishing factors are:

- The views of a number of different parties (stakeholders) are sought.
- It often occurs when large-scale infrastructure projects are planned, to help minimize the number of disputes.

- It is also common in the areas of corporate social responsibility and environmental protection. (See box 2.4 bis.)

Dispute Resolution Boards

Used infrequently, mainly in the construction sector, dispute resolution boards (DRBs) are panels of impartial professionals formed at the beginning of a project to follow the construction progress, encourage the avoidance of disputes, and assist in their resolution for the duration of the project. DRBs usually consist of three experienced, respected, and independent adjudicators. The term DRB is used to include dispute adjudication boards, dispute review boards and panels, and dispute conciliation boards. While mainly based on adjudicative processes, the board may facilitate the parties in negotiating a resolution to their dispute.

Decisions by DRBs are not final, but statistics from the Dispute Resolution Board Foundation indicate that 98 percent of disputes are resolved at the board level. Standing dispute boards, from the outset, routinely provide the benefit of dispute avoidance, but there are also ad-hoc boards formed only when disputes arise.

Box 2.4: The Office of the Compliance Advisor/Ombudsperson (CAO)

The CAO is the independent recourse mechanism for projects supported by IFC and MIGA, the private sector lending arms of the World Bank Group. CAO is independent and reports directly to the President of the World Bank Group. CAO's mandate is articulated in its Terms of Reference. A CAO ombudsperson reviews all complaints and works with stakeholders to help resolve grievances about the social and environmental impacts of IFC/MIGA projects. Ombuds processes typically involve a number of alternative dispute resolution (ADR) approaches. As an advisor, CAO provides guidance to the President of the World Bank Group and senior management of IFC and MIGA. Drawn from its caseload, CAO advice focuses on strategic issues and emerging trends aimed at systemically improving IFC/MIGA's performance.

Source: <http://www.cao-ombudsman.org>

The Environment Council of England

This group offers courses to help organizations facilitate stakeholder dialogue and works with them on specific initiatives. In a well-known example, the council contracted with Shell Oil to discuss various options for the disposal or re-use of the Brent Spar oil platform.

Source: J. Bendell, "Talking for Change? Reflections on Effective Stakeholder Dialogue." In J. Andriof, S. Waddock, B. Husted, and S. S. Rahman, eds. *Unfolding Stakeholder Thinking 2: Relationships, Communication, Reporting and Performance* (Sheffield: Greenleaf, 2000): 53–69.

Box 2.5: The Hong Kong Airport (Chek Lap Kok) Conflict Management Model

The Hong Kong government used a carefully crafted mix of alternative dispute resolution methods to avoid, manage, and resolve a wide range of problems that—if mismanaged—could well have delayed, significantly increased the cost of, or even prevented completion of this vast undertaking.

More specifically, the government included a multi-tiered system of alternative dispute resolution mechanisms as a standard condition in all its Chek Lap Kok-related contracts to avoid, or at least mitigate, the threat of delay, cost escalations and overruns, litigation costs, the risk of judicial interference, and the myriad other problems that frequently—if not inevitably—plague complex construction projects. Arbitration was available—but only in the event all other ADR methods provided for in the contractual dispute resolution process failed. A multi-tiered dispute resolution scheme was also used in the construction of the huge airport terminal itself. Both systems relied on the use of pre-selected panels of experts—each with both procedural and substantive expertise spanning a broad range of disciplines—to immediately address emerging disputes in order to nip potential or emerging disputes in the bud, by seeking their voluntary resolution as they emerged. This process was backed, however, by the potential of binding arbitration in the event disputing parties failed to resolve their differences voluntarily under the aegis of the pre-selected expert facilitator or facilitators.

Source: [http://www.mediate.com/acrccommercial/docs/Bob%20Wrede%20DRB%20Article%20ACR%20Commercial%20Sec%20%20IF%20Aug09\(2\).pdf](http://www.mediate.com/acrccommercial/docs/Bob%20Wrede%20DRB%20Article%20ACR%20Commercial%20Sec%20%20IF%20Aug09(2).pdf)

Examples of DRBs can currently be found in a wide range of projects, in numerous countries:²³

- **Dams/hydroelectric plants** in Brazil, Canada, China, Egypt, Ethiopia, Ghana, Iceland, India, Lesotho, Maldives, Pakistan, and Uganda
- **Airports** in Athens and Hong Kong (see box 2.5)
- **Road plans** in Ireland, Kazakhstan, and Romania
- **Railways** in The Netherlands
- **Waste treatment** in St. Lucia
- **Tunnels** in Switzerland, Turkey
- **Public works** in Vietnam (see box 2.5)

Ombuds Processes

Frequently used within organizations in the public sector (national as well as supra-national), and in the industry for internal complaints, ombuds services typically deal with complaints from employees or citizens. Although each ombuds regime operates under slightly different rules, in general an ombudsperson

does not consider a complaint unless the organization, business, or professional standards body concerned has first been given a reasonable opportunity to deal with it.

If the ombudsperson decides to conduct a formal investigation, a written report will be issued that cites the evidence considered and offers proposals for resolving the dispute. If a complaint is upheld, the ombudsperson will expect the subject organization to provide a suitable remedy. Often, mediation is offered as part of the resolution process. Ombuds services are usually focused around a particular industry, sector, organization, or type of dispute. (See box 2.4 and 2.6.)

Hybrids

Mediation-arbitration/adjudication processes (called “med-arb/adj” among practitioners), combine mediation with arbitration or adjudication, while “con-arb” processes combine conciliation and arbitration.²⁴ (See

23. <http://www.drb.org/>

24. Although mediation is typically non-binding, binding mediation has recently been developing. It may be selected by the parties through a “binding mediation agreement,” either prior to or following a dispute. Alternatively, parties can mutually elect binding mediation through an addendum, even after a mediation agreement is in effect. Binding mediation combines the negotiation of mediation with the decision finding of arbitration when negotiations prove unsuccessful. The mediator issues a decision at the end (or at the end of a given issue), which is final and binding on the parties, just as an award from an arbitrator would be. A major advantage that binding mediation offers is that the parties have the opportunity to directly participate in the process from the beginning to the end of the session. Another advantage is that the parties may represent themselves and do not need the services of an attorney, although attorneys do in most cases assist. See <http://valawyersweekly.com/blog/2009/02/02/is-%E2%80%98binding-mediation%E2%80%99-a-new-solution/>

Box 2.6: The English Housing Ombudsman

The English Housing Ombudsman deals with complaints from people who receive a direct service from registered social landlords and other landlords who are members of the system, including those who assume the management of homes transferred from local authorities. Some private landlords are members of the system. The ombudsmen can also consider other disputes involving a member landlord whether or not there is evidence of maladministration, provided the disputes concern complaints about home management.

Source: British and Irish Ombudsman Association at <http://www.bioa.org.uk/index.php>

box 2.7.) Typically, the neutral begins by attempting to assist the parties in resolving their disputes by mutual agreement. If this is unsuccessful, the neutral makes a binding determination. Such hybrid models incorporate two different roles for the neutral. In complex disputes with different technical issues relating to law and fact, it is possible to divide the dispute so that, for example, certain aspects are dealt with by mediation and others by arbitra-

tion or litigation.²⁵ A possible downside is the diminished chance for negotiation some hybrids carry. Even where different persons act as neutrals in the non-binding and binding parts of the process, parties will be more hesitant to offer concessions as they risk being bound by their disclosed threshold of negotiation in an ensuing binding decision. This makes such processes more suitable for disputes with little factual contention. (See box 2.7.)

Box 2.7: Med-Arb in New Zealand

Dispute referees hear small-claims cases, using a med-arb approach. First, they attempt to assist the parties in mediating their dispute. If this mediation is unsuccessful, the referees make a decision based on a streamlined adjudication process.

Con-Arb in South Africa

The CCMA (Commission for Conciliation, Mediation and Arbitration of South Africa) in South Africa utilises a system called “con-arb.” Conciliation is followed immediately by arbitration in the event conciliation fails. “Con-arb” applies to certain types of disputes, such as unfair dismissals relating to misconduct or incapacity. Where a dispute is set down as a “con-arb,” the parties have seven days within which to object to the process. If there is an objection, the matter will then be set down as conciliation. If the conciliation fails, a certificate is issued and the parties can then refer the matter to arbitration. Where the parties do not object, the commissioner appointed to deal with the dispute will first attempt to settle the dispute through conciliation. If conciliation fails, the commissioner will then arbitrate the dispute. The parties may object to the commissioner conducting both the conciliation and the arbitration. The provisions for the “con-arb” process are statutorily regulated in the Labour Relations Act.

25. See the New Zealand case of *Medex Holdings Ltd v Kao Liang-Shih* (N° 2) 2 NZ Conv C 191 at 335. In this case, the court noted that it is generally reluctant to execute orders that will have the effect of splitting the proceedings, resulting in some of the issues being dealt with by arbitration and the remainder by the court.

Further Considerations for ADR Process Choice

Certain sociocultural criteria can help determine the most appropriate ADR process. The following factors should be taken into account when determining whether ADR provides a suitable venue for dispute resolution.

1. The nature of the dispute: If a dispute is so novel or unprecedented that further judicial elaboration is sought, then litigation is considered the preferred process.
2. The relationship between the disputants: For disputes involving parties with long-term relationships or those that seek to maintain or improve their relationships, resolution by mediation or conciliation is indicated.
3. The size and complexity of the dispute: The greater the number of issues in the case, the better it will be served by mediation or mini-trial/adjudication.
4. Facilitative features: These attributes may affect a case's suitability for an ADR process; for example, the parties seem open to problem solving, eager to settle or engage in ADR, or willing to apologize. Another facilitative feature is the involvement of high-ranking agents. If the situation requires the specific expertise of a neutral, an advisory process such as expert evaluation may be better suited.
5. Impediments: Every dispute may have impediments to its effective resolution. These include poor communication, the need to express emotions, differing views on the facts or the law, links to other disputes, multiple parties, fear of disclosing true interests, unrealistic expectations, or a power imbalance. Each process should be assessed for its ability to

overcome any impediments that stand in the way of effective resolution.

Sociocultural Aspects of Conflict Culture

When the hallmarks of an ADR process can be aligned with its cultural context, the disputants are more likely to accept the process. While there is little direct research on the relationship between culture and disputes, cultural aspects can provide useful clues in determining which ADR process may be most effective. A number of authors have sought to provide various cultural classifications.²⁶ Hofstede's five dimensions of culture are used in this analysis to examine the potential correlation between ADR processes and culture (see table 2.2).²⁷

Types of Disputes in the Courts

Certain types of disputes may more logically relate to particular dispute resolution processes than others (see table 2.3). When considering the range of appropriate ADR processes, it is useful to carefully analyze the cases in the courts—in particular, the types of cases and the value of their disputes.

Disputes of lower value are not economical to resolve via mainstream litigation because of their disproportionate costs. Streamlined adjudicative models (tribunals) or specialist form of mediation, including by telephone, may be preferred.²⁸ Also, governments may prefer a particular process in order to further a larger social policy agenda. For example, in New Zealand the use of mediation and informal tribunals is part of a policy decision to facilitate access to justice for all citizens.²⁹ (See table 2.3.)

26. For example, the works by Geert Hofstede, Fons Trompenaars, Charles Hampden-Turner, and Edward T. Hall to name just three.

27. Geert Hofstede conducted the most comprehensive study of how values in the workplace are influenced by culture. He analyzed a large database of employee value scores collected by IBM between 1967 and 1973 and covering more than 70 countries. Subsequent studies, validating the earlier results, have covered commercial airline pilots and students in 23 countries, and "elites" in 19 countries. Hofstede identifies five primary dimensions to assist in differentiating conflict cultures: power distance, individualism, masculinity, and uncertainty-avoidance, as well as long-term orientation. These can be applied to ADR processes. For example, adjudicative-based processes represent the greatest power distance. The neutrals there are normally senior and respected individuals in society, which is why disputants will view them with the greatest power distance. In recommendation-based processes there will be less of a power distance, while facilitation-based processes have the least power distance, because mediators, while often respected individuals, do not have substantive decision-making powers. See <http://www.geert-hofstede.com>

28. England set up a telephone mediation program for small-claims disputes. Specially trained court staff mediate these disputes via telephone, thereby keeping costs low (<http://www.hmcourts-service.gov.uk/cms/14156.htm>).

29. Tribunals with mediation have been established for cases involving residential tenancy, labor, human rights, and land claims.

Table 2.2: Use of Sociocultural Aspects of Conflict Culture for ADR Process Selection

Sociocultural criterion	Adjudication-based ^a	Recommendation-based ^b	Facilitation-based ^c
Power distance Extent to which the less powerful members of organizations and institutions accept and expect that power is distributed unequally	High		Low
Extent to which individuals are integrated into groups	Individualist		Collectivist
Distribution of gender roles (a) women's values (modest and caring) differ less among societies than men's values; (b) men's values (containing a dimension from very assertive and competitive)—maximally different from to similar to women's values	High masculinity		High femininity
Uncertainty Tolerance for uncertainty and ambiguity, indicating the extent to which a culture feels either uncomfortable or comfortable in unstructured situations	Uncertainty avoidance		Uncertainty acceptance
Long-term vs. Short-term orientation Values like thrift and perseverance are associated with the first; values associated with the latter include respect for tradition, fulfilling social obligations, and saving face	Long-term orientation		Short-term orientation

a. The neutral makes a decision for the parties.

b. The neutral makes suggestions for dispute resolution.

c. The neutral merely serves as a facilitator and has no formal role.

Table 2.3: Use of Conflict Typology for ADR Process Selection

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

Figure 2.1: The ADR Landscape

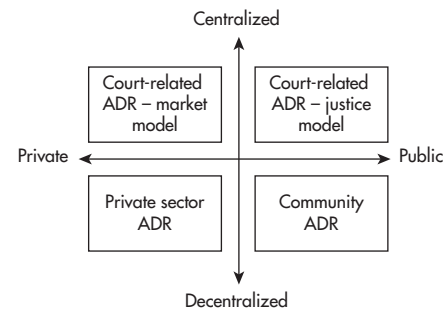
Within the public model, the court authorities refer cases to alternative means of dispute resolution. ADR can be (a) an integral part of the justice system and therefore a function of the court (the justice model or court-annexed model), or (b) part of an emerging private sector marketplace for dispute resolution (the marketplace model or court-connected model) where the parties are referred to ADR by the court.

Within the public model (1), the ADR process usually takes place in the court building and is conducted by court-based ADR practitioners. ADR practitioners are drawn from the judiciary, court personnel, panels of mediators attached to the court, or an external community ADR organization. Within the public model, mediators are chosen and appointed by the court and the costs of the mediation are borne by the justice system. Examples of the public model of court-related ADR can be found in Germany, parts of Scandinavia, Slovenia, and other (mainly civil-law) jurisdictions.

The marketplace model (2) represents a privatized form of court-related ADR, in which the court outsources ADR services. The ADR practitioners are typically external to the court and are members of a panel of court-approved ADR service providers, who set their own fees. In the marketplace model the user pays, and the user also has the choice of ADR service providers from the court panel. In most cases, the parties are also free to agree on an ADR service provider who is not on the panel. Examples of the marketplace model of court-related ADR originated in common-law jurisdictions, including Australia, Canada, England, and the United States.

By contrast, private ADR models and processes move away from the courts and away from centralization. The community ADR model (3) represents the combination of a high degree of regulation and/or government support with a decentralized approach. In the community ADR model, ADR is widely accessible through community-based ADR organizations and other community organizations such as refugee and women's shelters, government-sponsored legal centers, legal aid, and the police. ADR practitioners include volunteers, employees of community ADR organizations, and freelance mediators engaged on a contractual basis. Typically, disputants do not pay for the service and where ADR services are not volunteered, the costs are carried by the government. Although there is a great variety in community ADR practice, most practice models follow an interest-based or therapeutic approach. Community ADR services can be relevant in commercial contexts where business operates on the village level or involves members of a village, such as construction disputes involving land rights issues.

The private ADR quadrant (4) represents the combination of a decentralized and a private/deregulated approach. Here ADR is offered by a range of private sector organizations and freelance ADR practitioners on a fee-for-service basis. Mediators represent a wide range of professions with a corresponding range of qualifications depending on organizational or industry requirements and standards. In this quadrant, training and accreditation organizations flourish, specializing in a variety of ADR practice areas. Examples of private sector approaches to ADR can be found in many sectors including telecommunications, construction, and banking and finance. The discussion below sets out the four most common models to be found within the landscape.



Selecting the ADR Model

ADR models can be grouped according to the sphere in which ADR services are requested and administered. Broadly, the models can be classified as either public or private. The public model provides mediation services that are connected to some degree with the public courts or other public actors. The private model operates in the private sphere without any (or very minimal) connection to the courts. Private models are typically connected to a chamber of commerce or trade body, but they can also be free-standing, relying on private referrals from disputants or their lawyers. (See figure 2.1.)

Different ADR Models: Advantages and Disadvantages Public Models

Public models center on some degree of connection with the court system or other public body in any jurisdiction, the latter typically authorizing and controlling them. Often judges or court officials fill the role of the ADR neutral party. Thus, public models rely on a minimum level of functioning and trust in the judiciary. (See box 2.10.) Public models can be further subdivided into court-annexed and court-connected programs.

Box 2.8: Multi-Door Approach to Dispute Resolution

The Multi-Door Courthouse (MDC) concept envisions one courthouse with multiple dispute resolution doors or programs. Cases are referred through the appropriate door for resolution. The goals of a multi-door approach are to provide citizens with easy access to justice, reduce delays, and provide links to related services, making more options available through which disputes can be resolved. The Multi-Door Dispute Resolution Division helps parties settle disputes through mediation and other types of appropriate dispute resolution (ADR), including arbitration, case evaluation, and conciliation. The concept was first suggested at the Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, which took place in 1976 in Minneapolis, Minnesota and brought together 200 judges, legal scholars, and leading members of the bar to examine concerns about the efficiency and fairness of court systems.

Source: “A Dialogue between Professors Frank Sander and Mariana Hernandez Crespo Exploring the Evolution of the Multi-Door Courthouse” at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265221 (last accessed March 9, 2011).

While prevalent in many parts of the Western hemisphere (the United States, Canada), because of their proximity to the institutions of formal dispute resolution, public ADR models are generally indicated in any culture with a strong sense of deference or authority. For example, in controlled or formerly centralized economies, where private initiative and self-reliance are still nascent, public models provide parties with the assurance of a public institution. For countries with a comparatively stronger regulatory framework, frequently anchored in formal legislation, public models are typically required when reliance on the enforceability of ADR awards is a prerequisite to joining a larger trading bloc, or otherwise for the promotion of foreign inward investment.

Where ADR is to tackle specific problems within the formal court system, for example battling case backlogs, increasing the acceptance of a commercial court, or generally improving court efficiency, implementation of ADR at the public (court) level itself should be sought.

Court-annexed

Court-annexed ADR programs or practices are authorized and used within the court system; their procedures are controlled by the court. The court assures ownership of all aspects of the ADR process, including accommodation within the court and the selection of the neutral. Cases are referred by the courts only. Often judges or other court officials serve as mediators. An agreement arising out of the court-annexed program is enforceable

as a court order. The court schedules dates and times for the ADR process and assures the administration of each case referred to ADR, including monitoring and evaluation (see table 2.4 and box 2.8).

Court-connected

Court-connected ADR is linked to the court system but not part of it. Cases are referred by the appropriate courts to ADR service providers outside the court system. The ADR center, however, might at the same time deal with cases emanating from outside the court system. Agreements arising from court-connected mediation are usually enforceable as court orders. In court-connected models, separate mediation centers handle the provision of mediation services and also take cases that have not yet been issued in court. Thus, their pool of available referrals is potentially wider than that of court-annexed programs.

For instance, the Balkan countries have evolved over the last decade from controlled, former communist states to free-market economies. In this region, all successful ADR projects have had considerable connection with the courts. In Slovenia, the highly successful mediation program was run by the municipal court in Ljubljana. In Bosnia and Herzegovina, two pilot programs were connected to the municipal courts of Banja Luka and Sarajevo. In Serbia, a court-annexed program is part of the Belgrade second Municipal Court. In many of these countries, the next step in mediation practice has been to broaden the service offerings

Table 2.4: Court-annexed Model: Advantages and Disadvantages

Advantages	Disadvantages
<ul style="list-style-type: none"> • Benefits from the authority of the court system—no additional legislation for enforcement is required if decisions are court-issued • Increased chance of referrals by judges to mediation • Typically focuses around one court in terms of activities and use of resources (court buildings, personnel, and systems and processes); use of court staff facilitates ADR implementation 	<ul style="list-style-type: none"> • Decision making about the mediation service by the court may suit the court's agenda rather than being the best mediation process • ADR processes can become tainted as just another court procedure if the court system is not well-regarded • Strict procedures and rules, similar to court rules, may burden the process • Increased pressure on court resources and risk that over time resources needed to maintain the ADR program will be withdrawn and momentum lost due to pressure on the court personnel's time • Risk in providing ADR services for no or low cost, thereby inhibiting growth of mediation as a profession, which can inhibit the ongoing viability of mediation service provision

away from the courts and promote mediation through more diverse means. In the Former Yugoslav Republic of Macedonia, the program is less connected to the courts and more closely resembles a free-standing model, and it has had difficulty establishing itself. (See table 2.5 and box 2.9.)

Mandatory mediation

The courts can order mediation. Of course, nobody can force disputing parties to come to a binding resolution. As with ADR, settlements are quintessentially voluntary. In mandatory mediation, a settlement cannot be forced upon the parties. However, the attempt to resolve a dispute amicably can be made a prerequisite to official court proceedings. Mandatory mediation is distinguished from judicial conciliation, in which the competent judge will attempt a negotiated settlement between parties, often in a so-called procedure *in chambers*, i.e., outside the public forum. In mediation, however, the judge recuses himself from discussions between the parties. This way, parties do not have to fear that information disclosed in mediation could be used against them, should mediation fail and the dispute need to be adjudicated.

Mandatory mediation is either court-annexed or court-connected: while some jurisdictions leave the choice of mediator to the court, others let the parties choose from a roster of court-approved mediators or private

mediators. (See box 2.10.) While countries like Argentina or Brazil require for certain disputes all filings to exhaust the possibility of mediation before the case can be formally admitted in court; other jurisdictions, like those in Taiwan, have tied mediation to a minimum claim value.³⁰ Mediation can also be made mandatory for certain types of disputes. To moderate the consequences of mortgage defaults, several jurisdictions in the United States require that mediation between banks and homeowners to avoid having foreclosure be automatic.³¹ The decision to order parties to mediation can also be left with the judge—who will typically base his decision on specific referral criteria—and can also give him or her the prerogative to order costs for parties that refuse to attempt mediation.

Private ADR Models

ADR models can also be located in the private sector, with services offered through a business chamber or a completely free-standing private organization.

In general, private ADR models are indicated in jurisdictions where going to court is stigmatized or associated with “losing face.” This is because private ADR models ensure to the largest possible degree the confidentiality of the matter and the privacy of the parties.

30. As the judicial prerogative to refuse adjudication until mediation has been explored is required by law in approximately 10 percent of jurisdictions worldwide. Based on a sample of 140 economies, for which use of ADR was investigated within the 2011 edition of the Doing Business report.

31. http://www.americanprogress.org/issues/2009/06/pdf/foreclosure_mediation.pdf

Table 2.5: Court-connected Model: Advantages and Disadvantages

Advantages	Disadvantages
<ul style="list-style-type: none"> • Allows for cases to be referred from both inside and outside the court system • Provides a ready supply of referrals through its court connection • Offers more inclusive and extensive reach because control is not held by one stakeholder • Supports reform of the justice system by reducing backlogs, improving settlement culture, and changing court processes and procedures 	<ul style="list-style-type: none"> • Split control means increased opportunities for miscommunication; the court might not be as engaged in or supportive of mediation • Enforceability of agreed outcome is not automatic, but must be sought in an extra procedure • Long-term financial viability may be an issue as additional resources become necessary

Box 2.9: Court-annexed Models

Croatia. The development of alternative dispute resolution methods such as mediation was seen as a key part of the Ministry of Justice's national strategy for judicial reform, beginning in 2003. With the assistance of the British Association for Central and Eastern Europe, an awareness-raising workshop was conducted in Zagreb and local stakeholders reacted positively in considering a court-based mediation pilot. A formal project, funded by the British Foreign and Commonwealth Office through the British Embassy in Croatia, assisted the Commercial Court of Zagreb in operating the pilot and organizing training events for mediators, judges, lawyers, and other stakeholders. The court-annexed Zagreb Commercial Court mediation program in the initial pilot period allowed only judges of the Commercial Court to be mediators because the program was located within the court and run by court staff. The pilot evaluation report, completed in May 2007, highlighted that of 150 mediations undertaken in the first year, over half resulted in agreement with parties reporting high levels of satisfaction with the process.

Source: CEDR Civil Justice Case Study – Croatia (http://www.cedr.com/cjs/track_record/studies.php?param=99)

Albania. At the Mediation Center within the District Court of Durres, established in 2009 following a successful pilot project, mediations are administered by an independent association of mediators. The Mediation Center operates under terms set forth in the Law on Mediation, the Code of Civil Procedure, and a Memorandum of Understanding between the Head of Court, Ministry of Justice, High Council of Justice, and the APCR. At the court, cases are identified as suitable for mediation and parties are invited to use the mediation service. The Mediation Center's coordinator appoints a mediator or the parties select a mediator from the list of mediators certified and employed by the Mediation Center. If the dispute is resolved, the parties sign a settlement agreement. A report is submitted to the court on the mediation outcome.

Romania. The Mediation Center in Craiova was established as a pilot project in 2003 by the Ministry of Justice through the intermediary of Craiova First Instance Court and Craiova Tribunal and with the support of the United States Embassy in Romania and Dolj Bar Association.

They also tend to work well in free-market economies with a strong private sector, where individualism is more prevalent than collectivism or in jurisdictions where the level of public trust in the formal system is low. Private models can constitute the best ADR option where court resources are strained to a point that

additional ADR services, including training and physical facilities cannot be obtained. For private models to function properly, enforcement legislation, providing for the execution of agreements reached through ADR by public agents, should pre-exist, or be easily attained.

Box 2.10: Court-connected Models

Bosnia and Herzegovina. The court-connected mediation centers—initially attached to the Sarajevo Municipal Court and the Basic Court of Banja Luka—were transferred to the Association of Mediators of Bosnia and Herzegovina (AoM) in 2007. The AoM, founded in 2002, is the only organization licensed to provide mediation services in Bosnia and Herzegovina and now administers disputes referred through the private sector and the courts. The AoM offers mediation services, training, certification, seminars, presentations, and direct consulting on mediation. Family mediation and certain types of labor disputes are dealt with in other forums.

Chamber-connected

Under this model, the ADR service is connected to some form of a business chamber. This is a typical form of a private-sector approach to ADR interventions (described in more detail in Chapter 5). While mediation and arbitration centers are most commonly located in chambers of commerce, they can also be placed in industry-specific organizations such as trade bodies. Chambers of commerce enjoy the advantage of being trusted partners for businesses and trade organizations, and in most jurisdictions, being mandatory for all members of the business community. In addition to a strong membership, they predispose of physical facilities as well as an institutional framework that can be easily extended to offer ADR as an additional service to its members.

In general, the chamber-connected ADR model is appropriate for situations involving disputes between businesses from the same industry or business community. Indicators for the chamber-connected model include: lack of a settlement culture within the formal court system, low level of trust in the judiciary, and a strong self-regulating culture. (See box 2.11 and table 2.6.)

Free-standing

These models involve neither the courts nor a business chamber, but rather are set up as separate organizations. The free-standing model can be structured as either a for-profit or not-for-profit organization, with the aim of providing ADR services to any and all groups in society. (See table 2.7 and box 2.12.)

Table 2.6: Chamber-connected Model: Advantages and Disadvantages

Advantages	Disadvantages
<ul style="list-style-type: none"> • Efficient use of resources, using chamber infrastructure and administration support • Cases do not have to be registered via the court • Chamber's reputation can encourage use of services • Chamber's pool of members has easy-to-access information about available services • Fast and easy access to relevant expertise 	<ul style="list-style-type: none"> • No steady or reliable flow of cases, compared to ADR mechanisms attached to formal justice institutions—only if there is not enough demand • Risk of loss of momentum through limited demand and resources of chamber, as ADR activity will not be the single or major focus for the chamber • Scope can be quite narrow because disputes may be limited to those involving chamber members • Potential problems enforcing settlement agreements or awards because this ADR mechanism is not part of the court process • Processes and outcomes may be dominated by main business drivers (i.e., large company owners)

Box 2.11: Business Chamber-connected Models

Chile. The Arbitration and Mediation Center of the Santiago Chamber of Commerce (CAM Santiago) was established in 1992 and is the country's main ADR institution. After initially offering only arbitration services, the center introduced mediation in 1998 and now has 198 arbitrators and 10 mediators on its roster. CAM Santiago has conducted 1,278 arbitrations and 102 mediations since its inception, dealing only with disputes submitted by the parties, since Chile's legal system does not provide for court-referred mediation.

Source: <http://www.camsantiago.com/en/index.htm>

Burkina Faso. Created in 2005 under the Chamber of Commerce and Industry of Burkina Faso, the Ouagadougou Arbitration, Mediation and Conciliation Centre administers arbitration and mediation procedures. It has already contributed to the settlement of several disputes, offering low administrative charges. The Centre administers arbitration and mediation procedures and is involved in training commercial operators and business legal advisors as well as mediators.

Source: <http://www.camco.bf/>

Bangladesh Garment Manufacturers and Exporters Association (BGMEA). With over 700 members, the BGMEA is one of the largest and most important trade associations in Bangladesh. The association operates its own arbitration service to help settle disputes promptly and at minimal cost. In 2008, BGMEA received close to 700 referrals and succeeded in resolving almost 600 of these. BGMEA's status and authority are in part responsible for the model's effectiveness. In this case, arbitration awards are technically non-binding but can be elevated in status if the arbitrator files the award in court, which, in turn, converts it into a court decree. In practice, this level of enforcement is rarely necessary.

Source: CEDR "Feasibility Study for the Establishment of Alternative Dispute Resolution Mechanisms in Bangladesh," 2009; (prepared for the IFC Bangladesh Investment Climate Fund [BICF]).

Pakistan. With a particularly supportive provincial chief justice and a largely supportive judiciary, a court-referred mediation model seemed to be the most logical route introduction of the ADR process. The Karachi Center for Dispute Resolution was established in 2007 as an independent, not-for-profit organization with the support of the High Court of Sindh. Initially, the Center dealt with cases referred by the High Court and local District Courts. With the amendment to the Civil Code of Procedure, disputes are now referred privately to the Center as well as through the courts. Fees for mediations are paid by the parties, regardless of the referral source.

Source: Karachi Centre for Dispute Resolution (KCDR) Web site (<http://www.kcdr.org/>).

Table 2.7: Free-standing Model: Advantages and Disadvantages

Advantages	Disadvantages
<ul style="list-style-type: none"> • Flexible approaches can provide ADR services to the widest range of disputants and disputes • Independent from the rules of another institution, i.e., a court or a business chamber • Cases do not have to be registered via the court • Potential to develop mediation and or arbitration as financially viable professions through paid-for services 	<ul style="list-style-type: none"> • Potential for unreliable flow of cases either from the court or business chambers • Financial sustainability is often a problem without resources from courts or business chambers • Potential problems enforcing settlement agreements or awards because ADR is not part of the court process • Establishing a market can be difficult in developing countries with no history of paying for private sector dispute resolution

Box 2.12: Free-standing Models

Morocco. The Tangiers International Mediation and Arbitration Center was founded as an independent, private association in 2006. Despite its name, the Center conducts mediation and arbitration for parties, whether international or domestic, that submit disputes for resolution. Court-referred mediation is not yet operational in Morocco. The Euro-Mediterranean and Arbitration Center was established in 1959 as an independent, private association of entrepreneurs that offers mediation and arbitration to businesses and the general public in the Euro-Mediterranean region. The Center has more than 200 members and a 30-member board. Of the approximate 55 disputes mediated over the last 16 months, 70 percent reached settlement, according to Center records.

Cairo. The Cairo Regional Center for International Commercial Arbitration is an independent, not-for-profit regional organization, operating in Egypt since 1979 and established by agreement between the Egyptian government and the Asian-African Legal Consultative Organization. Although originally founded as an institution for arbitration, a mediation and ADR Center was opened as a branch operation in 2001. Services include administering domestic and international arbitrations (according to UNCITRAL rules) and other ADR processes; providing administrative and technical assistance to parties for ad hoc arbitrations; and rendering assistance in the enforcement of arbitration awards.

Source: IFC, A Manual to Guide Practitioners in Establishing or Improving Alternative Dispute Resolution Centers, (Washington, D.C.: The World Bank Group, 2010).

Chapter 3: Assessing the Need for and the Viability of an ADR Intervention

This chapter sets out factors critical in assessing the need for and success of an ADR intervention in a given country, and describes the impact it can have on the implementation of a project. The list is neither exhaustive nor prescriptive, and the importance of these factors in determining the success of an ADR intervention varies. While some factors argue more strongly for or against initiating a project, others are more indicative of issues to take into account when considering a potential project.

Factor 1: Needs Assessment—The Time and Cost of Litigation as a Business Consideration

In diagnosing whether a country is likely to benefit from ADR, the state of the existing dispute resolution landscape should be assessed and whether ADR can play a significant part in remedying its potential weaknesses. (See box 3.1.) The key economic indicator to consider when assessing the health of a dispute resolution system is its ability to enforce contracts. This ability to enforce contracts is crucial both at the individual business level (seeking to recover monies, goods, or services) and to instill greater confidence in businesses. Lack of adequate contract enforcement has been shown to be a disincentive for economic growth as well as foreign investment in emerging economies.¹

Embedded in a larger reform program or as a stand-alone project, ADR may be able to ameliorate the dispute resolution landscape, mainly through speedier resolution of disputes and higher compliance with consensual agreements.

In addition to the outcome of litigation (i.e., the material content of a formal court decision), the process of dispute resolution also has other factors of economic importance to business. Among transaction costs, time is of particular importance: the longer the resolution of a dispute takes, the more costs a dispute engenders. Such transactional costs include legal costs, the diver-

sion of labor away from business, the loss of opportunity from funds tied up in dispute, and damage to the parties' reputations. Set out below are the main shortcomings of a country's dispute system for which ADR can provide a remedy.

Time of Proceedings Before Court

From the filing of a complaint until the verdict is effective, a number of factors contribute to the length of time it takes for a determination to be made in the court system. The availability of human and financial resources, the degree and quality of case management, and the court's policy in dealing with adjournments contribute to the number of cases on the docket or court roll. If the court system cannot cope with the number of cases, a backlog builds up, creating further delays.

Pre-trial

The settlement of disputes prior to formal hearing can curtail proceedings significantly. In some jurisdictions, very few proceedings actually end up in a determinative hearing. Instead, parties reach a settlement with the assistance of the court or their legal teams. For example,

Box 3.1: Backlog in Bangladesh

Time delays in Bangladesh's court system are a primary reason to introduce ADR there. Official statistics show a significant backlog, with cases taking from 3–4 years to conclude at civil trial. Outdated and protracted procedural rules give parties opportunities to delay further by filing interlocutory applications and requests for adjournments and appeals. The courts often fail to set early dates for hearings, hearing cases on a day-by-day basis instead, or not signing judgments as soon as they are pronounced.

Source: CEDR, *Feasibility Study for the Establishment of Alternative Dispute Resolution Mechanisms in Bangladesh*, 2009 (prepared for the IFC Bangladesh Investment Climate Fund [BICF]).

1. Zhigang Tao and Susheng Wang, "Foreign Direct Investment and Contract Enforcement," *Journal of Comparative Economics* 26, no. 4 (1998): 761–82.

in the United Kingdom, of the disputes filed, fewer than 10 percent are determined by the courts; the case is similar in the United States, and has led to the debate on the “vanishing trial.”² In India, in contrast, of all law suits filed in the courts, approximately 90 percent end up being tried, while only 10 percent are settled beforehand. Pre-trial settlement requires legal mechanisms and a settlement culture.

Post-trial: Appeal and enforcement of judgment title

The degree to which unsuccessful litigants can appeal an original determination of their case can significantly contribute to the overall length of dispute resolution. In some jurisdictions, court procedures restrict the right of appeal by law. This means that parties are allowed to appeal the original decision in only a small number of cases. However, in many developing countries there is no such control and there is an almost unfettered right of appeal, resulting in a large majority of cases being appealed.

If the judgment debtor, the party against which the decision is directed, refuses to comply with the decision, an enforcement procedure must be initiated. Frequently a procedure in its own right, it generates further delays and costs.

Direct Costs of Litigation

The longer a process takes to reach a conclusion, the more it will cost. Direct legal costs include filing a case (court fees) and employing legal representation (legal fees). Indirect costs include the time involved, loss of income, even bribes. These costs vary widely from country to country, but in most cases the legal fees are the higher of these two direct costs. In some jurisdictions, disputants can find it hard to take their case to trial, as legal costs cancel out or exceed the amount of the potential award. While in many jurisdictions the losing party must cover the prevailing party's costs,³ it is important to note that the amount of

legal fees a successful party can recover depends on the procedural rules and capacity of the unsuccessful litigant to pay.⁴

The Role of the Judiciary

In some jurisdictions the judiciary is perceived as impeding, rather than facilitating, the resolution of disputes. Outside the scope of judicial corruption, various reasons can contribute to such a perception within the legal and business community:

- Low regard for the professional standards of the judiciary
- Frustration with the way court proceedings are conducted
- Perceived judicial bias

As a consequence, businesses often refrain from expanding beyond the smaller scale of local markets, where business partners all belong to the same commercial community.⁵ Small and middle-size businesses suffer most from this growth obstacle, often referred to as contractual informalism. (See box 3.2.)

Box 3.2: Judiciary Latin America

In a study undertaken by the Inter-American Development Bank and the Alternative Dispute Resolution Network across nine Latin American countries into the cost of disputes and the use of ADR, 46 percent of businessmen had a moderate opinion of the judiciary and 26 percent had a negative opinion. The study also found that while larger companies used the courts, the majority of smaller companies looked for alternative methods of resolving their disputes.

Source: Full report at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1078124>.

2. Lisa Blomgren Bingham, Tina Nabatchi, Jeffrey Senger, and Michael Scott Jackman, “Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes” at http://works.bepress.com/lisa_bingham/1/ (last accessed March 9, 2011).

3. This is not a universal principle; in the United States each side must bear its own costs.

4. For a cross-country comparison of allocation of costs and fees in civil procedure, see James R. Maxeiner, Supplement: Article: Section II.C: Civil Procedure: Cost and Fee Allocation in Civil Procedure, 58 Am. J. Comp. L. 195 2010.

5. Dani Rodrik, in “Second-best institutions” (<http://www.nber.org/papers/w14050.pdf>), describes some of the aspects of relational contracting, as “screening potential business partners by gathering information about them, inspecting goods on delivery prior to payment, and [being] often willing to renegotiate when contract terms are not fulfilled.”

Pre-project assessment and early analysis

The abovementioned parameters can be addressed in larger-scale justice-reform projects, yet they also stake out access points for ADR as a permanent remedy. They are best explored through an in-depth country assessment, including a thorough review of procedural codes and court acts, as well as the gauging of actual courts, capacities, efficiency, and public trust.

Indicator-based reports provide an initial idea about ADR needs. Various indicator sets aim to measure the rule of law and the performance of the formal justice sector, gauging respect for property rights, trust in the judiciary, and the efficiency of the litigation environment.⁶ The World Bank/IFC's annual Doing Business report can provide guidance in identifying some of the impediments that may hamper the formal judicial sector. (See box 3.3.) Conducted on a global scale and based on a typical dispute scenario between two mid-sized businesses,⁷ the study measures:

1. **The time it takes to enforce a contract**, which is calculated in calendar days from the moment the

plaintiff files a lawsuit in court until he receives payment following enforcement of a court title;

2. **The cost, which is recorded as a percentage of the claim**, assumed to be equivalent to 200 percent of income per capita in the country measured;
3. **The number of procedural steps** a party must go through to enforce a contract from initial filing through final enforcement, with steps defined as any interaction between the parties or between them and a judge or court officer. (See figure 3.1.)

Once the needs assessment has established support for ADR, consideration should be given to the environment for successful implementation of ADR mechanisms.

Factor 2: Economic Development—Strength and Organization

Strength of the Domestic Commercial Sector

Successful implementation of ADR, particularly in the commercial realm, depends on the level of the country's economic development. Different levels demand different approaches to the reach and possibilities of an ADR intervention. Since ADR also follows the rules of supply and demand, the volume of commercial disputes plays an important role in gauging the possibility and nature of an ADR intervention. When the number and value of economic disputes are particularly low, ADR can focus on specific subject matter where a need exists due to a lack of access to formal resolution options such as land titles or primary industries.

Influence of Trading Blocs

Global trade and increasing economic interdependence play an important role in economic development in most countries. Regional trading blocs such as the European Union, the North American Free Trade Association (NAFTA), Mercosur, the Southern African Development Community (SADC), OHADA, the Association of Southeast

Box 3.3: Enforcing Contracts in Doing Business 2011

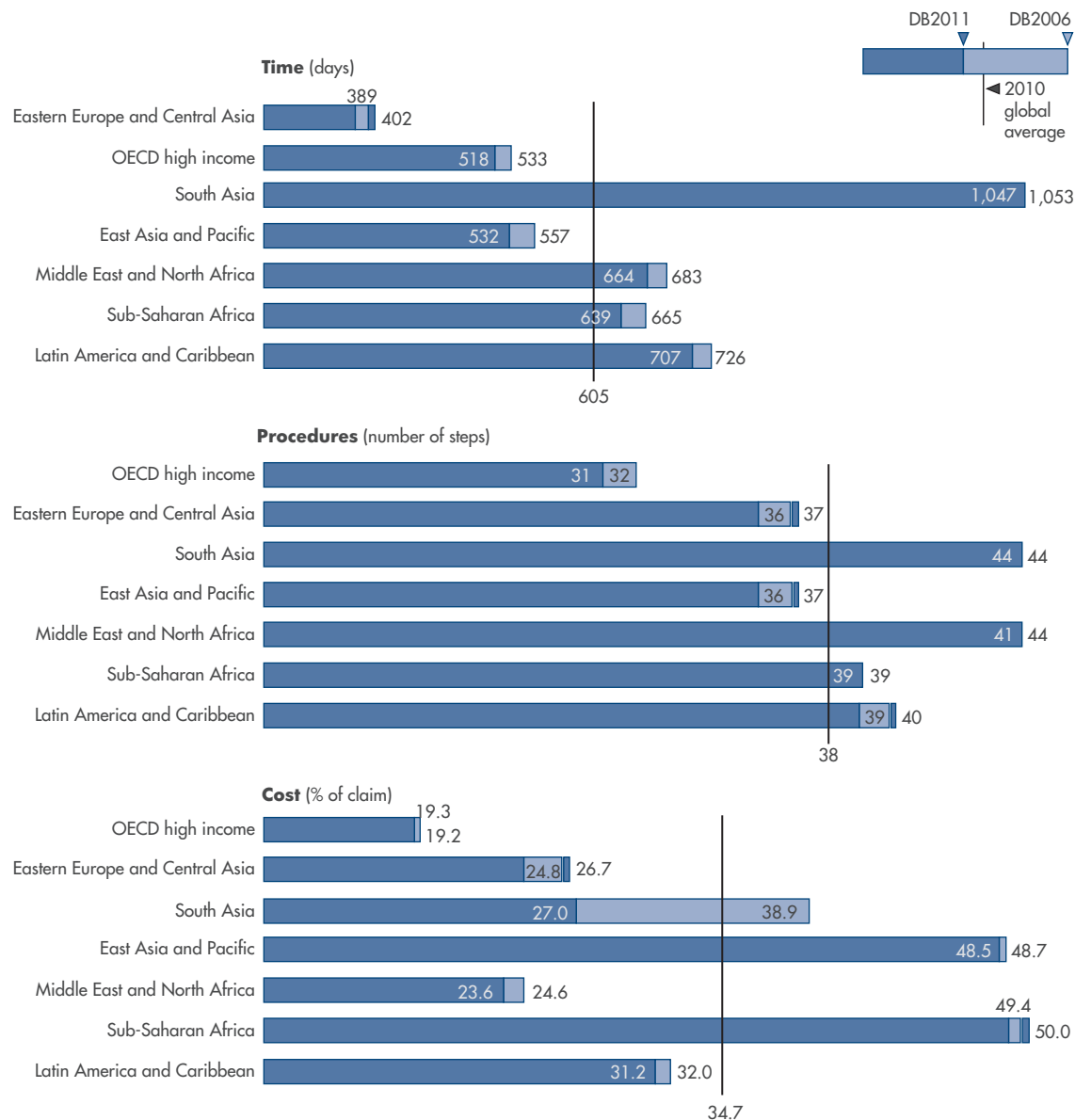
Doing Business 2011 reveals stark national and regional discrepancies: dispute resolution in the formal court system can take as little as 150 days in Singapore and as many as 1,715 days in Suriname. Regional differences are likewise significant: from 402 days on average to resolve a commercial dispute through the courts in OECD economies to 1,053 days in the South Asia region; 31 procedural steps to go through in OECD economies compared to 44 in the Middle East and North Africa as well as South Asia; and costs to be advanced, ranging from 19.2 percent of the claim value in OECD to 50 percent in Sub-Saharan Africa.

Methodology: <http://doingbusiness.org/methodology/enforcing-contracts>

6. World Bank Worldwide Governance Indicators and World Bank Group Enterprise Surveys, for example, but also regionally limited studies such as CEPEJ and the Latinobarometro include indicators on the rule of law.

7. For details on the methodology of the Doing Business survey and contract enforcement, in particular, see <http://www.doingbusiness.org/MethodologySurveys/EnforcingContracts.aspx>. Another indicator set includes the Council of Europe's CEPEJ report, at http://www.coe.int/T/dghl/cooperation/cepej/default_en.asp.

Figure 3.1: Fastest Courts in Eastern Europe and Central Asia
Regional averages in enforcing contracts



Source: *Doing Business* database.

Note: The data sample for DB2006 (2005) includes 174 economies. The sample for DB2011 (2010) also includes The Bahamas, Bahrain, Brunei Darussalam, Cyprus, Kosovo, Liberia, Luxembourg, Montenegro and Qatar, for a total of 183 economies. Organisation for Economic Co-operation and Development (OECD).

Asian Nations (ASEAN), or Asia-Pacific Economic Cooperation (APEC) play a significant role in harmonizing business environments to further trade between the member states. A typical requirement for membership⁸ in such trading blocs is the inclusion of ADR as part of the

justice system (for example, OHADA's Uniform Act of March 11, 1999, on arbitration). Similarly, the EU Directive 2008/52/EC of May 21, 2008 aims to facilitate access to ADR and to promote the amicable settlement of disputes by encouraging the use of mediation

8. Countries such as Bosnia and Herzegovina, Croatia, and Serbia implemented ADR as part of their accession curriculum for EU membership.

and by ensuring a balanced relationship between mediation and judicial proceedings. (See box 3.4.)

Turkey has aspired to EU accession for many years and has recently focused on strengthening its domestic laws. After Turkey introduced the International Arbitration Law in 2001, the European Commission sponsored project “Technical Assistance for Better Access to Justice—Turkey” sought to further assist the state in meeting EU standards; enabling litigants and their representatives, as well as the judiciary in the pursuit of justice; and increasing awareness of ADR generally. A new draft law on mediation has been submitted for approval and is based on the EU Mediation Directive to demonstrate that EU requirements have been satisfied.⁹

Box 3.4: Economies in Transition

Many economies of Eastern Europe, Central Asia, as well as China that were previously heavily centralized have over past 20 years established market economies, entailing economic liberalization (restructuring and privatization), lowering trade barriers, and allowing most prices to be determined in free markets. This transition has made legal and institutional reforms inevitable, establishing the rule of law, introducing appropriate competition policies, and often redefining the role of the state.

As these economies move to increased private enterprise with a viable financial sector, the volume of disputes arising between commercial parties has also increased. ADR processes, stand-alone or as part of a wider series of reforms, have been instrumental in providing alternative ways to resolve disputes, in particular at a time where existing court systems have been slow to develop the needed capacities or to abandon the historical bias of collective rights over individual ones.

Factor 3: Political Stability and Continuity of Government

Due to the time it takes to develop and implement a successful ADR project and the potential for legislative

Box 3.5: Legislative halt in Ukraine

Despite political will favoring mediation, the laws of Ukraine posed a major obstacle to ADR. The law did not protect the confidentiality of information exchanged during mediation. As a result, mediators could be called into court as witnesses in cases where mediation failed. In order to obtain “mediator privilege”—preventing questioning as a witness in court—a law assuring professional standards for mediators became necessary to prevent abuses, such as the obtaining of mediator certificates by those seeking to escape being witnesses in court. Such a certification body turned out to require state authority, entailing a legislative process that stalled after a change of government.

Source: IFC Research.

intervention, ADR implementation requires a minimum level of political stability and government goodwill. Impending elections and the likelihood of change in policy, or shifts in priority at the ministry of justice or its equivalent in the country, can adversely affect the completion of projects, from serious setbacks to projected timelines to a complete foundering of reform activity. (See box 3.5.)

Factor 4: General Respect for the Rule of Law

A minimum “shadow of the law” is essential for parties to consider ADR. While it is practiced outside of, or alongside, formal justice institutions, ADR relies on a minimum level of respect for the rule of law and contract enforceability. If the perception of justice delivery, for example, in post-conflict countries, is so low as to have quenched all confidence in justice, ADR might better be approached as part of a wider justice reform project. In these circumstances, resources should be devoted to establishing the rule of law and making an operational civil justice system a priority. Even significant court delays can represent obstacles for ADR. When they are significant enough to amount to court failure, they might have the consequence

9. ADR Centre, “Technical Assistance for Better Access to Justice—Turkey” (<http://www.adrcenter.com/international/international-adr-projects-turkey.html>)

Box 3.6: Backlog in India

With severe backlogs in the courts, India has begun to introduce a series of mediation- and ADR-related training programs for judges and lawyers to assist litigants in achieving swifter resolution to disputes. The Ministry of Justice and other local stakeholders have stated their desire for the establishment of an International Dispute Resolution Centre. However, there is concern that litigants themselves may be suspicious of alternative methods such as mediation, given that India is said to have an estimated 466-year backlog, with as few as 11 judges per million and allegations of corruption.

Source: <http://www.gmanews.tv/story/148581/Report-Indian-court-is-466-years-behind-schedule>

of completely undermining trust in legally predictable behavior of other economic agents. (See box 3.6.) One way to minimize the risk of failure when introducing ADR can be to conduct a pilot project focusing on small numbers of low-claim cases and mechanisms to encourage parties in a select jurisdiction to use mediation. Further alternatives are non-court-based models such as chambers of commerce or trade body mediation programs.

A further aspect to consider is the existence of customary forms of ADR that may already exist in a country. While customary forms of justice can carry a gender bias that should not be perpetuated, their existence can be an indicator of ready acceptance of alternative methods of resolving disputes. Similarly, a strong reliance on customary forms of dispute resolution over contemporary court systems may indicate that there is a problem with the latter; however, their existence also indicates a society's willingness to look to alternative ways of resolving disputes. Often the operation of such systems does not differ much from the underlying principles of modern ADR and can contribute significantly to the acceptance of contemporary ADR processes.

Factor 5: Legal Framework to Support ADR

While the extent varies, all types of ADR rely on a legal framework to support them. At a minimum, laws

need to allow for the enforcement of settlements or awards reached in ADR processes. Confidentiality and the admissibility of evidence without prejudice are further aspects that must typically be enshrined in formal legislation. (See box 3.7 and 3.8.)

The likelihood and time frame of introducing the necessary and desired degree of legislation also needs to be assessed. Formal parliamentary legislation, often time-intensive, is not always necessary. Depending on the organization of the justice system, rules can take the form of administrative guidelines or court rules and might not go beyond requiring the consent of a judicial council or court president. Some private sector approaches to ADR also are not dependent on legislation. See chapter 5 for more detail.

Factor 6: Settlement Culture within the Court System

As mentioned in the section on needs assessment, the degree to which cases are settled prior to a final determination by the courts varies widely. In jurisdictions

Box 3.7: Mediation in Tonga

In 2006 Chief Justice Anthony Ford redrafted the Supreme Court Rules to include a provision for mediation. Some initial resistance to the rules came from the Law Society. To accommodate concerns, mediation, initially mandatory, was made contingent on the consent of both parties. The new rules came into effect on April 12, 2007. They require mediation to be practiced by trained or sufficiently experienced persons. Because court registrars are well-respected members of Tongan society, they are particularly suited for the task. To encourage parties to give their consent, nothing said in mediation can be used in a later trial, should mediation fail. The mediators may report to the judge only about the progress and the outcome of the process. The rules also state that reference to mediation is justification neither for staying the proceedings nor for causing delay in the trial preparation.

Source: Anthony Ford, IFC Smart Lessons.

Box 3.8: Legislative halt in Pakistan

The IFC team first began working with the Pakistani Ministry of Justice and the Supreme Court with reference to ADR in 2005. Changes to Section 89A of the Civil Procedure Code (CPC)—to allow for mediation and ADR to be more formally incorporated into the law—were discussed from the very beginning. Indeed, wording for the amendments to the CPC was agreed upon with the Ministry as early as 2006. By the end of the project period in 2009, however, this amendment had still not been included in the Civil Procedure Code.

Source: IFC Research.

where settlement through compromise and agreement is accepted, the percentage of cases that actually proceed to trial can be less than 10 percent.¹⁰ In other countries one can find the opposite, with 90 percent of the cases filed at court proceeding all the way to a final hearing.¹¹ The lack of settlement culture means an expectation on the part of judges, lawyers, court staff, and litigants that a case will be fought out in court.

The existence or lack of a settlement culture has proven to be key to the success or failure of ADR programs, especially if they are court-related. If settlement of disputes is part of the system or culture, then ADR is more easily integrated and more acceptable to the stakeholders. If there is no culture of settlement in the court system, the risk is that either the stakeholders will not accept the concept of ADR, or they will simply see it as another process within the court system, with ADR running the risk of becoming beset by the same problems as the formal court system.

The lack of a settlement culture in and of itself is not a reason not to proceed with an ADR project. Indeed, the point has been made that even gradual change in this type of culture will be an important achievement; however, project planning should take into account that

cultural change takes time and that realistic targets must be set in terms of the percentage of successfully mediated cases, settlement rates, and funds released. In essence, the bar for success may need to be set lower in these circumstances.

Factor 7: Stakeholder Involvement

Those involved in or affected by the project must be engaged and brought into the development and implementation process of the project itself. In the case of ADR reforms this is particularly important for two reasons. First, many of the stakeholders involved in the existing court or other settlement processes are influential professionals (lawyers) or senior members of society (ministry officials, judges, business community) who very much control the current processes, enjoy varying degrees of power and autonomy and are used to doing things a certain way. Any change could therefore be perceived as threatening their position or at least providing no benefits that would merit supporting any changes.

Second, ADR reforms may challenge the interests and monopoly that certain stakeholders have on dispute resolution. In many countries, lawyers and judges have the exclusive authority through the civil court system to resolve disputes between parties. Accordingly, they are the gatekeepers to many disputes in society and have a vested interest in protecting their roles. Unsurprisingly, therefore, even when the system is clearly not working, and alternative approaches could assist in alleviating these problems, stakeholder groups can resist such challenges to their position.

Key stakeholders in ADR implementation include:¹²

- the business community;
- business organizations; chambers of commerce, trade bodies, etc.;
- the legal profession: bar associations, lawyers, notaries, etc.;
- the judiciary;
- the Ministry of Justice; and
- existing ADR organizations.

10. See <http://timesofindia.indiatimes.com/india/Courts-will-take-320-years-to-clear-backlog-cases-Justice-Rao/articleshow/5651782.cms>

11. Examples include India, Pakistan, and Bangladesh.

12. See Lukasz Rozdeiczer and Alejandro Alvarez de la Campa, *Alternative Dispute Resolution Manual: Implementing Commercial Mediation* (Washington, D.C.: IFC, World Bank Group, November 2006), p. 17.

Level of stakeholder engagement

An important indicator of the likely success of an ADR initiative is the general willingness of the key stakeholders to engage.

Reluctance may sometimes be found among the legal profession in relation to ADR, for the reasons previously outlined. While it is normal for lawyers to express doubt or to give reasons why ADR would not work in their given jurisdiction, if there is a stated intention not to support an ADR initiative—for example, by the bar association or other legal professional groups—then the project would face great difficulty. The same would be true for other stakeholders such as the judiciary, the Ministry of Justice, and the business community.

Support in principle. At a minimum, the desired level of engagement would be support of the project in principle

by the stakeholders. This implies that these key groups would not actively oppose ADR and would possibly make supportive public statements. They might also be prepared to be part of the consultation process and to attend events, seminars, and training provided as part of a project. This type of support could also come from business groups, such as small and medium enterprises (SMEs).

Active engagement. The more stakeholders are actively engaged, the more likely it is that the project will be successful. Active engagement involves supporting the project through the allocation of resources or other commitments of support. A memorandum of understanding, signed by ministries, courts, or chambers of commerce, committing these stakeholder groups to work in close partnership with a project is a good indicator of active support.

Chapter 4: Practical and Logistical Considerations for Alternative Dispute Resolution Interventions

This chapter discusses factors critical to the successful implementation of an ADR intervention. While various objectives can contribute to an ADR project's successful outcome, a number of implementation aspects are common to most scenarios. This chapter outlines these success-critical factors and suggests whether each is best supported through private or public sector partners. The analysis in this chapter draws on multiple case studies of ADR initiatives and should be useful for practitioners preparing an analysis of the suitability of proposed ADR implementation.

The Interface between the Dispute Resolution Process and the Legal System

Basic Enabling Framework

As discussed in chapter 3, many ADR interventions rely on a legal framework to support them. A country's legal framework must have provisions to allow for ADR as an alternative forum of dispute resolution. (See box 4.1.) Assuring the interface between formal litigation and ADR, a legal order should at a minimum recognize and thus allow for the enforcement of settlements reached in ADR processes. (For differences between common law and civil law systems, see box 4.2) Of equal importance, confidentiality and the admissibility of evidence without prejudice are aspects typically ensured through

Box 4.1: Inter-American Development Bank in Latin America

A review of IDB-funded ADR programs in Latin America indicated that "in many cases not all the conditions necessary to launch ADR were present. The use of alternative dispute resolution methods such as arbitration and mediation is only legally valid in countries where the legal framework recognizes them. In the cases of Honduras and El Salvador, operations were approved despite the absence of the necessary minimum legal framework. This meant that execution times were drawn out unreasonably, as the projects awaited passage of the new legislation by congress. Interventions of this kind ... are always risky, since if the legal framework for ADR is not approved, the projects are truncated."

Source: Inter-American Development Bank, Multilateral Investment Fund (IDB MIF), *The Cost of Disputes in Companies and the Use of ADR Methods, Lessons from Nine Latin American Countries*, 2005.

Box 4.2: Comparing Common and Civil law Systems for ADR

Generally, in common law countries such as the United Kingdom and the majority of former British colonies, including Australia, Canada, India, New Zealand, Nigeria, Pakistan, and the United States, a legislative framework has not always been considered necessary for mediation to operate, since the principles of confidentiality, without prejudice, and the enforceability of settlement contracts are well established in general law. In common law jurisdictions, mediation is often included when the courts themselves update their civil procedure rules.

Experience in countries that operate under civil law—a legal system used in large parts of the world, including continental Europe—shows that it may be necessary to pass a law outlining the principles under which an ADR process can operate before ADR will be seriously considered by all stakeholders. As an example, in Croatia, although mediators were trained as early as the 1990s, there was no substantive effort to introduce ADR until the Croatian Parliament passed the Mediation Act in 2003.

Source: Frank Carr with Pete Swanson and Bob Randolph, "The Challenge of Establishing a Commercial Mediation Program In Croatia," <http://www.conflict-resolution.org/sitebody/acrobat/Croatia.pdf>.

formal legislation. As another example of the formal-legal/ADR interface, parties might need to approach the court because of allegations of breach of confidentiality, enforceability of the mediated settlement, or professional negligence of the mediator or one of the lawyers in the mediation.¹ Referral legislation is of importance especially for court-connected and court-annexed forms of ADR. Referral criteria determine which cases brought to a jurisdiction should be considered for resolution through an alternative means; they are typically set out in court or procedural rules.

(See section below for more detail.)

Provisions Supporting and Promoting the use of ADR

At a higher level of implementation, rules can provide mechanisms to encourage the use of ADR in and out of court, just as contract clauses—provided legislation permits them—can make ADR a preferred forum for dispute settlement. (See box 4.3 and 4.4.) Such rules can:

- order a halt in proceedings for parties to consider ADR²;
- order parties to engage in ADR or an ADR information session³;
- demand that parties provide reasons to the court why mediation is not appropriate in their case,⁴

and even penalize parties for unreasonable refusal to engage in settlement and ADR⁵;

- reduce court fees for parties engaged in mediation; and
- amend the disposal targets for judges to give them credit for referring cases to mediation.

Internal Rules Framework for ADR

In addition, ADR approaches themselves require a framework in which to operate. Such rules typically include procedural aspects of ADR such as commencement, termination, costs, and appointment of ADR practitioners. They can also set standards for the accreditation of mediators and practice standards for conducting the process such as those found in codes of conduct.

ADR Referral Legislation—a Systemic Approach

The level of contention in dispute, the need for finality, and whether a matter is of public interest in principle are among the relevant factors in determining rules for the introduction of a particular ADR process into the formal court process. The growing sophistication of

Box 4.3: Review of Civil Procedure Rules in Hong Kong

In 2006, Hong Kong embarked on a comprehensive review of its Civil Procedure Rules, which led to the adoption of the Civil Justice Reforms in 2009. From the outset, the use of ADR was examined, and as a result, a number of provisions relating to ADR were incorporated into the reforms. The courts now have the power to order a halt to proceedings for the parties to consider mediation. All parties to civil proceedings begun in the High Court, except for proceedings related to certain types of construction and personal injuries, are required to consider the appropriateness of mediation as a means of ADR. The court, reversing costs, could penalize any party that unreasonably fails to engage in mediation.

Source: <http://www.judiciary.gov.hk/en/index/index.htm>

1. Where no such specific interface laws have been enacted, general laws may apply—for example, the general law of contract.
 2. Rule 26 of the United Kingdom Civil Procedure Rules and s. 89A of the Pakistan Civil Procedure Code.
 3. Rule 24.1 of the Ontario Civil Procedure Rules.
 4. Practice Direction 31 on Mediation (PD 31) and Practice Direction 3.3 on Voluntary Mediation in Petitions Presented Under Sections 168A and 177(1)(f) of the Companies Ordinance (Cap.32) (PD 3.3). of the Hong Kong Civil Justice Reforms, 2009.
 5. Rule 44 of the United Kingdom Civil Procedure Rules.

Box 4.4: Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008

On certain aspects of mediation in civil and commercial matters, applicable to cross-border disputes: Art. 1 of the directive states as its objective, the facilitation of *access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings*. A number of countries such as Greece, Spain and Italy have made their primary legislation on mediation on cross-border disputes also applicable to domestic disputes.

Source: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF>

referral criteria and methods demonstrates the need for expertise in dispute resolution processes and conflict dynamics. Moreover, the move toward judges specializing in ADR in jurisdictions such as Victoria, Australia, reflects the demand for experts in referral processes.

Five main approaches are used in legislation establishing the ADR referral mechanism and interface:

1. **The presumptive approach** allows for referral of all matters to mediation or another specific ADR process, unless a party contests a proposed referral and can demonstrate to the referral body's satisfaction that the case is unsuitable for mediation. Examples include the Court-Annexed Mediation Program in Lower Saxony, Germany, and the Multi-Option Program at the United States District Court for the Northern District of California.
2. **The opt-out approach** allows any one party to choose to opt out of the ADR referral without having to establish the unsuitability of the case for

mediation; in effect, referral is only possible with the consent of both parties.

3. **The screening approach** identifies certain criteria that make mediation or another ADR process unsuitable, such as an excessive power imbalance between parties, and uses these criteria to screen out unsuitable cases. It is often used in conjunction with the matching approach.
4. **The matching approach** uses a case-by-case evaluation of the suitability of a dispute for mediation or other dispute resolution processes based on referral criteria without any presumptions of suitability. This method is found in some multi-door courthouses (see chapter 2 for details) in the United States that offer a range of dispute resolution processes such as mediation, neutral evaluation, mediation-arbitration, and arbitration. The matching approach can also be used after an initial screening has taken place. For example, when mediation has been identified as unsuitable through a screening approach, a matching approach may be used to choose between other dispute resolution processes such as mini-trial⁶ and arbitration.
5. **The pre-filing approach** moves to ADR without an analysis of the suitability of the individual case for mediation or other ADR process. Although in some industries and courts there is a trend in this direction, generally these approaches have not worked well when they cut across different sectors and relied on criteria proven to be irrelevant such as monetary limit. However, they may have some merit in industries with a high rate of disputes.

Matching Available Legislative Mechanisms With the Required Level of Intervention

Any legal change can take substantial time to implement. (See table 4.1.) Legal frameworks can be implemented at different levels of legislative quality. They range from simple practice notes or guidelines, penned by a court president, all the way to formal acts of parliament, and

6. A mini-trial, like mediation and arbitration, constitutes a unique form of ADR, and is really not a trial at all but rather a settlement process in which the parties present highly summarized versions of their respective cases to a panel of officials who represent each party (plus a "neutral" official) and who have authority to settle the dispute. The presentation generally takes place outside of the courtroom, in a private forum. After the parties have presented their best case, the panel convenes and tries to settle the matter. See <http://www.enotes.com/everyday-law-encyclopedia/mini-trials>

Table 4.1: Types of Rules Frameworks

Implementation time	Type of rules framework
<p>Less</p> <p>↓</p> <p>More</p>	<ul style="list-style-type: none"> • Practice guidelines for a particular court ordered by a court president^a • Civil procedure rules for all courts ordered by a chief justice or relevant ministry^b • Statute requiring enactment by parliament (particularly in countries with a civil-law system) • International convention signed and ratified by a number of countries^c

^aOne of the advantages of court-based systems is the relatively easy implementation of rules through the court administration. Court presidents tend to have wide discretionary powers on how their courts will be run and can amend their processes easily. In particular, they can award legal costs against parties whom they deem to have behaved inappropriately during proceedings. Court presidents can also turn settlements reached by parties into enforceable orders.

^bFor a summary of these reforms, including ADR, see <http://www.info.gov.hk/gia/general/200903/17/P200903170133.htm>

^cSee, for example, <http://www.newyorkconvention.org/>

even international agreements. (See box 4.5.) Depending on the type of rules (or legislation, if it passes parliament) the respective implementation time can differ significantly.

When pre-existing laws are sufficient, they should be used; there is no need to introduce sector-specific

legislation. At the same time, there may be sectors with special requirements related to the court interface, such as confidentiality and enforceability, which differ from the norm. In these cases, it may be useful to enact appropriate legislation specific to the sector.

Box 4.5: The UNCITRAL Model Laws

Among the foremost best practice guides are the following texts elaborated by UNCITRAL:

- 2010—UNCITRAL Arbitration Rules (as revised in 2010)
- 2002—UNCITRAL Model Law on International Commercial Conciliation^a
- 1985—UNCITRAL Model Law on International Commercial Arbitration (amended in 2006)^b

^aLegislation based on the UNCITRAL Model Law on International Commercial Conciliation has been enacted in Albania (2003), Canada (2005), Croatia (2003), Honduras (2000), Hungary (2002), Nicaragua (2005), and Slovenia (2008). Uniform legislation influenced by the Model Law and the principles on which it is based has been prepared in the United States (Uniform Mediation Act, adopted in 2001, amended in 2003, by the National Conference of Commissioners on Uniform State Laws) and enacted by the states of Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington, and the District of Columbia.

^bLegislation based on the UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985 has been enacted in Armenia (2006), Australia (1989, 2010*), Austria (2005), Azerbaijan (1999), Bahrain (1994), Bangladesh (2001), Belarus (1999), Bulgaria (2002), Cambodia (2006), Canada (1986), Chile (2004), China (the Hong Kong Special Administrative Region [1996] and the Macao Special Administrative Region [1998]), Croatia (2001), Cyprus, Denmark (2005), Dominican Republic (2008), Egypt (1994), Estonia (2006), Georgia (2009*), Germany (1998), Greece (1999), Guatemala (1995), Honduras (2000), Hungary (1994), India (1996), Iran (Islamic Republic of) (1997), Ireland (1998, 2010*), Japan (2003), Jordan (2001), Kenya (1995), Lithuania (1996), Madagascar (1998), Malta (1995), Mauritius (2008*), Mexico (1993), New Zealand (1996, 2007*), Nicaragua (2005), Nigeria (1990), Norway (2004), Oman (1997), Paraguay (2002), Peru (1996, 2008*), the Philippines (2004), Poland (2005), the Republic of Korea (1999), the Russian Federation (1993), Rwanda (2008*), Serbia (2006), Singapore (2001), Slovenia (2008*), Spain (2003), Sri Lanka (1995), Thailand (2002), the former Yugoslav Republic of Macedonia (2006), Tunisia (1993), Turkey (2001), Uganda (2000), Ukraine (1994), the United Kingdom of Great Britain and Northern Ireland (Scotland (1990) and Bermuda (an overseas territory of the United Kingdom), the United States (the states of California [1996], Connecticut [2000], Florida [2010*], Illinois [1998], Louisiana [2006], Oregon, and Texas), Venezuela (Bolivarian Republic of) (1998), Zambia (2000), and Zimbabwe (1996). * Indicates legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006.

Triggering Mechanisms

The existence of a dispute is often insufficient to encourage the parties to consider ADR. (See box 4.7.) For this reason, most ADR frameworks involve incentives or requirements for people to attend mediation or another ADR process. While awareness of ADR services is necessary, it is usually not enough to mobilize ADR practice. Specific triggering mechanisms can facilitate access to ADR and can originate in either the public or private sector.

Statutory Triggering Mechanisms

Triggering mechanisms may take the form of laws, rules, and court orders. Examples of these types of triggering mechanisms include:

- **Court information sessions on mediation and voluntary and mandatory referrals.** Article 1(1) of the European Directive on Mediation⁷ specifies its objective as being, *inter alia*, to “facilitate access to alternative dispute resolution.” Article 5 sets out different mediation triggering mechanisms that member-states may consider in their regulation policy.
- **Mandatory information sessions about ADR**, sometimes including assessment of suitability for ADR. These are increasingly found in family mediation contexts, including in Austria, France, and the United Kingdom;⁸ however, they may also be suitable in other areas. Article 5 of the European Directive on Mediation recognizes the right of national courts to invite parties to attend information sessions on the use of mediation.
- **Mandatory consideration of ADR.** Lawyers are required to consult with their clients and consider

the use of ADR and, in some jurisdictions, report to the court on the outcome of this consideration.⁹ Examples can be found in the Minnesota General Rules of Practice 114, and the United Kingdom Civil Procedure Rules. Financial sanctions may apply for failure to comply with these requirements, such as a cost order that takes into account pre-action conduct of the parties.¹⁰

- **Referrals to mediation with all parties’ consent.** This currently occurs in Australia, France, and Germany.¹¹
- **Referrals to mediation at the request of at least one of the parties**, as demonstrated by existing legislation on farm debt mediation in Australia, Canada, and the United States.¹²
- **Mandatory referral to mediation at the discretion of a referring body irrespective of the parties’ wishes.**¹³ This currently occurs in certain jurisdictions of Australia and the United States. (See box 4.6.)
- **Pre-filing mediation**, according to which prospective litigants cannot file a claim in court until they

Box 4.6: Triggering Mechanisms in Mediation

For disputes arising within Australia’s franchising industry, one-third of referrals to mediation come through the Australian Competition and Consumer Commission and one-sixth through the Franchising Council of Australia. Others emanate from the Office of the Mediation Adviser (OMA).

Source: Laurence Boulle, *Mediation: Principle, Process, Practice* (Sydney: Lexis Nexis, 2005).

7. Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters, proposal as adopted by the European Parliament and the Council of the European Union on May 21, 2008, L 136/3, 24.05.2008.

8. Article 255 of the French Civil Procedure Code (Code de procédure civile); Part III of the Family Law Act 1996 (UK), especially s 29 and the Law on Marriage; and the Civil Procedure Code (Familienrechts-Änderungsgesetzes 2009 – FamRAG 2009) in Austria.

9. In England, see also Practice Direction to the Pre-action Protocols 4.7 and the case of *Halsey v Milton Keynes General NHS Trust* and *Steel v Joy and Halliday* [2004] EWCA Civ 576.

10. Civil Procedure Rules (UK) r 44.3.

11. Art 131-1 C pr civ (France), § 278 V 2 Code of Civil Procedure (Germany), and Federal Court Rules (Amendment) 1991 N° 461, r 4(1) (Australia).

12. See also United States s 44.102(2)(a) Florida Statutes 2008, Title V, Ch 44.

13. In Australia, see s 24A Victoria Supreme Court Act 1986. In the United States, see r 3.871 California Rules of Court–Civil Rules in relation to disputes not over USD50 000, r 16 Ohio Rules of Civil Procedure, § 44.102, § 44.108 and in relation to appellate mediation § 44.1011(2)(a), Title V, Ch 44, Florida Statutes 2008 and § 154.021 and § 154.022 Texas Civil Practice and Remedies Code.

Box 4.7: Ineffective Triggering Mechanisms for Mediation

Sri Lanka. In 2000, the Commercial Mediation Center was established by statute as part of a Justice Reform Project funded by the World Bank. The chambers of commerce championed the private sector initiative, which involved other stakeholders as well. Project stakeholders insisted that the decision to go to ADR (mediation) be voluntary; they deliberately chose to limit ADR triggering mechanisms to the preferred use of mediation clauses in commercial contracts and strong encouragement by the sector-specific chambers of commerce. The triggering mechanisms and incentives were not sufficient. Although the center's introduction was accompanied by mediation training and extensive stakeholder and industry consultations, there was virtually no uptake of commercial mediation after the center opened.

In 2005, the statute establishing the Commercial Mediation Center was amended to include court-supported triggering mechanisms. One of the main features of the amending Act is to require that parties who have signed a mediation clause must attempt mediation before initiating court proceedings—a pre-filing court referral model.

Papua New Guinea. This initiative—which involved the establishment of a Commercial Mediation Center—initially failed due to a lack of cases. Although there were many suitable cases for mediation, the triggering mechanisms and incentives were insufficient, relying only on voluntary referral from the legal and judicial sector. In June 2010, legislation that allows for court referral to mediation went into effect. Since then more than 100 mediations have been completed.

Austria. The legislature passed legislation regulating the practice of civil mediation (2001) and the accreditation of mediators (2004). However, there has been minimal uptake in the practice of mediation, given the absence of triggering mechanisms and incentives. Private sector initiatives may encourage the uptake of mediation on a sector-by-sector basis; however, these have been slow to develop.

have attempted mediation.¹⁴ Provisions of this type exist in Australia and Germany.

- Court-imposed cost sanctions on parties that unreasonably refuse to participate in mediation, but also making legal aid and other government subsidies available for mediation. Examples are found in various forms in Australia, England, and the United States.

Triggering Mechanisms by Contract and other Types of Agreement

Triggering mechanisms can also emanate from the private sector, and include mainly encouragement or pressure from an influential institution. Some examples are:

- **ADR clauses in commercial contracts.** These clauses have moral and legal power. Legal power depends on courts' readiness to enforce them and, thus, potentially involves a public sector element. At the same time, the moral power of ADR clauses and agreements cannot be underestimated. In Australia, in the 1990s, a number of standard mediation clauses were held to be invalid on the basis of contractual uncertainty. However, as a matter of practice, these clauses had initiated and supported hundreds of mediations before being tested in court.¹⁵
- **Industry-specific ADR regimes.** These encourage (and in some cases, mandate) that disputes arising within the industry be referred to an ADR system.

14. § 15a of the Introductory Law to the Code of Civil Procedure (Gesetz betreffend die Einführung der Zivilprozessordnung, EGZPO) and the Bavarian Conciliation Law (Bayerisches Schlichtungsgesetz) (Germany), and s60(8) Family Law Act 1975 (Australia).

15. See the Australian case of *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* [1995] 36 NSWLR 709.

- **Free and voluntary information sessions.** A central point, such as a chamber of commerce or other industry building, can provide this service. In ADR projects in Macedonia, failure to have information about ADR available resulted in people not following up on the availability of mediation after learning about it.¹⁶
- **ADR weeks organized by industry groups.** In many countries (for example, Australia, the Netherlands, and the United States), annual or biannual “Mediation Weeks” or “ADR Weeks” have helped promote awareness of ADR.
- **ADR training for referral bodies.** Training among industry groups increases awareness and heightens their motivation to refer matters to ADR.
- **Various financial incentives.** For example, the Slovenian Bar Association increased lawyers’ fees for mediated settlements by 50 percent. Financial incentives motivate lawyers both to use mediation, and to encourage settlement.¹⁷ Industry incentives include sponsored referral systems in which consumers can take advantage of ADR services free of charge or at a subsidized rate. Experiences in Hong Kong, Korea, and Singapore with incentives set up in the wake of the Asian financial crisis show that initiatives and support from the banking and financial sectors were critical to the success of the informal work-out (ADR) schemes.¹⁸

Broad Approaches to Triggering Mechanisms

Relying on just one triggering mechanism is rarely successful. Good practice calls for packaging a set of mechanisms tailored to suit the specific ADR intervention.

Triggering mechanisms should ideally be drawn from both the private and public sector.

Ensuring Professional Quality Management and Standards

Quality management and high professional standards are critical to the success of an ADR intervention. There are risks embedded in ADR processes for all participants. For example, when a process is not fairly conducted, a dispute escalates, one party is intimidated or coerced by the other, or the mediator places undue pressure on the parties to settle trust in ADR can be diminished. From a public interest perspective, ADR brings with it risks associated with unjust outcomes, denial of public interest in dispute resolution, and, over time, a potential reduction in the credibility of the public justice system. (See box 4.8.)

ADR practitioners must deal with the risks of stress and competition, especially where supply of ADR services exceeds demand; they must also be able to deliver quality services and manage complaints about performance. Performance and ethics standards can offer a way to manage these risks. Accordingly, they can contribute to risk management strategies for consumers, practitioners, and organizations and can provide consumers and practitioners with a feedback mechanism to the ADR industry.

Standards also provide measures of quality in ADR process performance. They guide practitioners on ethical issues that may arise in the context of their work. They encourage commitment and professionalism in the field, which in turn creates greater capacity and coherence. Further, the promotion of standards in the wider community leads to increased consumer awareness of ADR and confidence in its processes.

16. Marina Perunovska, “Getting Litigants to Complete the Mediation Puzzle: Lessons from the Former Yugoslav Republic of Macedonia,” IFC Smart Lessons, December 2008.

17. This can have the negative effect of unduly pressuring parties to accept prejudicial settlements.

18. “Informal Workouts, Restructuring and the Future of Asian Insolvency Reform. Proceedings from the Second Forum for Asian Insolvency Reform—December 2002,” OECD (2003). In insolvency situations, for example, the OECD proceedings offer the following advice: “Encouragement to mediate may come from a central bank and might take the form of a simple endorsement of the process or a directive. It might be more appropriate if encouragement comes from within the sector itself, through, for example, an endorsement of an informal process by an association of banks or an agreement amongst banks themselves as, for example, under the Korean process.” “Informal Workouts, Restructuring and the Future of Asian Insolvency Reform. Proceedings from the Second Forum for Asian Insolvency Reform—December 2002,” OECD (2003), p. 188.

Box 4.8: Multiple Professional Codes

While attempts by one profession to monopolize ADR have not proven successful, professional tensions continue to surround issues of ownership and demarcation of ADR, especially in the mediation field. For example, the recognition of mediation as a legitimate aspect of the lawyer's professional role by German professional legal bodies resulted in a series of legal cases challenging the right of non-lawyers to mediate or advertise their mediation services in particular contexts.^a

^a See, for example, OLG Rostock (2001) ZKM 192; LG Hamburg (2000) NJW 1514.

Setting ADR service quality standards

Opinion differs widely on the extent to which regulation of ADR processes delivers material benefits to the services delivered. Some jurisdictions rely on informal "market" mechanisms to deliver regulatory checks and balances such as the capacity of users to share information informally on the effectiveness of individual mediators. Other jurisdictions adopt a more formal approach. In Slovakia and Romania, ADR legislation requires mediators to be formally registered with a designated body, to comply with minimum continuing education requirements each year, and to submit themselves to disciplinary oversight by a central authority when a complaint about their conduct is made.¹⁹

On the European continent, there is a discernible trend toward a formal legislative approach, particularly in Eastern and Central Europe. This approach has been fostered by the adoption of the European Directive on Mediation. Where there are gaps in the formal legislative approach, opportunities for other regulatory forms such as self-regulation and market-contract approaches emerge. In designing the regulatory framework, ADR practitioners should consider:

- the degree of regulation required in order to give confidence to users of the services;
- the degree of regulation appropriate to the level of development which ADR has reached in the country and sector; and
- the need to develop credibility of a new system, while avoiding too much regulation of a nascent field.

As previously indicated, regulation of ADR can take a number of forms and can be implemented in the public or private sectors or through a combination of the two. Neil Gunningham, Peter N. Grabosky, and Darren Sinclair advise that "contemporary best practice models recommend a combination of private and public mechanisms in regulated markets with a high level of responsiveness to needs, interests and changes. Experts further suggest that reflexive and responsive processes—often associated with self-regulatory approaches and even formal framework approaches—encourage performance *beyond compliance*."²⁰ In other words, sector participation and buy-in to regulatory measures do more than enhance awareness, understanding, and compliance; they also support aspirations to achieve best practice in the regulated market.

Furthermore, responsive regulation draws on expertise from the relevant sector and from dispute resolution experts. Regulators are not expected or intended to be technicians or business pioneers; if they were, they would be working for the new enterprises that develop technologies and new business models.²¹ In many instances, it may be more appropriate for regulators to allow entrepreneurs and market players to have input in determining how to solve complex sector problems.

A good starting point for quality standards are codes of conduct. International experience shows that in situations where ADR infrastructure, systems, and service providers enjoy the confidence and trust of consumers, experimentation in practice models and accreditation is very useful in the early developmental years of ADR.

19. See, for example, Mediation Acts in Slovakia and Romania, and the draft (at the time of writing) Mediation Act in Turkey.

20. As quoted in Nadja Alexander, *International and Comparative Mediation: Legal Perspectives* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2009).

21. http://www.itu.int/ITU-D/treg/publications/ITU_VWB_Dispute_Res-E.pdf

Sustainability of ADR Initiatives

Consider structures to ensure the institutional and financial sustainability of an ADR project.

Finally, ADR initiatives are more likely to be sustainable when they operate within the context of other ADR systems, which enhances awareness of the initiatives and their credibility. Opportunities will likely arise for sharing resources to benefit all participating ADR initiatives. Thus, when planning an initiative, it is essential to consider the context in terms of existing ADR structures, institutions, and sources of funding.

While an externally funded project may provide financial resources to develop and implement ADR, these resources may not be sufficient.²² Identifying resources to support ADR beyond the project funding source, usually from one of the stakeholder groups, can greatly increase the chances of a successful ADR project. Incremental resources can come from government agencies, business organizations (such as chambers of commerce), courts, or a donor organization. (See box 4.9.)

Mediation services must develop a sustainable method of financing to be successful in the long term. How this funding is achieved will to a large extent depend on the model of service provision selected (see chapter 2). It is necessary to look at these issues when considering whether to proceed with an ADR initiative.

If services are to be provided wholly within the courts, as in court-annexed approaches, the courts must fund the adequate provision of the services. Courts can either fully fund the ADR service, as part of their drive to provide access to justice, or require that the services be charged for at an additional cost to litigants. In the second case, it is important to assess how likely it is that litigants can and are willing to pay for such a service.

Existing (and already financed) infrastructures may be able to play a role in offering ADR services. For example, service providers such as chambers of commerce may take on ADR services within their existing infrastructures, at minimal incremental cost.

Existing courts may resource a court-annexed mediation service; for example, they may use existing person-

Box 4.9: Raising ADR Funding in Bangladesh

Three well-respected sponsors—the International Chamber of Commerce Bangladesh, the Metropolitan Chamber of Commerce, and the Dhaka Chamber of Commerce—provide limited funding for ADR. In 2008, they made a proposal to the IFC Bangladesh Investment Climate Fund for additional funding to support the launch of the Bangladesh International Arbitration Centre. The funding was to be used to help develop local capacity (through training of judges and lawyers), build awareness of ADR, set up the operation, and launch the center, which was intended to be viable and self-financing within three years. IFC and the Bangladesh Investment Climate Fund (IFCBICF) was keen to assist in light of the significant financial, human, and other resources offered by the sponsors.

Source: CEDR, “Feasibility Study for the Establishment of Alternative Dispute Resolution Mechanisms in Bangladesh,” 2009.

nel to administer referrals to ADR. This can be an effective use of resources in the early stages of an ADR program when the volume of referrals may be low. As referrals grow, additional resources will need to be considered. Beyond purely court-annexed systems, all other models of service provision require that the organization providing the service be able to develop sustainable revenue streams.

Industry groups may fund an initiative for their sectors; for example, ombudsman services are usually funded by a levy on each business in a given sector.

Nascent ADR organizations that have trained mediators and conducted awareness programs can be used as a foundation for building financial support. Some basic ADR infrastructure, such as knowledge of, or even limited practice of ADR at the local chamber of commerce, is typically a positive factor. In particular, local mediators, and others interested in the field, should be treated as project stakeholders. As is the case with

22. For detailed information on costs and funding, refer to the forthcoming IFC publication, *A Manual to Guide Practitioners in Establishing or Improving Alternative Dispute Resolution Centers*.

other stakeholder groups, mediators have their own interests; if they feel they are being ignored by any new project, members of such organizations could present an obstacle to the project.

Training services can provide incremental revenues. When the provision of ADR services is slow in building a viable revenue stream, providers may consider offering fee-based training of neutrals and related courses. Experience from around the world indicates that often this revenue stream develops before revenues for ADR services, contributing a crucial portion of early, ongoing funding for new dispute resolution bodies. However, building on an existing structure may not be appropriate and can be detrimental to project sustainability in circumstances where the relevant institutions are biased against women or other groups or do not enjoy the confidence of potential litigants and other stakeholders.

Providing free ADR services. When first developing ADR services in a jurisdiction, stakeholders may consider providing the service for free to encourage parties to use the process. Newly trained and enthusiastic ADR practitioners who want to be involved in the project may offer to do this for a while. However, providing free services is not a strategy for building a sustainable revenue stream for any organization. If disputants become accustomed to receiving a service for free, it will be very difficult later to collect a fee for that service. Also, neutrals may not continue to provide the service for free; at some stage, they will expect to be remunerated for their work. Providing a dispute resolution service, like any other professional service, should be charged at an appropriate rate in order to develop a viable profession in the long term.

Gauging the Nature and Scope of an Intervention by Assessing the Existing Level of ADR Development

Ensure that the proposed ADR intervention will match the level of ADR development in the relevant country or sector.

ADR initiatives often carry the weight of significant expectations. Governments and judges may target reduced court backlogs; businesses may seek fair and quick dispute resolution; nongovernmental organizations may focus on improved access to justice; and donors are keen to see the impact of their funding. All of this can translate into unrealistic expectations about the outcomes and results of ADR initiatives, particularly related to timing. Unrealistic expectations that cannot be met will generate skepticism about the value of ADR reforms, and over time, undermine an initiative's effectiveness and sustainability.

A proposed ADR intervention should fit the level of ADR development already existing in the subject jurisdiction. This will enable it to be perceived as relevant and appropriate by those within the sector or country, increasing buy-in and willingness to use it.

It is important to recognize that changing the way in which people handle and resolve disputes involves significant cultural shifts—in local legal culture, business culture, assumptions about strength and weakness, and so on. While the reforms can be introduced relatively quickly, developing user confidence in the reforms takes longer. (See box 4.10 and 4.11.)

Box 4.10: ADR Coordination and Collaboration in Hong Kong

The Hong Kong Department of Justice established a working group in 2008 to “review and consider the important issues fundamental to the greater use of mediation in Hong Kong.” The working group included the main ADR service providers—many of whom are competitors—and other stakeholders. In February 2010, the working group produced a report on mediation, which was circulated for comment. The establishment of the working group required competitors to work together, listening to and negotiating with each other to influence the future development of ADR in Hong Kong. Anecdotal evidence suggests that it was a productive experience in supporting Hong Kong's transition through the stages of ADR development.

Source: Report of the Working Group on Mediation, Hong Kong, Department of Justice 2010.

Box 4.11: Construction Industry Arbitration Council (CIAC)

The construction industry in India felt the need to introduce new measures so that disputes are resolved in a fair, speedy, and cost-efficient manner. With a view to providing an institutional mechanism for resolution of construction- and infrastructure-related disputes, the Construction Industry Development Council (CIDC), in cooperation with the Singapore International Arbitration Centre (SIAC), has set up an arbitration center in India called the Construction Industry Arbitration Council (CIAC). CIAC provides facilities for ADR, which includes international and domestic commercial arbitration. CIAC also conducts executive development programs and workshops and national and international conferences on various aspects of ADR. CIAC, a registered society with its headquarters in New Delhi, is dedicated to promoting the practice of institutional arbitration in the Indian construction industry. CIAC works under the aegis of CIDC, an apex body for the construction industry established by the Planning Commission and construction industry. It is based on the premise that substantial sums are locked up in many contractual disputes in the construction sector alone in India.

Source: www.ciac.in.

Four Stages of ADR Development

Four stages are typically apparent in the development of ADR: (1) pioneering work; (2) acceptance and adoption of ADR; (3) fragmentation, duplication, and inconsistency; and (4) increased coordination and collaboration.²³ While these four stages indicate a typical developmental pattern, developments do not occur in linear fashion. The growth of ADR usually spans multiple phases in varying degrees at any given time. For example, ADR practice may vary by sector, with some sectors enjoying well-developed ADR infrastructure, services, and demand, and others in an earlier stage of development. For example, in Hong Kong, ADR in the construction sector has long been recognized, but in other sectors it is just beginning to emerge.

Identifying the four Stages of ADR Development: A Checklist

1. **Pioneering work** develops ADR programs, often in the face of resistance from traditional service providers such as courts, judges, and lawyers. Some of these programs are highly successful; however,

they usually depend on the extraordinary efforts of individuals acting as champions. (See box 4.12.)

Guiding question:

- Are champions identified?

2. **ADR is increasingly accepted and adopted** in policy, legislation, and practice as a result of success in a number of programs. This leads to rapid growth in the number of providers, programs, and accrediting and training organizations, which in turn leads to an oversupply of service providers for a limited market.

Guiding questions:

- How can systematic sustainability be created when champions move on and are no longer available?
- Are there regulatory policies in place to manage this transition?

3. **Fragmentation, duplication, and inconsistency** in practice result in a confused ADR marketplace. Rivalries arise among professions, service providers, and organizations over ADR qualifications, practices, and approaches.

Guiding question:

- Can the organizations benefit from linkages, mergers, or market initiatives to promote ADR?

23. These four stages of ADR development have not been subject to formal empirical research. However, they can be discerned in the vast majority of jurisdictions that introduce ADR and, in particular, mediation. In Australia, the National ADR Advisory Council has recognized the four stages. NADRAC, *A Framework for ADR Standards, Report to the Commonwealth Attorney-General*, Canberra, 2001, p. 15.

Box 4.12: Identifying Sector “Champions” to Advocate for ADR

The development of ADR practice around the world owes much to the presence and activity of champions. Champions are usually high profile, well-connected individuals who are inspired by, and committed to, the introduction and systematic implementation of ADR in a particular sector. Alternatively, a champion can be an organization such as a particular business or industry association.

ADR interventions in any sector—whether public or private—are usually initiated with the vision, support, and energy of one or more champions. Champions can be identified in the legal profession or among the judiciary; among corporations, captains of commerce, and industry leaders; and in any other ADR interest group. For example, judicial champions from the courts in Slovenia and Papua New Guinea have been instrumental in developing ADR, and particularly mediation, in those countries.

Conversely, “spoilers” are those who see the introduction and development of ADR as inconsistent with their own interests. For example, lawyers may be resistant to ADR in the early stages of development of the field because they fear the loss of clients and revenue.

These options may apply when there seem to be too many ADR organizations.

- 4. Increased coordination and collaboration address common challenges** and achieve joint objectives. The nature of the coordination and collaboration can take any form and does not necessarily infer a centralized and institutionalized approach to ADR. A pluralistic and decentralized ADR landscape can be the result of a deliberate policy achieved and implemented through collaboration and coordination.²⁴

Guiding question:

- Is competition between ADR providers counter-productive?

Competition is generally viewed positively in relation to ADR—it encourages development and quality. However, in cases where there is a surplus of ADR service providers vis-à-vis the demand, then governmental coordination or other soft intervention may be useful in bringing competitors into constructive dialogue with each other.

Additional Considerations— Gender Inclusiveness of an ADR Intervention

When designing an ADR intervention, gender inclusiveness may need to be specially considered, depending

on the circumstances in a given country. In some low-income countries and emerging markets, women entrepreneurs often face discrimination when enforcing their rights and access to dispute resolution. In a number of jurisdictions, women have to rely on male family members or friends when faced with disputes, as they may not have legal literacy and are not aware of how to access legal services or the judicial system. (See box 4.13.)

The situation becomes problematic when women are enforcing or defending their legal or inherent rights, which are being usurped by a strong party. A woman’s position becomes vulnerable if she loses access to financing or if a contractual due is taken away from her. ADR mechanisms in such an environment become very important for a number of reasons and the following scenarios highlight the benefits of ADR, especially of mediation, for enforcing contracts involving women entrepreneurs.

Saving time and cost: The time and cost of resolving disputes in the courts may be beyond the reach of working and business women who are also caregivers for their families. Mediation mechanisms can provide an attractive incentive for those who cannot afford to litigate their disputes. Women can avoid high court fees and minimize the risk of paying for costs if they happen to lose a case.

Societal attitudes in the courts: The court environment in some countries does not cater to the needs of women,

24. For example, in 2001 the Australian National Alternative Dispute Resolution Advisory Council delivered a report to the Commonwealth Attorney-General recommending a coordinated framework approach for a pluralistic ADR landscape.

Box 4.13: Pro-bono Mediation for Women Litigants in Pakistan

The IFC Advisory Services Project in Pakistan has been instrumental in introducing a well-thought-out concept of popularizing mediation among women litigants through the Karachi Centre for Dispute Resolution (KCDR), which IFC helped establish and fund. With pro-bono mediation services provided by accredited mediators registered at KCDR, these services were offered to women litigants whose cases were pending in courts in Karachi. Cases involving women were resolved through mediation in a matter of hours or days rather than months or years.

Working against a Gender Bias in Bangladesh

ADR programs sought to provide a substitute for the courts and traditional dispute resolution systems that displayed bias against women. Although mediation processes were conducted by non-traditional providers trained in ADR and mediation, the existing multi-tier village mediation structures were used, thus compromising effectiveness.

Source: "Bangladesh: NGO supported Community Mediation," in Alternative Dispute Resolution Practitioners Guide (Washington, D.C.: USAID, 1998).

and society in general does not respect women who litigate or are seen at court. Although this trend is changing, as more women are using courts to enforce and defend their rights, courts often do not provide adequate facilities

for women such as special waiting areas. ADR and mediation can provide women with a setting where proceedings are confidential and flexible and parties do not experience publicity or interaction with society at large.

Chapter 5: Private Sector Approaches to Alternative Dispute Resolution

While ADR is often introduced within the wider scheme of court reform, or otherwise emanates from a public agency's desire to introduce efficiencies into dispute resolution facilities, the use of ADR can also emanate from the private sector. This chapter outlines the conditions for and potential advantages of an ADR intervention originating in the private sector, in a specific industry or trade. It provides key considerations and discusses various access points for introducing an ADR initiative from within an existing business community.

Advantages of Private Sector Involvement

Increased Industry Ownership and Credibility within the Sector

Sectoral ADR initiatives present an opportunity for a business sector to take responsibility for its own disputes. This approach shifts the resolution process and outcome—traditionally outsourced to the courts—to the business community. It engenders greater *ownership* of disputes and builds the capacity of the business sector to handle its own affairs. Taking this approach should not be seen as undermining the integrity of state judicial systems; parties should have the right to seek other forms of redress, especially those based on consensual outcomes the state cannot deliver.

An ADR process developed within a given business sector, consensually and with proper consultation, will likely have greater credibility within that sector than externally imposed centralized reforms. In particular, key players from within the industry may be better able to operate as neutrals who are perceived to understand the sector—its members' needs and aspirations, industry pressures, and norms for that community—than neutrals from outside the sector.

Commercial Sector Cooperation, Commitments, and Awareness

An ADR initiative developed for a particular business sector provides a valuable opportunity for members of

that sector to unite and act around a mutually beneficial strategy. Such opportunities can provide a useful platform for engendering broader sectoral cooperation, not only around the question of disputes, but also potentially around other themes relevant to the sector (for example, future regulation, industry standards, environmental compliance, and so on).

Since the target group for private sector ADR systems is invariably smaller than that for public sector reforms (usually members of a given business sector rather than all court users), it is easier to publicize the system's availability to potential users.

Moreover, it is quite common for the industry sector to encourage (or even require) its members to commit to use an industry approach, thus enhancing its chances of adoption. Such commitments, though possible, are harder to achieve in relation to generalized public sector ADR reforms. Typical examples of such commitments include industry ombuds approaches in which companies within a particular industry commit to refer their disputes to an ombuds service and be bound by the outcome.

Access to Disputes, Earlier Referrals, and Speed of Implementation

Many centralized, public sector ADR systems suffer from low levels of adoption, at least initially. Industry sector initiatives provide much greater access to the disputes in question. Key business managers are likely to be more aware of industry initiatives than of judicial reforms. Furthermore, managers referring cases to an industry system are more likely to feel they are retaining some control over the process rather than relinquishing control to a court-connected system.

Most court-based ADR systems require that disputes be filed *within* the court system before they can be referred to mediation. Usually this means issuing court proceedings, forcing the parties to take an adversarial stance simply to access a less adversarial procedure. Private sector approaches generally provide for earlier referral and are often viewed as a way to avoid the courts, rather than as a choice to be exercised once a dispute is within the court system.

In addition, the vast majority of disputes in the courts are never accessed¹; the parties either find some other way to resolve the matter or it is never addressed,

1. By definition, reliable statistics are impossible to produce; estimates, however, of up to 80 percent have been made.

potentially damaging key commercial or other relationships. For this reason, court-based ADR systems might never connect with most disputes. Their impact can never reach beyond that of the courts in which they are based.

In general, it takes less time to establish an ADR system within the private sector than it does to introduce public sector ADR reforms. The former usually requires only the buy-in and support of industry members. It will often be driven by the governing or overseeing body of the industry, and it is not tied to any national political agenda or reform program. Public sector ADR reforms inevitably involve broader consultation, are often subsumed into other legal reform initiatives (typically civil court procedure reforms), and can become subject to broad political or timing considerations.

Types of Private Sector Involvement in ADR

This section highlights a few types of private sector initiatives among the wide range of those available.

Industry-Based ADR Framework

In this type of initiative, the ADR framework is set up by, and for the benefit of, a particular industry sector. The need for ADR can arise in response to a particular crisis or simply as part of the industry's pursuit of a best practice agenda. The framework generally consists of a series of steps that businesses can take to refer their disputes for resolution. The industry body framing the ADR system can make it mandatory, requiring that businesses comply in order to retain their membership. Some frameworks may focus on disputes between industry members or those involving an industry member and a third party.

This sort of approach often requires a central trade body or institution—such as a trade association—to play a key leadership role, implementing and managing the initiative in conjunction with an ADR organization. The trade body provides the connection to and leverage over its members, and the ADR organization pro-

vides the expertise and requisite independence in the system's operation.

For example, industry bodies may promote best practice in dispute resolution among their members, often if partnered with local or international ADR organizations. Their efforts can range from crafting model ADR contract clauses to creating promotional materials used to enhance an industry's image, often within a broader campaign emphasizing industry best practices.

Pitts and Sherman (2008) note that private sector ADR initiatives “arose in the 1990s to resolve workplace conflicts in response to failures in corporate culture, the increased costs of litigation, and corporate crises, among other factors. The systems vary from company to company, but typically are intended to encompass all types of disputes, are embedded in a culture that is open to the resolution of conflicts, offer multiple access points, provide non-litigation options to resolve conflicts, and are well-supported by the company. They are designed to enable the company to resolve individual disputes fairly, quickly, and at low cost—the traditional justification for non-judicial dispute resolution. But they also enable companies to learn from those conflicts and fix systemic problems in order to prevent their recurrence. A number of very different organizations have implemented and reported favorably on the use of such systems in the workplace, including the World Bank, the U.S. National Institutes of Health, the Royal Canadian Mounted Police, the U.S. Air Force, and the U.S. Postal System.”²

ADR Pledges

Similar to industry-based approaches, ADR pledges are typically more generalized in nature and not limited to one sector. A business or association makes a public commitment in a unilateral pledge to use ADR when possible and appropriate, irrespective of whether other businesses also commit to use ADR. The pledge is meant to represent a statement of intent and values on the part of the business or association, rather than be a legally binding commitment. These pledges also demonstrate support for ADR among individual businesses within a sector and can play a key role in building credibility for ADR reforms.

2. Chip Pitts and John Sherman, “Human Rights Corporate Accountability Guide: From Laws to Norms to Values.” Working Paper 51 (Cambridge, Mass.: John F. Kennedy School of Government, Harvard University, 2008).

The many examples of ADR pledges include the U.K. government's ADR Pledge³ (a commitment to use ADR for cases in which the government itself is a party to litigation); the International Institute for Conflict Prevention and Resolution's CPR ADR Pledge signed by over 5,500 businesses in the United States;⁴ and the Euro-Mediterranean Charter on Appropriate Dispute Resolution 2007, signed by the Arab Union of Lawyers, the Egyptian Bar Association, the Council of Bars and Law Societies of the European Union, and the Union of Turkish Bars.⁵

Regulator-Imposed Approaches

In a regulated sector, the regulator can establish an ADR process for disputes arising in that sector. (See box 5.1.) In this context, businesses may need to use the ADR process (and enable their counterparties or customers to use it) in order to comply with the sector's regulations. This can result in immediately raising the profile of mediation and potentially increasing demand. The development of mediation frameworks among regulators is a fairly recent phenomenon and not widespread in practice, although such experiences have proved effective.

Concerns are sometimes raised that a regulator's use of mediation may diverge from its principal role of

enforcing compliance with industry regulations without fear or favor. However, experience indicates that mediation functions well in a regulatory environment and that its use by a regulator is consistent with the regulatory function. To date, there are examples of both regulators and regulated entities embracing the opportunity for effective and meaningful dialogue on a sensitive issue of non-compliance, without any perceived or actual loss of regulatory function.

Box 5.2: ADR Legislation in New Zealand Industry

New Zealand has used legislation to introduce ADR processes into fields as diverse as telecommunications, electricity, gas, biosecurity, animal products, wineries, share-milking, residential tenancies, fisheries, construction and building contracts, weather-tight homes, Maori television services, retirement villages, fisheries, and commercial aquaculture.⁶ The legislation does not deal with ADR generically, but simply with its application to disputes in a particular sector.

Box 5.1: The United Kingdom Financial Services Authority

The United Kingdom Financial Services Authority regulates the financial services sector. As part of its enforcement process (for taking action against firms or individuals who have breached regulations), the authority offers mediation to enable effective dialogue between regulator and regulated entity. The latter can choose whether or not to request the mediation process.

Source: www.fsa.gov.uk

ADR Legislation Targeted at Specific Commercial Sectors

In some jurisdictions, legislation is used to introduce ADR processes into a *specific* industry sector rather than across all sectors. Although this approach is not considered a private sector initiative per se, it is nevertheless effective in combining the benefits of legislation with the necessary targeted approach to develop ADR in a given sector. The legislation may prescribe the use of a particular ADR process or—when used to introduce reforms into a wide range of commercial sectors—provide for the use of ADR without imposing specific procedures. (See box 5.2 and 5.3.)

3. See details at www.justice.gov.uk, including a report analyzing the value derived from the pledge.

4. See details at www.cpradr.org

5. See details at www.adrmeda.org

6. See New Zealand Legislative Advisory Committee at http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/appendix_6.html

Box 5.3: The International Trademarks Association (INTA)

INTA has a global mediation system for trademark and other intellectual property disputes. It addresses both the supply side (by training mediators from within the sector with specific technical knowledge) and the demand side (by promoting mediation for intellectual property disputes among its members, as well as an ADR pledge). INTA's global nature enables it to promote mediation effectively worldwide, and its central role provides credibility to users who enter mediation through their connection with a familiar and trusted entity.

Some ADR initiatives are based on thematic, rather than industry-specific, approaches. Typically, these initiatives focus on a specific type of dispute, for example, those pertaining to intellectual property, or insolvency regulation.⁷ Thematic initiatives can have a particular cross-cutting effect internationally and also between industry sectors.

Access Points and Agents for Private Sector ADR Initiatives

In designing private sector ADR initiatives, it is important to identify possible access points for entry into the private sector. Each stakeholder, and the relationships it has within the sector, offers different access points for ADR initiatives, as shown in figure 5.1. and box 5.6.

Individual Businesses within the Sector

ADR interventions involving individual businesses within a given sector tend to focus on ADR contract clauses and pledges, training programs and capacity building, the development of internal ADR systems, and relations with external stakeholders—including customers, competitors, and contractors. Often corporate governance or best practice issues are at the heart of such approaches.

Such strategic approaches to ADR assume a degree of knowledge and sophistication on the part of participating businesses. It is not easy for an individual business to adopt an ADR program unilaterally, not least because any disputes (at least, those with external

Box 5.4: Early Dispute Resolution Systems

Global manufacturer General Electric has adopted a sophisticated and systematic use of ADR, which includes ADR training for in-house counsel and key business management, the use of ADR contract clauses, and an internal protocol requiring that all disputes be reviewed for applicability of mediation. An interest-oriented culture, aimed at defining and attaining goals has been successful in reducing major litigation with substantial savings in legal fees and win/win settlements. As a side benefit, lawyers are viewed as problem-solvers, and have become more visible in the company.

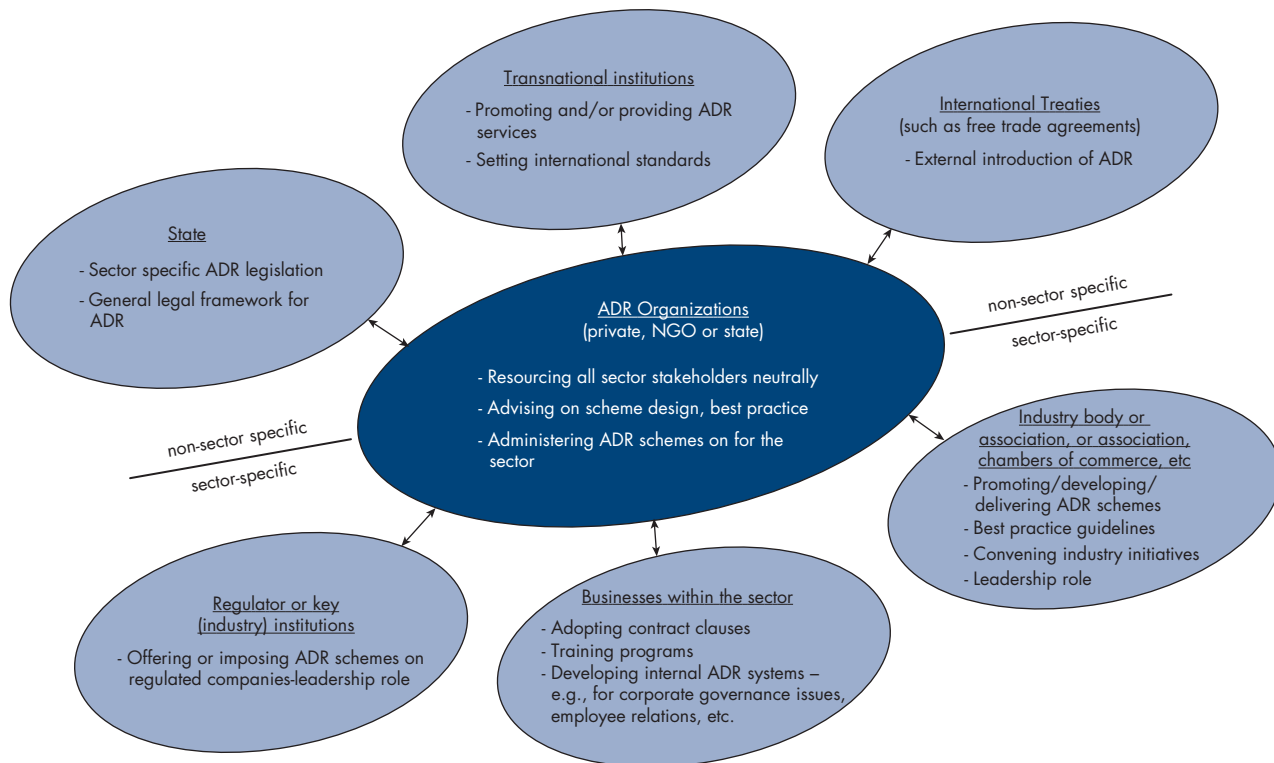
Source: <http://hbr.org/product/ge-s-early-dispute-resolution-initiative-b/an/801453-PDF-ENG>

Established in 1947, the Northrop Grumman Early Dispute Resolution system features a four-step process. An employee's first-line supervisor represents the company in a first step, a departmental administrative unit represents the company in a second step, and a management appeals committee in the third step. The fourth and last step is external, binding third-party arbitration, with the arbitrator jointly chosen by the employee-grievant and the company's management.

Source: Samuel Estreicher and David Sherwyn, eds. *Alternative Dispute Resolution in the Employment Arena: Proceedings of New York University 53rd Annual Conference on Labor* (New York: Kluwer Law International: 2004).

7. For more on ADR projects in the field of insolvency, see https://insol.org/emailer/insol_enl_september_2010.html

Figure 5.1: Access Points for Private Sector ADR Initiatives



parties) require the cooperation of the counterparties. However, there are notable examples of ADR systems being implemented by companies in such a systematic fashion. (See box 5.4.)

Industry Bodies or Associations, Chambers of Commerce

To address the problems associated with unilateral ADR activities, industry bodies such as trade associations and chambers of commerce can become involved in, and offer a useful access point for, private sector ADR initiatives, as previously discussed. This involvement can take advantage both of the industry bodies' role in representing their industries as a whole and of an established set of relationships. Moreover, when an industry

body or chamber of commerce is involved, the perception is reinforced that the ADR system is separate from the court system and is grounded in the industry and business community. (See box 5.5.)

The roles of a chamber or industry body can include:

- **Delivering ADR systems.** Many chambers of commerce offer ADR services directly to their members. Alternatively, this function can be outsourced to ADR organizations.
- **Developing best practice guidelines for dispute resolution.** Best practice codes of conduct are common in many industries and can include guidelines on industry-specific dispute resolution.
- **Convening industry members.** Chambers and industry bodies are well positioned to set up roundtable discussions and working groups around a key topic such as dispute resolution.

Box 5.5: Leveraging the Mediation and Arbitration Center of Bogota's Chamber of Commerce

The experience in Colombia demonstrates how much can be achieved through chamber of commerce involvement. Initial Multilateral Investment Fund (of the Inter-American Development Bank) financing was used to consolidate the Bogota center's operations, and enabled it to transfer its knowledge and experience to 70 other centers throughout Colombia. Since then, 150 more centers have been established, and the Bogota center has been able to create an income-generating market for its services, increasing revenues from Col\$100,000 (\$50) in 1997 to Col\$1.026billion (\$542000) in 2001.

The Bogota center has become a lead institution on the regional, national, and international levels in the settlement of commercial disputes. It currently acts as Directorate General of the Inter-American Commercial Arbitration Commission.

Source: Inter-American Development Bank MIF/GN-78-2, November 13, 2002.

Europe's Information Society Alliance

EURIM is an organization that brings together politicians, officials, and industry members to improve the quality of policy formation, consultation, scrutiny, implementation, and monitoring in support of the creation of a globally competitive, socially inclusive, and democratically accountable information society. EURIM has promoted ADR as a key theme within its own sector (information and communications technology), seeking to encourage this sector to view ADR as part of industry best practices and include it in industry guidelines. EURIM is also exploring the potential for making ADR more systematically available throughout the sector via partnerships with trade associations.

Source: See http://www.eurim.org.uk/what_is_eurim/notes_to_editors.php

Regulators and Other Key Institutions

When a regulator or other centralized governing institution is responsible for best practice within an industry, it can play a key role in ensuring that the appropriate resolution of disputes becomes a priority within the sector. This is essentially a leadership role integral to introducing systematic behavior and approaches across a sector. (See also section above, which discusses a typical model of the regulator-imposed approach to ADR.) Central banks can play a similar role. The Korean model identifies the leadership role that central banks, for example, could play in such an initiative.⁸

ADR Organizations

Most ADR organizations offer services across the wider commercial spectrum, and often have the capacity and expertise to offer a "free-standing" model of ADR implementation. They are key stakeholders in the overall commercial landscape and can add value to any private sector initiative by:

- **Resourcing all sector stakeholders neutrally.** Local ADR organizations are well placed to resource local businesses in ADR in an even-handed and independent manner.
- **Advising on system design and best practice.** The know-how of local ADR organizations is important in

8. In Korea, an agreement among banks was spearheaded by the Central Bank. See OECD, *Informal Workouts, Restructuring and the Future of Asian Insolvency Reform. Proceedings from the Second Forum for Asian Insolvency Reform—December 2002* (Paris: OECD, 2003), p. 188.

Box 5.6: International Points of Access for ADR

International Labor Organization. The ILO uses a system of international framework agreements, which are instruments negotiated between a multinational corporation and a Global Union Federation in order to establish an ongoing relationship between the parties (related to employer/employee issues) and ensure that the corporation observes the same standards in all the countries where it operates.^a In effect, these agreements offer the scope for ADR contract clauses—with potentially world-wide application—to be inserted, thus providing a platform for promotion and use of ADR in a specific sector or corporation.^b

^a http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_080723/index.htm

^b See for example “International Labour Standards and Companies,” International Organization of Employers at <http://www.ioe-emp.org/en/policy-areas/csr/index.html>

Commonwealth Telecommunications Organization. The CTO established its own global ADR center in 2005, offering a wide range of dispute resolution services for telecom sector disputes. It functions as a typical ADR service.^a The CTO cites its “100-year history of professional neutrality in the affairs of its member states and entities” as the basis for “a notable advantage in offering such a service to members. With English as a common language amongst its members, and most of its member states deriving their commercial traditions and legal systems from the U.K., it is generally recognized that the CTO ADR has an important role to play in addressing the needs of member countries and entities.”^b This is an excellent example of the leverage that an international (or domestic) organization can offer within its own sector.

World Intellectual Property Organization. The WIPO also offers an ADR scheme,^c again with global application, through its WIPO Mediation and Arbitration Centre. Like CTO, WIPO is able to leverage its global standing in intellectual property matters to promote and offer ADR services in that area.

^a See for example the CTO mediation agreement at http://www.cto.int/Portals/0/docs/adr/adr_agreement.pdf

^b <http://www.cto.int>

^c <http://www.wipo.int/amc/en/>

North American Free Trade Agreement. The language of the NAFTA agreement encourages resolution of private sector trading disputes, but does not mention the process of mediation for resolving private-party disputes.^a However, the NAFTA Commission has established the Advisory Committee on Private Commercial Disputes to advise it on the effectiveness of various ADR options.^b Clearly, such an agreement is likely to generate a need for an effective cross-border ADR response. In the case of NAFTA, such services are offered by ADR organizations from the three countries concerned.

^a See Steven Anderson, “NAFTA: Mediation and the North American Free Trade Agreement,” *Dispute Resolution Journal* May-July 2000.

^b It is true that the use of ADR for commercial disputes in this context has been fairly low, but the system still offers a useful access point for influencing private sector ADR development.

designing and implementing an ADR plan for a local industry sector.

- **Administering sector-specific ADR systems.**

Transnational Bodies, International Agreements, and Treaties

International agreements and treaties may provide an effective, access point to private sector ADR development. At the international level, numerous industry-specific bodies can influence private sector ADR use. One of the key advantages of this route is that it builds consistent regional, and even global, approaches to ADR. Some of these bodies function through binding international agreements; others set standards or establish frameworks for ADR use. Free trade agreements encourage private sector cross-border trade within specified regions. Almost inevitably, these sorts of transactions will generate some disputes, and the free trade agreements provide an opportunity to regulate their resolution.

Implementation of Private Sector ADR Initiatives

If industry representatives have expressed the desire to explore ADR, or other conditions on the ground point to a private sector intervention, a number of indicators can be used to evaluate the option to develop a private sector ADR initiative.

Envisaging a sector-specific ADR intervention requires a basic understanding of the sector's dynamics, principal participants, and types of disputes.

Best Practice Guidelines for Private Sector Interventions

The profile of an industry sector is a useful starting point in understanding a sector's dynamics, potential for conflict, and needs related to dispute resolution. Identifying its principal agents and its conflict dynamics and dimensions is vital. Another central question concerns the sector's infrastructure—is it sufficient to manage disputes effectively? Since the sector's business community would essentially manage its own ADR system, it needs

to be perceived as sufficiently independent with a stable and sustainable infrastructure. Institutions in the sector must enjoy a reputation of integrity. For a more detailed checklist, see box 5.7 and table 5.1.

Industry sector participants

Identifying a sector's main participants can shed light on a number of related questions. For example, in the franchising sector, participants include franchisees, franchisors (including master franchisors, sub-franchisors, investors, employees, customers, banks, suppliers of goods to franchisees, and franchise organizations (industry bodies).

In the franchising sector, for example, it is important to look beyond the immediate relationships between franchisee and franchisor to include relationships among franchisees and customers, the franchise organizations, the government, suppliers, and other third parties, as these relationships are also a likely source of disputes. In the financial services sector, participants may include banks, building societies, private lenders, government and semi-government (sub national, local government) borrowers, business borrowers, consumer credit borrowers, home borrowers, and so on.

Typical Areas and Levels of Dispute

Statistics from dispute resolution bodies (such as courts, tribunals, arbitration centers, mediation centers, and other dispute resolution service providers) can be helpful, but they will not tell the whole story. For example, a low number of court disputes in a given sector may indicate a low level of disputation, but it may equally indicate lack of confidence in the courts or lack of incentives to use court processes. Therefore, it is useful to combine statistics with a survey of stakeholder views on disputation and a consideration of other factors in the sector profile (see box 5.9, below, on the levels and types of disputation in the franchising sector in Australia).

The environment under consideration may have existing forms of dispute resolution, including court adjudication; a traditional (see box 5.10), village, or tribal process; ADR (facilitative, recommendatory, adjudicative, hybrid); negotiation with or without professional advisers, or a power struggle. The question then is: To what extent do current forms of dispute resolution work well and how do they need to improve? Are there gaps available dispute resolution processes? In gathering this information, it is

Box 5.7: Checkpoints in Deciding for or Against a Private Sector Initiative**Is there a desire to target a particular commercial sector?**

Introducing ADR into one sector can address a sector's high level of disputes, the desire to enhance the investment climate of a priority sector for economic development (such as export competitiveness), or make a quick impact on economic development in that sector.

Does the sector's profile justify an intervention?

Factors to consider include the level of demand, the presence of champions to advocate for ADR, and likelihood of stakeholder buy-in.

Do ADR processes need to be significantly adapted to suit a sector's needs?

For example, a sector might benefit from a hybrid form of ADR using a combination of mediation and arbitration.

What resources are available for ADR in this sector (from a variety of sources)?

In some cases, resources are available within one sector that might not be available for a more generalized initiative (such as financing from industry members or an effective industry association). Resources may also exist outside the sector (such as the courts, which may be accessed by the sector).

Is sustainability more likely to be realized through a private sector initiative?

The prospects of funding an ongoing sector-specific initiative from a variety of sources may be more likely than funding a general or national initiative at the same level.

Does the sector under consideration have effective access points for an ADR initiative?

Access points can be located within or outside the sector.

Can progress be accelerated by developing ADR in a particular sector due to the focused nature of the initiative?**Are wider public reforms likely to take too long or have dispersed impact?**

Examples of public reforms include court-annexed mediation systems and national mediation legislation.

Can the private sector initiative succeed without public sector support or reform?

For example, does the initiative depend on enactment of supporting legislation to enable mediation?

Is the private sector initiative likely to have credibility among users and be perceived as genuinely neutral and effective?**Can a private sector initiative complement wider public sector ADR reforms?**

For example, can it add to the ADR profile and credibility and provide success stories?

Is there an opportunity to link with wider regional or global ADR initiatives in a given sector or in other sectors?

important to consider enforceability issues, referral rates, settlement rates, user and stakeholder views, recurring challenges related to ADR implementation, and sustainability. Are there sufficient resources and is there a resource mix? To analyze the resource mix, consult available reports, studies, and empirical research. (See box 5.8 and 5.9.)

Achieving Sector "Buy-In"

Proper industry consultation is important in achieving critical buy-in from the sector concerned. As previously noted, sector-specific ADR initiatives often command

more attention and buy-in from key industry players than general initiatives would; industry players see sector-specific initiatives as more relevant, even tailor-made, to their particular needs.

Consultation to shape a sector-specific ADR initiative can occur in stages: first, broader community consultation, followed by targeted consultations and negotiations.

The legal sector as a whole should be approached at an early stage of the ADR initiative in order to inform as many professionals as possible and gain their support for the proposed measures. Studies from Australia, Europe, and the United States have shown

Table 5.1: Important Industry Sector Considerations for ADR Initiatives

Aspect of ADR	Comments
Access points for ADR (potential and current)	The types of participants in the field indicate the likely access points (for example, through an industry association or trade body, through a regulator, and so on).
Triggers and incentives for ADR (potential and current)	The types of participants in the field indicate the likely trigger mechanisms and incentives for ADR.
Funding for ADR services	The types of participants in the field inform consideration of how an ADR service might be funded (for example, through an industry levy).
Potential for power imbalances	Understanding potential or actual power imbalances in sector relationships will inform the choice of ADR process.
(Conflict) dynamics among the players	Understanding how players in the field relate is important in considering what ADR processes might help.
Type of ADR processes most suitable	Are particular processes already accepted or used? Can they be built on or improved in some way?
Sector potential for dispute systems design	Is there scope within the sector for designing a specific process that is tailored to the needs of that sector?

that court-related mediation programs are successful when they have the full support of the judiciary, the legal profession, and other interest groups involved in dispute resolution.

Judges and lawyers act as gatekeepers and first points of call for disputants. Lawyers are frequently the first professionals that come into contact with individual

cases, and their advice and support is important in guiding cases to successful mediation. Judges, registrars, and lawyers also need to understand the benefits of mediation for their respective professions and embrace fully the introduction of mediation into the court system.

In developing countries, community leaders, including chiefs, church leaders, and women's and youth group

Box 5.8: Questions in Profiling Participants in an Industry

- Within the sector's categories of participants, how many are in each group? For example, how many franchisees, how many franchisors, how many suppliers of a particular product contribute to the total pool of participants? This calculation helps size the sector and its potential demand (number of people who could find themselves in dispute).
- How many major stakeholders/players are in the industry? How many other important players have a role? This may affect power structures and bargaining power.
- What is the level of education and sophistication of participants in each category? This may affect the parties' willingness (and ability) to consider different dispute resolution options and select one suitable to their circumstances.
- What is the level of income of participants in each category? This may (directly or indirectly) affect the value of disputes and indicate how much money participants are prepared to invest in dispute resolution.
- What is the level of transactional interactions among participants, both within each category and between categories? High transaction volumes suggest a higher potential for disputes and a greater need for ADR services.
- How would you describe the complexity of interactions? This may affect the choice of ADR process. It may also be relevant for ADR training and facilities required to conduct processes in a professional manner. For example, if the industry requires lengthy, documented transactions (for example, bank joint venture lending), ADR professionals may require specific training.
- What is the extent of state regulation in the industry?

Box 5.9: Areas of Dispute in Australian Franchising

An analysis of the players in the Australian franchising industry offers insights into disputes between franchisees and franchisors. In Australia, the potential for an imbalance of power between franchisees and franchisors indicates the need for triggering mechanisms that would effectively require powerful players (such as the franchisors) to use ADR. The potential power imbalance also suggests the need for regulating and limiting costs associated with the ADR process.

The conflict dynamics in franchising disputes often involve family businesses. It is not uncommon for disgruntled franchisees to inform other franchisees of their disputes and dissatisfaction, which creates the potential for significant unrest within the industry. These dynamics suggest that a process involving dialogue with the potential for creative solutions would be useful.

Evidence shows that allegations of misleading and deceptive conduct are on the increase in franchising situations. In these circumstances, the Australian Competition and Consumer Commission may decide to conduct its own investigations and resort to legal procedures instead of referring parties to mediation. One source of conflict disclosed in federal court cases has been franchisors' refusal to negotiate with franchisees when problems arise. Information obtained by the Office of the Mediation Advisor (OMA) suggests that the main causes of conflict relate to product purchase requirements; other significant causes are lack of franchisor support, training, and assistance, and the franchisees' lack of financial viability. Sources of conflict are relevant in predicting the types of mediation that need to be made available. Training and marketing issues can be resolved through facilitated, interest-based negotiation, while claims of misleading and deceptive conduct can be dealt with in a more legalistic and evaluative style.

Sources: Laurence Boulle, *Mediation: Principles, Process, Practice* (Sydney: LexisNexis, 2005); Elizabeth Spencer, "'Charlatans and Rogues' or Just Another Dysfunctional Family?—Part 2" *ADR Bulletin* 6 (6): 2003, 118; *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) 178 ALR 304.

Box 5.10: Dispute Resolution in the Solomon Islands

In the early 2000s, chiefs who "successfully" practiced ADR at the village level attended ADR training along with other members of the community. There were several reasons for this. Judges in Western societies increasingly undertake ADR training to develop their skills, so it seemed appropriate for the chiefs to participate as well. Given the contemporary nature of village life and the intergenerational, gender-based, tensions that can arise, many chiefs recognized that traditional forms of dispute resolution were no longer as effective in dealing with a range of dispute issues. The chiefs saw ADR training as an opportunity to improve their skills in a changing world and consolidate their role within their communities.

leaders may also play a pivotal role in private dispute resolution and in advising people in conflict, in particular. It is vital that these interest groups are included in the information- and awareness-building process both in metropolitan and in rural areas. Their cooperation is essential to the success of the introduction of ADR in the

private sector. Private sector ADR initiatives will require some basic legal framework. In designing an initiative, decide to what extent public sector legal reform is required to provide a supportive environment. To function effectively, private sector ADR initiatives may still rely on public sector reform.

Chapter 6: Monitoring and Evaluation

Importance of Output, Outcome and Impact Indicators

It is essential for the success of any ADR program to set performance targets and to measure them, from the inception of the project, to ensure that targets are met during and after implementation. Monitoring of the project and its performance will serve as a reporting tool to the implementing institution, donors, the government, and main stakeholders and will give recognition to the work and the reforms achieved. IFC's Country Investment Climate (CIC) department uses a set of indicators for monitoring and evaluation (M&E) that is derived from program logic and describes the sequences of cause and effect relationships that link IFC program activities to intended impacts.

The required statistical information typically includes the number of referrals and of cases successfully settled, the (litigation) value of cases referred to ADR, and the time and cost of the ADR process as compared to litigation. This information allows businesses to estimate the cost savings for choosing the alternative venue. However, as direct cost savings constitute only a small fraction of an ADR project's impact, projects seek ways to assess the broader development impact, for instance on the reduction of opportunity costs to go through an ADR process versus litigation.

Impact Models

The development impact of a project includes higher productivity, greater income and economic growth through the creation of jobs in the formal sector, and increased private sector activity. ADR contributes to the improvement of the business climate primarily through reducing the costs of doing business and accelerating the release of funds tied up in litigation due to resolving economic disputes between companies. These linkages between the broader development goals envisaged and the more immediate impact of cost savings and released funds are currently being researched further.

CIC is currently developing an *ex ante estimation model* for ADR that, in the current draft version, predicts two sets of impact measures following the implementation of

ADR reforms in ten countries between FY11 and FY13. The first set of estimations includes (a) the number of commercial cases filed in the courts and ADR centers since the reform, (b) the number of commercial cases settled in ADR centers, and (c) the savings to firms that resolve their disputes in ADR centers. The second set of estimations includes the capital released by firms resolving disputes in ADR centers.

In order to calculate the savings to firms that resolve their disputes in ADR centers, CIC has developed the *Compliance Cost Savings (CCS) Model*. CCS, although not a comprehensive cost-benefit analysis, provides an indication of the extra resources that private businesses may use, at least in part, to expand their businesses or make new investments. Another methodology, the *Impact Evaluation Model*, predicts the number of firms that will be reached through an intervention and the costs saved as a result of ADR reform; it will be piloted in ten countries between 2011 and 2013. Once operational, the *ex ante* estimation model for ADR will be used to improve the allocation of resources among projects in the ADR portfolio, and more broadly contribute to the M&E of an ADR intervention.

M&E Sequencing

Monitoring and evaluation follows the sequencing of ADR interventions in its three main stages of potential intervention. Under (1) *Review/reform of legal and regulatory framework*, M&E assesses outputs and outcomes relating to the need for new legislation and/or the removal of legal obstacles. For legislative and regulatory provisions relating to ADR to be effective, (2) an *institutional framework* is necessary. Here, outputs measured concern the supply side of ADR projects, including facilities as well as the qualification of individuals responsible for the delivery of high-quality ADR services. The final component is concerned with the demand side of ADR, (3) *achieving ADR best practice*. Are clients taking advantage the services offered and, to the extent that they do, are they achieving tangible business benefits by so doing? Are the services delivered efficiently?

Performance indicators build on outputs such as entities receiving advisory services, training, and media appearances, and measure these against the number of cases referred to ADR, their successful resolution through ADR, and finally the funds released by resolving a case through ADR. Typical data sources for output

indicators comprise program records, ADR records, and interviews with the business community and business associations. ADR projects should track output indicators with the objective of mainstreaming and increasing ADR practices beyond the realm of current practice, geographically as well as by industry sector and claim value.

Monitoring Tools and Data Collection

Successful measurement depends on the quality of data collected through program records, surveys, and secondary sources.¹ Data should be collected in a consistent manner using agreed definitions and procedures,

and stored in appropriate computer databases to facilitate data access, analysis, and reporting. The table below lists the recommended sources of data and frequency of data collection efforts in order to calculate core indicators. Program records detailing the nature and magnitude of activities undertaken by staff and associated outputs should be continuously updated. Surveys used to assess client satisfaction and learning outcomes should be conducted upon project completion, as needed. Other surveys should be undertaken before programs are initiated, to establish needed baselines, and repeated annually (as budget allows) in order to monitor changes. Data should also be collected from secondary sources, such as Ministry of Justice statistical reports, on an annual basis. (See table 6.1, Data Sources.)

Table 6.1: Data Collection

Data sources	Timing and frequency of data collection
Program records (data as described above)	Ongoing, during the whole project cycle
Baseline survey (needs assessment)	Diagnostic phase, one time
Client satisfaction survey	Upon project completion, one time
Training participants	Upon completion of training during whole project cycle
Parties	Upon settlement
World Bank, Doing Business data	Diagnostic phase, and annually thereafter
World Bank other: Implementation Completion Reports (ICRs), Reports on the Observance of Standards and Codes (ROSCs), Financial Sector Advisory Program (FSAP) reports, enterprise surveys	Diagnostic phase
Government ministries, central banks, courts	Diagnostic phase, and annually thereafter
Other reports	Diagnostic baseline, and annually thereafter

1. See Rozdeiczer and de la Campa, *Alternative Dispute Resolution Manual* on best practices for M&E data collection.

References

- ADB (Asian Development Bank). 2002. Multilateral Investment Fund (ADB MIF)/GN-78-2, November 13, 2002.
- IADB (Inter-American Development Bank). Multilateral Investment Fund (MIF/GN-78-2, November 13, 2002.
- ADR Centre. "Technical Assistance for Better Access to Justice—Turkey." <http://www.adrcenter.com/international/international-adr-projects-turkey.html>
- Alexander, Nadja. 2009. *International and Comparative Mediation: Legal Perspectives*. Alphen aan den Rijn, The Netherlands: Kluwer Law International.
- Anderson, Steven K. 2000. "NAFTA: Mediation and the North American Free Trade Agreement." *Dispute Resolution Journal* May–July 2000.
- Ball, Markham. 2006. "The Essential Judge: The Role of the Courts in a System of National and International Commercial Arbitration." *Arbitration International* 22, no. 1: 73–93.
- Barrett Jerome T., with Joseph P. Barrett. 2004. *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement*. San Francisco, Calif.: Jossey-Bass.
- Bendell, J. 2003. "Talking for Change? Reflections on Effective Stakeholder Dialogue." In J. Andriof, S. Waddock, B. Husted, and S. S. Rahman, eds. *Unfolding Stakeholder Thinking 2: Relationships, Communication, Reporting and Performance*. Sheffield, England: Greenleaf: 53–69.
- Bingham, Lisa Blomgren, Tina Nabatchi, Jeffrey Senger, and Michael Scott Jackman. 2009. "Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes." *Ohio State Journal on Dispute Resolution* 24 (2). http://works.bepress.com/lisa_bingham/1/
- Born, Gary. 2009. *International Commercial Arbitration*, 3rd ed. Alphen aan den Rijn, The Netherlands: Kluwer Law International.
- Boulle, Laurence. 2005. *Mediation: Principle, Process, Practice*. Sydney: Lexis Nexis.
- Carr, Frank, with Pete Swanson and Bob Randolph. "The Challenge of Establishing a Commercial Mediation Program in Croatia." <http://www.conflict-resolution.org/sitebody/acrobat/Croatia.pdf>
- CEDR (Centre for Effective Dispute Resolution). "Civil Justice Case Study—Croatia." http://www.cedr.com/index.php?location=/library/news/20060123_221.htm&print
- . 2010. "Dispute Resolution Service." http://www.cedr.com/CEDR_Solve/services/mediation.php
- Center for Democracy and Governance. 1998. "Bangladesh: NGO-Supported Community Mediation." In *Alternative Dispute Resolution Practitioners' Guide*. Washington, D.C.: U.S. Agency for International Development.
- Department of Justice. 2010. *Report of the Working Group on Mediation*. The Government of the Hong Kong Special Administrative Region. <http://www.doj.gov.hk/eng/public/pdf/2010/med20100208e.pdf>
- Estreicher, Samuel, and David Sherwyn, eds. 2004. *Alternative Dispute Resolution in the Employment Arena: Proceedings of New York University 53rd Annual Conference on Labor*. New York: Kluwer Law International.
- IDB (Inter-American Development Bank). 2002. Multilateral Investment Fund (MIF/GN-78-2, November 13, 2002.
- IFC (International Finance Corporation). 2008. *Diagnostic of Alternative Dispute Resolution (ADR) Mechanisms in Burkina Faso*. Washington, D.C.: The World Bank Group.
- . Paths of Mediation in Bosnia and Herzegovina. Sarajevo 2009. The World Bank Group.
- . 2009. *Giving Mediation a Chance, Advisory Services in ECA*. Washington, D.C.: The World Bank Group.
- . 2009. *Feasibility Study for the Establishment of Alternative Dispute Resolution Mechanisms in Bangladesh*. Washington, D.C. The World Bank Group.
- . 2010. *Doing Business 2011*. Washington, D.C.: The World Bank Group.
- . 2010. *Investing Across Borders 2010*. Washington, D.C. The World Bank Group.

- Mackie, Karl, David Miles, William Marsh, and Tony Allen. 2000. *Commercial Dispute Resolution: The ADR Practice Guide*, 2nd ed. London: Butterworths.
- . 2006. *The ADR Practice Guide*, 3rd ed. West Sussex, England: Tottel.
- McIlwrath, Michael, and John Savage. 2010. *International Arbitration and Mediation: A Practical Guide*. Alphen aan den Rijn, The Netherlands: Kluwer Law International.
- NADRAC (National Alternative Dispute Resolution Advisory Council). 2001. *A Framework for ADR Standards: Report to the Commonwealth Attorney-General*. Canberra: Commonwealth of Australia.
- Nolah-Haley, Jacqueline. "Mediation: The 'New Arbitration'," *Harvard Negotiation Law Review* 17 (2012), forthcoming.
- OECD (Organisation for Co-operation and Development). 2003. *Informal Workouts, Restructuring and the Future of Asian Insolvency Reform: Proceedings from the Second Forum for Asian Insolvency Reform—December 2002*. Paris: OECD.
- Pearlstein, Arthur. 2007. "The Justice Bazaar: Dispute Resolution through Emergent Private Ordering as a Superior Alternative to Authoritarian Court Bureaucracy." *Ohio State Journal on Dispute Resolution* 22 (3).
- Perunovska, Marina. 2008. "Getting Litigants to Complete the Mediation Puzzle: Lessons from the Former Yugoslav Republic of Macedonia." *IFC SmartLessons*. December 2008.
- Pitts, Chip, and John Sherman. 2008. "Human Rights Corporate Accountability Guide: From Laws to Norms to Values." Working Paper 51. Cambridge, Mass.: John F. Kennedy School of Government, Harvard University.
- PriceWaterhouseCoopersPWC and Queen Mary University. 2008. *International Arbitration: Corporate attitudes and practices*.
- Redfern, Alan, and Martin Hunter. 1991. *Law and Practice of International Commercial Arbitration*, 2d ed. London: Sweet and Maxwell.
- Reisman, W. Michael, W. Laurence Craig, William Park, and Jan Paulsson. 1997. *International Commercial Arbitration*. Westbury, NY: Foundation Press.
- Rodrik, Dani. 2008. "Second-Best Institutions." NBER Working Paper 14050. Cambridge, Mass.: National Bureau of Economic Research. <http://www.nber.org/papers/w14050.pdf>
- Rozdeiczer, Lukasz, and Alejandro Alvarez de la Campa. 2006. *Alternative Dispute Resolution Manual—Implementing Commercial Mediation*. Washington, D.C.: The World Bank Group.
- Spencer, Elizabeth. 2003. "'Charlatans and Rogues' or Just Another Dysfunctional Family?—Part 2." *ADR Bulletin* 6 (6).
- Tao, Zhigang, and Susheng Wang. 1998. "Foreign Direct Investment and Contract Enforcement." *Journal of Comparative Economics* 26 (4): 761–82.
- Times of India*. 2010. "Courts Will Take 320 Years To Clear Backlog Cases: Justice Rao." March 6, 2010. <http://timesofindia.indiatimes.com/india/Courts-will-take-320-years-to-clear-backlog-cases-Justice-Rao/articleshow/5651782.cms>
- U.S. Agency for International Development. 1998. *Alternative Dispute Resolution Practitioners Guide*. Washington, D.C.: USAID.
- Woolf, Harry. 1996. *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*. London: HMSO.

Annex 1: Glossary of Terms

Ad hoc arbitrations Arbitrations that are not conducted under the auspices or supervision of an arbitration institution. Instead, parties simply agree to arbitrate. The parties will sometimes select a preexisting set of procedural rules designed to govern ad hoc arbitrations. UNCITRAL, for example, has published such rules.

Alternative Dispute Resolution The procedure for settling disputes by means other than court litigation. These methods include mediation, conciliation, and arbitration.

Arbitrability Whether a claim is capable of being resolved by arbitration. Certain categories of claims are considered in different countries as being incapable of resolution by arbitration. Such claims are deemed “non-arbitrable” because of their perceived public importance.

Arbitration A means by which disputes can be definitively resolved, pursuant to the parties’ agreement, by independent, nongovernmental decision-makers.

Arbitration agreement An agreement by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them in respect of a defined legal relationship.

Con-arb An ADR process combining conciliation and arbitration.

Confirmation of an arbitration award (*Exequatur*) One or more of the parties may apply for a court order recognizing the arbitration award as enforceable in the court’s jurisdiction. The court will issue the *exequatur* unless it has grounds for refusal or denial of enforcement.

Enforcement The conversion of an arbitration award or other ADR settlement decision into a court judgment with all the sanctions that a court judgment entails, such as the right to have the debtor’s assets seized.

Mediation clause or agreement An agreement to submit to mediation all or certain disputes that have arisen or that may arise between them in respect of a defined legal relationship.

Med-arb/adj An ADR process combining mediation with arbitration or adjudication.

Neutral Term generally used for the third party assisting the disputants in alternative dispute resolution, for example mediators and arbitrators.

New York Convention 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which entered into force in June 1959. The Convention requires national courts to recognize and enforce foreign arbitral awards, subject to specified exceptions; national courts to recognize the validity of arbitration agreements, subject to specific exceptions; and national courts to refer parties to arbitration when they have entered into a valid agreement to arbitrate that is subject to the Convention. The convention continues to be a successful legal instrument. As of October 1, 2009 142 United Nations member states had ratified the Convention.

Seat of arbitration/mediation The location of an arbitration/mediation forum. The seat of an ADR process can have significant effects upon the arbitration/mediation, including the potential of a national court’s interference or assistance with proceedings, the law applicable to the reached agreement/decision and a national court’s enforcement of an agreement/decision.

Setting aside (or vacating) an arbitration award One or more of the parties may commence an action, limited in scope of challenge to procedural defects or jurisdictions to judicially nullify the award.

Annex 2: Assessing the Need and Viability of an ADR Intervention (Checklists to Chapter 3)

Assessing the need: the dispute resolution landscape	
Contract enforcement has been identified as a significant problem for business activity in this jurisdiction.	
There is a considerable delay in obtaining a final determination of cases in the courts, due to some or all of the following factors: <ul style="list-style-type: none"> • Overall speed of the system • Lack of settlement culture • Unrestricted right of appeal • Poor enforcement procedures 	
Using the Doing Business contract enforcement indicator and other relevant indicators as a guide, the cost of pursuing a claim through the courts can be assessed as high.	
The Judiciary is perceived as part of the problem to the efficient resolution of disputes.	
Economic development and organization	
Strength of domestic commercial sector	
The country has a sustainable level of commercial disputes	
Influence of trading blocs	
The country is part of, or wanting to be part of a wider trading bloc, whose aims are consistent with the practice of ADR.	
Economies in transition	
The country is undergoing major economic reforms that recognize the value of negotiated resolution of individual commercial disputes.	
Political factors	
The country has a minimum of political stability, or government support is unlikely to change within the life of the project (e.g., through elections).	
General respect for the rule of law	
Legal framework to support ADR	
The current legislative framework supports the introduction of ADR, or such legislation is not necessary, or if the framework needs to be changed, to allow ADR to function, it is likely to be passed in a reasonable time/within the project period.	
Settlement culture within the court	
It is not unusual for cases to settle, once proceedings have been initiated in the courts.	
Stakeholder involvement	
The project has identified stakeholders critical to the project's success.	

Annex 3: Practical and Logistical Considerations for ADR Interventions (Checklists to Chapter 4)

Extent to which a private sector ADR initiative will require a legal framework in which to operate	
At which points does the intended ADR process interface with the legal system e.g., admissibility of evidence, limitation periods, enforceability of mediated agreements, confidentiality, inadmissibility of evidence?	
How are people and information in the ADR process protected? In other words, how are the legal rights and responsibilities of participants in the ADR process regulated?	
Can this be achieved simply through the law of contract? In other words, is it sufficient for the parties to an ADR process simply to agree on the legal framework between themselves?	
Where the existing legal framework is insufficient to support the proposed ADR process, what further legal provision is required?	
How will further legal provision be implemented? Through primary legislation? Through changes to court rules or other secondary legislation?	
What practical impact will the need to change the legal framework have on the proposed intervention (e.g., delays in passing legislation)?	
Effective triggering mechanisms	
Are there sufficient triggering mechanisms?	
If not, what further ones are needed?	
If further ones are needed, should these come from within the private or public sector?	
Ensuring ADR quality management and standards will be met	
Do ADR gatekeepers, institutions, and service providers in the ADR landscape have integrity and enjoy the confidence of users?	
<p><i>If yes</i>, then experimentation with accreditation models is useful as per above discussion. Consider:</p> <p>Could sector-specific standards differ from other existing standards?</p> <ul style="list-style-type: none"> a) If so, how? Are sector-wide standards desirable? b) Is it possible to introduce a framework approach to encourage experimentation? c) Alternatively, is it possible to introduce industry standards in the sector, such as a code of conduct, as opposed to formal regulation, such as legislation? 	
<i>If no</i> , then integrity issues will need to be addressed (e.g., different gatekeepers and service providers will need to be found and less room for experimentation may be warranted). Soft regulatory forms are still generally preferred.	
What other professional codes of conduct are mediators likely to be subject to?	
<p>What type of accreditation process is suitable?</p> <p>Facilitative process: generalist accreditation, continuing professional development may include specialist elements</p> <p>Recommendatory process: generalist accreditation plus some specialist training in accreditation</p> <ul style="list-style-type: none"> • Adjudicative process: generalist accreditation plus specialist accreditation • Hybrid processes: generalist accreditation and some specialist training in accreditation • Family mediation: generalist accreditation plus specialist training 	
<p>What type of accreditation regulation is suitable?</p> <ul style="list-style-type: none"> • Is the proposed regulatory framework for accreditation responsive? • Is there a regulatory mix? If not, how can this be introduced? • Is there buy-in from stakeholders? • Are review mechanisms in place? 	

Ensuring sustainability of ADR initiatives	
"Signposts of sustainability" The key indicators here relate to the factors that will help to engender sustainability of an ADR system.	
<p>Resourcing for implementation:</p> <ul style="list-style-type: none"> Identify resources (funds, staffing, level of knowledge and expertise, training resources), making sure, where appropriate, that there is a private/public mix. If it is reliant on industry funding, will this continue to be provided? What sector bodies might be able to finance an ADR initiative (e.g., ombudsman services are usually funded by a levy on all industry members)? If overseas trainers are to be used, is there confidence that they can continue to be accessed, or will local trainers be able to continue accreditation? Are the triggering mechanisms based on transient factors such as encouragement by champions, or are they integrated into the ADR system within the sector? Alternatively, are effective triggering mechanisms already in place as part of a general or national ADR framework? 	
<p>Does the developmental phase of ADR both in the sector and generally shed any light on sustainability issues?</p> <p>For example, is there an effective balance of supply (e.g., availability of mediators and ADR organizations) and demand (e.g., likely take-up of their services)?</p>	
<p>Using existing resources</p> <p>Can preexisting infrastructure be used (e.g., courts to administer and refer cases, or chambers of commerce to include an ADR service within their existing operations)?</p>	
<p>Consultation and buy-in. Has there been widespread consultation with the sector, and is there sufficient buy-in to proceed? Are the anticipated disputants in the sector likely to be willing and able to pay for services?</p>	

Assessing the existing level of ADR development	
At what stage/s is ADR development in the four-phase model?	
What can be learned from sectors that are further developed in ADR?	
What implications are there for the level at which further ADR initiatives need to be introduced? See factors listed above.	
Is the proposed ADR intervention appropriate in view of the broader level of ADR development in that sector/country?	
What implications does this have for resourcing ADR interventions? See factors listed above. For example, well-developed programs and facilities in another sector may be of use to the sector in which the intervention is planned.	

Annex 4: Example of Model ADR Clauses (International Chamber of Commerce¹)

Optional ADR

"The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules."

Obligation to Consider ADR

"In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider submitting the matter to settlement proceedings under the ICC ADR Rules."

Obligation to Submit Dispute to ADR with an Automatic Expiration Mechanism

"In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, the parties shall have no further obligations under this paragraph."

Obligation to Submit Dispute to ADR, Followed by ICC Arbitration as Required

"In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration."

1. This clause refers to arbitration within the ICC; other arbitration institutions exist, this is not read to be an endorsement.

Annex 5: Example of Model Mediation Clause and Model Arbitration Clause (Generic)

Mediation Clause

If any dispute arises in connection with this Agreement ("the Dispute"), the parties will attempt to settle the dispute by mediation ("the Mediation"). Unless otherwise agreed between the parties, the Mediator shall be [specify professional qualifications, certification requirements, belonging to a center, etc].

To initiate the Mediation a party shall give notice in writing ("the Mediation Notice") to the other party/ies requesting mediation. A copy of the Mediation Notice shall be sent to [specify center].

The Mediation shall take place not later than [] days after the date of the Mediation Notice.

The parties shall send to the Mediation negotiators who have authority to settle the Dispute.

In the absence of agreement to the contrary (but without fettering the discretion of any court or tribunal that becomes seized of the Dispute) the costs and expenses of the Mediation shall be shared equally between the parties.

Nothing in this Agreement shall prevent any of the parties from applying to any court or tribunal of competent jurisdiction to seek interlocutory relief.

Arbitration Clause

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the [specific center] by one or more arbitrators appointed in accordance with the [specific center] Rules.

Annex 6: Model Mediation and Arbitration Clause (Chartered Institute of Arbitrators¹)

Any dispute arising out of or in connection with this contract shall, at first instance, be referred to a mediator for resolution. The parties shall attempt to agree upon the appointment of a mediator, upon receipt, by either of them, of a written notice to concur in such appointment. Should the parties fail to agree within fourteen days, either party, upon giving written notice, may apply to the President or the Deputy President, for the time being, of the Chartered Institute of Arbitrators, for the appointment of a mediator.

Should the mediation fail, in whole or in part, either party may, upon giving written notice, and within twenty eight days thereof, apply to the President or the Deputy President, for the time being, of the Chartered Institute of Arbitrators, for the appointment of a single arbitrator, for final resolution. The arbitrator shall have no connection with the mediator or the mediation proceedings, unless both parties have consented in writing. The arbitration shall be governed by both the Arbitration Act 1996 and the Controlled Cost Rules of the Chartered Institute of Arbitrators, or any amendments thereof, which Rules are deemed to be incorporated by reference into this clause. The seat of the arbitration shall be England and Wales.

1. This clause refers to arbitration within the Chartered Institute of Arbitrators; other arbitration institutions exist, this is not read to be an endorsement.

Annex 7: Recommendations for Drafting an Arbitration Clause, Based on the UNCITRAL Model Clause (Markham Ball)

Start with a Model Clause

Don't be creative, not just yet. Use something off-the-shelf. The following, which is based for the most part on the United Nations Commission on International Trade Law (UNCITRAL) model clause, is a good model to start with:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the _____ Arbitration Rules as at present in force. [The appointing authority shall be _____.] The number of arbitrators shall be _____. The place of arbitration shall be _____. [The language to be used in the arbitral proceedings shall be _____.] [Judgment on the award may be entered in any court having jurisdiction.]

When you have gone this far, you have already answered the first and most fundamental of your questions:

Do the Parties want Litigation or Arbitration as the Tie Breaker if a Dispute Arises?

The model clause will legally bind the parties to arbitration. It would be possible, alternatively, to provide for the resolution of disputes through litigation in a selected judicial forum. And, of course, it is possible for a contract to say nothing at all about dispute resolution. In that case, the parties by their silence have elected litigation as the tie breaker, in a court that one or the other will pick after a dispute arises, but that neither can predict in advance.

Fill in the Blanks in the Model Clause and Deal with the Bracketed Sentences.

In the course of doing this, you will necessarily ask and answer the following important questions:

Should all disputes related to the contract be subject to arbitration? In addition to breach of contract, what about:

- Fraud in the inducement of contract?
- Antitrust (including Sherman Act) claims related to the contract?
- RICO claims related to the contract?
- Tort claims related to the contract?

A U.S. court, asked to enforce the suggested model arbitration clause, would probably hold that the broad language of the first sentence encompasses all such disputes. The courts of some other nations might not read the clause as broadly. Most courts would construe the clause more narrowly if it referred only to disputes "under" the contract.

What arbitral rules will apply?

Commonly selected rules include, among others, the rules of the American Arbitration Association (AAA) (either the AAA's Commercial Rules or its more up-to-date International Rules); the International Chamber of Commerce (ICC); the London Court of International Arbitration (LCIA); UNCITRAL; and the CPR Institute for Dispute Resolution. All of these rules are well tested and satisfactory. They differ in important particulars, however, and the differences will affect your decisions on the language to be included in your arbitration clause.

Will the arbitration be administered by an institution?

Arbitrations under the AAA, ICC and LCIA rules are administered by those institutions, which charge fees for their services. Arbitrations under the UNCITRAL and CPR rules are administered only by the parties and the arbitrators, unless the parties agree that an institution will administer the arbitration.

How many arbitrators will there be?

If the parties fail to specify, the number will be determined by the administering institution or will be fixed by the terms of the chosen arbitral rules. In international arbitrations the usual number is three.

Who will serve as appointing authority?

The role of an “appointing authority” is to name arbitrators if the parties fail to do so, and to consider challenges to arbitrators based on alleged lack of impartiality or independence. If the parties have chosen AAA, ICC, LCIA or CPR arbitration, those functions will be performed by the chosen institution. If they have chosen the UNCITRAL rules (which do not name an appointing authority in advance), the parties should designate an appointing authority. Thus, if the parties have selected the UNCITRAL rules, they should use the first of the bracketed sentences in the model clause. Otherwise the sentence should be deleted. The AAA, ICC, LCIA and CPR Institute are among the institutions that may be named as appointing authority for UNCITRAL arbitrations.

Where will the arbitration be held?

The arbitration will be held at the place the parties designate. If they fail to designate, a place will be chosen (pursuant to the governing procedural law or arbitral rules) by an arbitral institution, the arbitrators or a court. The choice of place is too important, however, to be left uncertain. The choice of place can greatly influence arbitral procedures and the enforceability of an arbitral award, and can determine the extent to which the courts may assist or interfere with the arbitration. Good practice demands that the place of arbitration be stated in the arbitration clause. The place should be one whose laws are hospitable to arbitration. In an international transaction, the place of arbitration should be a nation that has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the comparable Inter-American Convention.

Some drafters use “home and home” clauses. These provide that, if one party starts arbitration, the arbitration will be held in the other party’s country. Such clauses may produce mischievous results. For one thing, an unwary party who agrees to such a clause may find, when he or she wishes to assert a claim, that he or she must either proceed in an unfamiliar place under procedural laws that may be unfavorable, or else abandon his or her right to relief.

What procedural law will govern the arbitration?

Except in rare circumstances, the law of the place of arbitration governs procedures—including such matters as the interpretation, validity and enforcement of arbitration agreements, interim judicial relief, discovery and appeals of awards. In the United States, this generally means that the Federal Arbitration Act and judicial decisions under that Act govern. State laws also play a role in the United States and other federal systems. In the United States, federal law preempts inconsistent state law in international and interstate transactions.

What will be the language of the arbitration?

Unless the answer is clear from the circumstances, it is best for the parties to specify a language. The second of the bracketed sentences in the model clause may be used. If the parties do not choose the language or languages, the arbitrators will.

Will the award be enforceable in courts in the United States and elsewhere?

Assuming the dispute was arbitrable and within the arbitrators' jurisdiction, and that the arbitration proceedings were fair, the courts of most nations are required by their national laws to enforce awards rendered in their own territories, and by international conventions to enforce awards rendered in other countries. If the clause covers an interstate transaction in the United States, the last of the bracketed sentences in the model clause should be used to satisfy a requirement of the Federal Arbitration Act.

Consider Additional Key Questions that Could Make or Break an Arbitration.

It is not necessary to deal expressly in the arbitration clause with all of the additional questions that are noted below. The answers to many will be found in the governing procedural law, or in the rules chosen. If they are not, however, or if you find any of the answers unsatisfactory, you should deal with the most important of these additional questions in terms that you add to the arbitration clause. You may also want to call the parties' attention to important provisions of the chosen rules by including some of those provisions in the language of the clause. This is not legally necessary, but it can provide helpful guidance to parties who may not have copies of the relevant laws or rules instantly available to them when they refer later to the arbitration clause.

Some questions that, depending on the circumstances, could involve "make-or-break" issues are set out below.

How will arbitrators be selected?

The governing rules will describe how arbitrators are to be chosen. All major rules, however, give the parties the right to vary the rules and to design their own procedures for choosing arbitrators. If there are three arbitrators, it is generally advantageous for each party to be able to name one member of the panel. Thus, under most rules, if there are to be three arbitrators and if the parties have not specified the method of their selection, each party is permitted to appoint one. If parties choose the AAA Commercial or International Rules, however, and if they wish each party be able to appoint one of three arbitrators, they must expressly agree to that procedure.

Must the arbitrators be neutral?

Yes, under most rules. Under the AAA Commercial Rules, however, an arbitrator appointed unilaterally by one party need not be neutral, and is not expected to be, unless the parties have so agreed. The common practice, especially in international transactions, is for the parties to agree, where the rules do not so provide, that all arbitrators shall be neutral.

What will be the governing substantive law?

The parties may choose the governing law and should do so. If the parties do not select the governing law, the arbitrators will make the choice, applying choice-of-law rules that may not be knowable in advance. The governing substantive law need not be that of the place of arbitration. Typically, it is not. If the parties agree, as they are free to do, that the arbitrators shall decide under general principles of fairness (*ex aequo et bono*), regardless of legal rights, the outcome becomes more difficult to predict. For parties seeking to vindicate legal rights, or to negotiate settlements based on an analysis of legal rights, such uncertainty is not a good thing.

What discovery (production of documents, interrogatories, depositions) will be possible?

The answer depends, first, on what the parties agree. If they say nothing, their rights to discovery will depend principally on the governing procedural law and, to a lesser degree, on the chosen rules. The laws of the United

States and England give arbitrating parties the right to discovery of relevant documents, although not the same wide discovery as under the Federal Rules of Civil Procedure. In the United States, arbitrators, as well as the courts, may order discovery from non-parties as well as parties.

What statute of limitations, if any, applies?

Unless the parties expressly agree, the answer will not be clear in most cases. Generally speaking (arbitrations under the English Arbitration Act of 1996 are an exception), one can not assume that a state or national statute of limitations on law suits will automatically apply. Parties that wish more certainty may provide that arbitrations must be brought within a specific period after a claim arises; or they may incorporate by reference the limitations period of the laws of a stated jurisdiction.

May damages include pre-award interest?

If the parties do not agree on this point, the governing substantive law may answer the question for them. Typically, however, if the parties have not agreed, the award of pre-award interest is a matter left to the discretion of the arbitrators.

In addition to monetary damages, what relief may the arbitrators award? e.g.:

- Injunctions
- Punitive damages
- Specific performance.

The governing procedural law or the chosen arbitration rules may answer this question. If they do not, and if the parties foresee a need for the arbitral award to provide relief other than money damages, they should specifically authorize the arbitrators to grant such additional forms of relief.

Do the parties wish to limit the powers of the courts to review awards?

If the arbitration is in the United States, U.S. courts will have only limited powers under the Federal Arbitration Act to review arbitral awards. U.S. courts will not set awards aside for errors of fact or law (generally speaking, the arbitrators' decisions of fact and law are final), but they may set awards aside on such grounds as the arbitrators' lack of jurisdiction or fundamental unfairness in the arbitration proceeding. It is unlikely that the parties, by agreement, can further restrict this limited power of judicial review in the United States. Some U.S. courts (in decisions of questionable validity) have held, however, that the parties by agreement may expand the scope of judicial review.

Courts in other countries have similar powers to review awards rendered in their countries. These powers vary from country to country. In some countries, national law permits parties who are non-nationals to limit judicial review by agreement. In an arbitration in England, Switzerland or Belgium between parties who are not nationals of, or based in, the host state, the parties can—by use of an “exclusion agreement” in their contract—opt out of all or nearly all judicial review in the host country.

If enforcement of an award is sought outside the country where the award was made, the enforcing court will have the power under national law and international convention to review awards against similar standards—such as fairness, the arbitrators' jurisdiction, and public policy—and to refuse to enforce the awards if they fail to meet those standards.

May an arbitration under the contract be consolidated with related arbitrations under other contracts?

Unless all of the parties have agreed to consolidation, the courts in nearly every major jurisdiction consider themselves to be without power to order consolidation of arbitrations that arise under separate contracts. (The

Netherlands, by statute, is an exception to this rule, as are Massachusetts and Florida, in different ways.) Consequently, where a single venture or transaction involves multiple parties or more than one contract, the drafters of the contracts must seriously consider including clauses in each of the contracts that permit the consolidation of arbitrations of disputes between more than two parties or under more than one contract.

The issue is both important and recurrent. For example, a building owner may claim that a prime contractor did not properly perform a contract; and the prime contractor may claim that a subcontractor caused the problem. The dispute under the prime contract (between the owner and the prime) and the dispute under the subcontract (between the prime and the subcontractor) involve a common party, and both may turn on the same material facts or questions of law. It ought to be possible, as it would be in litigation, to consolidate the arbitration of a dispute under the prime contract with the arbitration of a related dispute under the subcontract. Otherwise, there could be inefficiency, and the two separate proceedings could produce inconsistent results. Consolidation of the arbitrations will generally not be possible, however, unless all parties have agreed to it.

The same issue arises in other multiparty arrangements, such as: vessel owner, charterer and shipper; purchaser, contractor and guarantor; and joint ventures and a party contracting with the joint venture.

Drafting language to provide for the consolidation of related arbitrations is not simple. The consolidation provision should address the following issues:

- To what contracts may the consolidation procedures apply?
- Under what circumstances may arbitrations be consolidated?
- Who decides which arbitrations are to be consolidated?
- How many arbitrators will there be in the consolidated arbitration, and how will they be selected?
- What procedures will apply in the consolidated arbitration?
- Will an award in the consolidated arbitration be binding on parties that elect not to participate in the consolidated arbitration?

Consider Supplementing the Arbitral Rules with Additional Procedural Provisions.

Review the rules and the relevant procedural law with other procedural questions in mind. If the rules and laws do not provide an answer, if you are not satisfied with the answer you find, or if you simply wish to call attention to particular provisions in the rules by stating them in the arbitration clause, you may want to add a sentence or two to the arbitration clause. Here are some of the questions you may want to consider:

Should the parties be required to negotiate, or to attempt mediation or another form of ADR, before commencing arbitration?

It is common for an arbitration clause to provide that no claim may be filed in arbitration until the parties have made a good faith effort to settle their dispute by agreement through some form of Alternative Dispute Resolution. Such a provision may or may not turn out to be helpful when a dispute arises. Some disputes may not be ripe for ADR at the outset. And even without such a provision, the parties are always free at any time to agree to try to resolve their dispute through negotiation, mediation or the like. The provision does, however, at least commit them in advance to try.

Must the arbitrators have any special qualifications?

Generally, the rules permit the parties to prescribe qualifications for arbitrators. The ICC and LCIA rules limit appointments of arbitrators of the same nationality as one of the parties. Sometimes parties require arbitrators to have certain technical expertise. Expertise as an arbitrator is generally the most important qualification, however. Excessively demanding or vague statements of qualifications may invite efforts to have arbitrators declared disqualified.

Will there be a pre-hearing conference?

A pre-hearing conference, to identify the issues in dispute and to establish procedures, is generally a good idea. All major rules permit them, and most arbitrators favor pre-hearing conferences whether or not the parties have agreed to one in advance. The ICC requires a comparable pre-hearing process to define the “terms of reference” that will govern the arbitration.

Will there be a hearing?

Yes, under all rules, if either party wants one. No, if the parties so agree.

Will evidence and argument be submitted in advance of the hearing?

It depends on what the parties agree or the arbitrators order.

What rules of evidence will apply?

Generally, arbitrators will admit most proffered evidence “for what it’s worth.” It is possible for the parties to agree in advance on more clearly defined rules of evidence.

Will witnesses be subject to cross-examination?

In the United States, a right to cross-examine may exist under state law. Cross-examination is the general practice in common law jurisdictions. It is less common elsewhere.

May the arbitrators appoint experts of their own choosing to advise them?

Most rules (the AAA Commercial Rules are an exception) permit arbitrators to appoint their own experts. The parties may see the experts’ reports and question the experts at the hearing. Parties that wish to avoid the appointment of experts by the tribunal are free to accomplish this through appropriate language in their arbitration clause.

Before the arbitration or while an arbitration is pending, may the parties seek interim relief, e.g., attachments of property, preliminary injunctions, from the courts?

Generally, yes, under national procedural law and arbitral rules, but there are exceptions and uncertainties. In at least one U.S. Circuit (the Third), the courts hold that, after they have referred an international dispute to arbitration under the New York Convention, they are without power to provide further judicial assistance in support of the arbitration while it is ongoing. Parties that wish to be sure they can apply to the courts for interim relief before and during arbitrations should consider one or more of the following: (1) provide in the arbitration clause that the parties consent to interim measures; (2) select arbitration rules (e.g., UNCITRAL, ICC, AAA International, CPR) that expressly authorize applications to the courts for interim judicial relief; (3) avoid jurisdictions where the courts have shown themselves reluctant to grant interim relief.

Will arbitral proceedings and awards be confidential?

Generally, yes—but check the rules to be sure. Where the rules are silent or incomplete, the parties may wish to agree expressly on confidentiality.

Must the award include a statement of reasons?

Generally, yes—but not under the AAA Commercial Rules, unless the parties otherwise agree.

In what currency will an award be paid?

The arbitrators will decide, unless the parties specify.

How will the costs of arbitration be apportioned?

The rules or the governing arbitration law will likely provide some guidance, but will give the arbitrators wide discretion. Parties may wish to provide more specific guidance in their arbitration clause.

How will the arbitrators' fees be determined?

The AAA, ICC and LCIA fix arbitrators' fees in accordance with their rules, or at least provide guidance, in their rules and through informal consultations, to arbitrators who fix their own fees. The parties may wish to agree at the beginning of an arbitration on their own guidelines for fixing arbitrators' fees, particularly if they choose not to use an arbitral institution to administer the arbitration. If the rules are silent, and if the parties do not otherwise agree, the arbitrators will fix their own fees.

Should the arbitrators be required to complete the arbitration within a fixed period of time?

If the chosen rules do not fix a deadline, such a provision may be a good idea, especially if there is no arbitral institution to help motivate the arbitrators to do their work efficiently. You had better include an escape clause, however—such as a provision that the arbitrators may extend the time for cause. If there is no escape clause and the arbitrators miss their deadline, their award, when finally made, could be deemed unenforceable as contrary to the parties' agreement.

Should there be a "performance to continue during arbitration" clause?

Some drafters borrow this concept from the standard U.S. Government contract disputes clause, and provide that the parties are to continue contract performance notwithstanding the pendency of a dispute. The concept can be particularly useful in construction contracts.

Annex 8: Descriptions of ADR Centers

ALBANIA—Mediation Center at the District Court of Durres and CCI Durres

Mediation in Albania is regulated by the Law on Mediation (2003). In September 2009, the government started to revise the Law on Mediation to better accommodate the new models of mediation. A special working group supported by IFC provided specific recommendations on the draft law, and a group of experts from the Organization for Security and Co-operation in Europe (OSCE), the United States Agency for International Development, the European Union, the School of Magistrates, the Ministry of Justice, Parliament, and the mediation community reviewed and provided further comments on the draft. The draft was passed by the Albanian parliament as a new law “On Mediation in Dispute Resolution,” no. 10835, dated February 24, 2011.

The **Albanian Foundation for Conflict Resolution and Reconciliation of Disputes** (AFCR)¹ is the main nongovernmental organization in Albania providing mediation services in civil and commercial disputes. AFCR played a major role and acted as one of the key partners of IFC in establishing the two mediation centers. AFCR currently administers court-connected mediations and provides “know-how” and training support to the new center established within the Chamber of Commerce. AFCR also accepts private referrals (which constitute the majority of its caseload). AFCR settles on average 2,000 conflicts (family, civil, criminal) yearly and has nine mediation centers set up in Berati, Dibra, Gjirokastra, Korça, Mat, Shkodra, Tirana, Vlora, and Elbasani, which employ full-time coordinators and part-time mediators. The mediators’ network is operational in 10 other districts. AFCR provides three days of basic training for mediators. An advanced, two-day training program was prepared in cooperation with Dutch experts. AFCR has a pool of experts trained internationally. Mediators are selected through an interview process after the publication of a vacancy announcement. Candidates must be over 22 years old, hold a university degree, and have no criminal record. All candidates to AFCR’s roster must complete the training and professional qualification program, approved by the National Chamber of Mediators, be certified by the Commission of Licensing², and abide by the Code of Conduct (which is based on the European Code of Conduct for Mediators). Mediators are independent contractors of the Center and are hired part-time based on caseload.

In 2009, two different mediation centers were set up in Albania with IFC’s support—one is court-connected (Mediation Center within the District Court of Durres), and the other is connected to the Chamber of Commerce and Industry of Durres (CCI Durres).

The court-connected **Mediation Center within the District Court of Durres** was established as a result of the cooperation between AFCR, IFC, the High Counsel of Justice, the Ministry of Justice, and the District Court of Durres. AFCR (with the help of IFC) selected the mediators and administrative staff to participate in the project and organized a special training program and introductory seminar for lawyers and judges. The court appointed judges to be trained in case referrals and provided office for mediation. Basic and advanced training programs for judges and mediators were designed and implemented by AFCR in collaboration with national and international experts and trainers. During the first three to four months, awareness campaigns were undertaken to raise judges’ awareness of mediation. In January–February 2009, the Center became operational and AFCR started the process of case management in court-referred mediations and has been monitoring the performance of mediations and tracking all the cases. Between 2009 and 2010, 87 commercial cases were referred to the Mediation Center, of which 56 cases were resolved, and \$5.5 million was released back to the private sector.

The Head of the District Court of Durres played a crucial role in convincing the judges to refer cases and participated in the creation of a mechanism for case referrals. With the help of IFC, a “Case-referral Manual for Judges”

1. AFCR is a professional association of mediators established in 1996 as a nongovernmental, non-profit, nonreligious, nonpolitical organization, whose mission is to contribute to the democratization of Albanian society by settling civil, commercial, family, and penal conflicts through mediation and reconciliation. AFCR is licensed by the Ministry of Justice to engage in mediation activity in Albania.

2. The Commission of Licensing is composed of representatives from the Ministry of Justice and the National Chamber.

was prepared and distributed in six district courts in Albania. Lawyers also were considered influential in the overall success of mediation, so it was important to involve them in some of the training sessions.

The establishment of the **Mediation Center at the Chamber of Commerce and Industry of Durres** (CCI Durres) was a follow-up initiative undertaken after the establishment of court-connected mediation. CCI was established as a result of the cooperation between IFC, CCI Durres, and AFCR. The project began in April 2010, and the Center became operational in June 2010. AFCR has been involved in the design and implementation of this plan by helping select the mediators; providing basic and advanced training to the mediators and guidance to the staff of CCI Durres; coordinating among CCI Durres and IFC; and raising awareness about the benefits of mediation. During April through June, training programs were implemented (three-day basic and two-day advanced), and roundtables and workshops for the business community, lawyers, and staff of CCI Durres were organized (83 participants). AFCR also provided CCI Durres with the necessary documentation, including sample mediation rules, terms of reference for mediators, and a database for evaluation. CCI Durres covered office administration expenses and seminars with its members.

BOSNIA and HERZEGOVINA—Mediation Center at the Sarajevo Municipal Court and at the Basic Court of Banja Luka

Two voluntary court-connected mediation centers were established in Bosnia and Herzegovina with IFC support—one connected to the Sarajevo Municipal Court and the other connected to the Basic Court of Banja Luka. These Centers were located outside the courts and established as independent from the courts, although during the pilot project they relied solely on court referrals. In 2007, the two Centers were transferred to the **Association of Mediators of Bosnia and Herzegovina** (AoM) that administers both court-referred and privately referred cases.

AoM is the only organization licensed to provide mediation services in Bosnia and Herzegovina. It was established in March 2002, at the initiative of several civil society members, judges, and prosecutors who participated in the “Third Party Neutral” program implemented by the Canadian Institute for Conflict Resolution (CICR) in Bosnia and Herzegovina in 1998. IFC joined these efforts in 2004 to assist with the development of a legal framework for the voluntary out-of-court mediation system. Members of AoM are judges, lawyers, teachers, psychologists, journalists, and other professionals trained in mediation. AoM offers mediation services, training, certification, seminars, presentations, and direct consulting on mediation.

AoM played a key role in the development of a legal framework for mediation in Bosnia and Herzegovina through its advocacy efforts and specific proposals submitted to the Ministry of Justice and international organizations. The laws on civil and penal procedure (2003) opened the door to mediation within court procedures, and in 2004 a law regulating voluntary out-of-court mediation was adopted. The Law on Mediation Procedure (2004) provides that “mediation tasks shall by a separate law be transferred to the association or associations by the procedure set forth in that law.”³ A Law on Transfer of Mediation Services to the Association of Mediators was adopted on July 28, 2005; it authorized the Association of Mediators to provide mediation services.⁴

The number of court-referred cases significantly decreased after the end of the pilot projects because mediations were no longer free of charge (during the projects they were funded by donors). Most cases that AoM deals with are referred before filing of claims in court (privately referred). The majority of disputes are commercial and some of them are valued at over half a million euros. Evaluations conducted by IFC showed that the rate of compliance with settlement agreements was 90 percent. The settlement agreements do not need to be verified by the court, but in court-referred cases the parties must inform the court of the outcome of mediation.

There are currently 100 mediators on the roster and 14 new ones were expected to be registered. Most are lawyers. Mediators are not considered to be employees of AoM. According to the Law on Mediation Procedure, the

3. See http://www.umbih.co.ba/eng/about_us/law.htm

4. Zakon o Prijenosu Poslova Medijacije na Udrugu Medijatora Bosne i Hercegovine [BIH Law on Transfer of Mediation Affairs to the Association of Mediators], published in 52 Službeni Glasnik Bosne i Hercegovine [Official Gazette of Bosnia Herzegovina] (2005).

conditions for becoming a mediator are general conditions for employment, university degree, completed training in mediation according to AoM's program or other program recognized by AoM, registration in the Roster of Mediators of AoM (after submission of the required documents and successful interview).⁵

CHILE—Arbitration and Mediation Center of the Santiago Chamber of Commerce (CAM Santiago)

Arbitration has a long tradition within the Chilean legal system, and its first regulation dates from 1875. Today domestic arbitration is subject to provisions of the Organic Code of 1903 and the Code of Civil Procedure of 1943. The increasing complexity and sophistication of arbitration led to the establishment of the first arbitral institution in 1992, the Arbitration and Mediation Center of the Santiago Chamber of Commerce (CCS), which was established with the support of the Chilean Bar Association and the Chilean Confederation of Production and Commerce. Its establishment and initial operations were financed by CCS, although since 1999 the Center has collaborated with and received support from the Inter-American Development Bank (IDB) to extend its arbitration and mediation services to national coverage and develop an online case administration technology. Currently, the Center receives hundred percent of its funds from arbitration and mediation fees. With more than 1,400 arbitrations conducted since its establishment, the Center maintains its role as the main arbitral institution in the country.

In 1998 the Center introduced mediation service. According to the Chilean law, the arbitral procedure gives the parties an opportunity to reach an amicable settlement, which is why mediation is still less frequently used. Indeed, more than forty percent of CAM Santiago arbitrations end with an amicable settlement achieved by the parties. Commercial mediation is not regulated by law, although the law provides for conciliation procedures in other types of disputes (health, family). There is no legal provision allowing courts to refer disputes to mediation; however the law provides for a mandatory conciliation, which explains the high volume of conciliations within arbitral procedures administered by CAM Santiago.

Between 1992 and 2010, 1,405 arbitration cases were referred to the Center of which 1,219 arbitrations were completed, and 105 mediation cases were referred. Sixty-five percent of arbitrations are finished within a year from the constitution of the arbitral tribunal; the average duration of mediation is nine days. Twenty percent of all cases emanate in the construction sector, and twenty-four percent in real estate.

Following the adoption of the UNCITRAL International Arbitration Model Law in 2004, CAM Santiago further extended its services to provide international commercial arbitration in 2006.

As of 2011 there were 10 mediators and 198 arbitrators on the Center's roster for domestic arbitration (parties can select arbitrators who are not on the Center's roster, but this rarely happens).⁶

PAKISTAN—Karachi Center for Dispute Resolution (KCDR)

The Karachi Center for Dispute Resolution (KCDR) was established in February 2007, as a result of the cooperation between IFC, the Ministry of Law and Justice of Pakistan, and the High Court of Sindh. At the start of the pilot project, an Advisory Board was constituted, comprising the Chief Justice of the High Court of Sindh as the Chairman of the Board, the Attorney General, a High Court judge, and the President of the Karachi Chamber of Commerce and Industry as key members. While IFC led the project in terms of financing and management, the Board provided strategic oversight and direction to the project and ensured a "buy-in" from all the relevant stakeholders. Before the Center became operational, a pool of professional mediators and master trainers were trained

5. For additional information on fee structure, rules and code of ethics of AoM, see <http://www.umbih.co.ba/eng>

6. More information on the CAM Santiago rules and fee structure can be found on the CAM Santiago web site: www.camsantiago.com

and certified and amendments to the Civil Code of Procedure were drafted to allow referrals of cases to mediation by courts (private referrals were already allowed).

The Center's facilities were set up in close proximity to the courts. When independent parties started approaching the Center for resolution of their commercial cases, the High Court rules were amended to provide an adequate enforceability mechanism for settlement agreements of such cases. Small businesses and banks supported the project from the beginning, but there was some resistance from the lawyers' association. To alleviate these concerns, the Chief Justice approached the bar to hold seminars on mediation and the President of the Bar Association of Karachi was included in KCDR's Board of Governors.

The Center is run by trained local staff, and managed by a Board of Governors (chaired by a former Chief Justice of Pakistan) and its members (professionals from business, legal, judicial, and government circles). KCDR has been moving toward financial sustainability by developing revenue streams that include mediation fees, training fees, and a corporate membership program for the private sector. Initially, KCDR relied on membership fees paid by businesses that benefited from KCDR's services through tailored trainings for their lawyers and accountants, lower prices for mediating cases, and advice on legal aspects of ADR. In the six months after launching the membership guild, KCDR brought in 14 new members, raising the total membership to 20 and generating revenues up to \$40,900. Corporate memberships led to referrals of cases to KCDR from its members, who became more aware of the Center's services and the benefits of mediation. As of 2010, KCDR has 36 corporate members, including law firms and companies.

Between 2007 and 2010, 1,512 commercial cases were referred to KCDR, 1,048 cases were settled, 10 are still pending and 230 were not accepted. The majority of the cases are court-referred; only 136 commercial cases of the total 1,512 are privately referred. Of the privately referred cases, most are small claims or credit card disputes and all come from the banking sector. Settlement agreements are sent to court, where they become court decrees. For privately referred cases, parties can ask the court to enforce their settlement agreements.

There are 49 mediators on KCDR's roster as of 2010; all mediators must be accredited by the Center.⁷ There are also 54 judges who are trained in mediation.

During the pilot project (in 2006–2008), the Center for Effective Dispute Resolution (CEDR) provided Foundations, Advanced, Master Trainers, and Mediator skills training. During that time, 72 professionals were trained in mediation skills and 49 were accredited by CEDR. The project has also run a Master Trainer course for 13 mediators. IFC and KCDR have jointly delivered five training sessions for professionals belonging to the corporate, banking, and legal sectors. Moreover, judges have benefited from the training; a study tour was organized to the United Kingdom, where judges could experience how institutionalized mediation works in practice.

KCDR is now using local master trainers to deliver in-house training programs at regular intervals. Basic training programs last two days and advanced last up to five days. Continuing professional development is available upon request; KCDR organizes seminars internally from time to time.

The project used a sectoral approach in the awareness-raising activities by targeting sectors likely to use mediation. Outreach activities were specifically targeted to the banking sector, where mediation was seen as an attractive method of dispute resolution. The sectoral approach, involving key industry federations and business associations, has proven successful in increasing the volume of cases. For example, KCDR received a bulk of cases from the banking industry (reaching 105 cases in a few months).

The project has organized meetings with the State Bank of Pakistan (SBP) on a Mediation Directive and Policy for the banking sector. Before work on banking mediation policy could commence, it was considered vital to bring SBP, Pakistan Banks Association (PBA), and the banks together and engage in a dialogue that could serve as a

7. The rules of KCDR, fee schedule and model mediation clauses can be found on KCDR web site: <http://www.kcdr.org/>

platform for future development and implementation of the policy. This dialogue has led to a gradual increase in cases referred from the banking sector.

In addition, over 2,500 members of the legal profession and the private sector attended study tours, conferences, seminars, and workshops organized to increase awareness and understanding of mediation.

SOUTH AFRICA—The Commission for Conciliation, Mediation and Arbitration (CCMA)

The Commission for Conciliation, Mediation and Arbitration (CCMA) is a statutory dispute resolution body that was established in 1996 on the basis of the Labour Relations Act, 66 of 1995 to close the cases of the former Industrial Court. It is an independent body which does not belong to and is not controlled by any political party, trade union, or business. CCMA deals only with labor-related disputes by offering conciliation and arbitration services as specified in the Labour Relations Act. CCMA and the Independent Mediation Service of South Africa (IMSSA) were the first institutions in South Africa to provide mediation and conciliation services. CCMA is headed by a governing body consisting of 10 members (one independent chairperson, three members from organized labor, three members from organized business, and three members from government). It is the supreme policy-making body of CCMA. CCMA's Secretariat is headed by a Director (who is nominated by the governing body) and a team of national experts; they all form part of the management team. As of 2010, CCMA has 10 offices. Its head office is in Johannesburg and each province has its own office and full-time staff. Convening Senior Commissioners have been appointed in each province and their role is to monitor the professional standards of CCMA and to assist in the allocation of cases to commissioners.

All matters that come to CCMA are referred to conciliation before they reach the arbitration stage. If no agreement is reached during the conciliation stage, depending on the nature of the dispute, the case may be referred to CCMA for arbitration or to the Labour Court. (CCMA must refer the dispute to arbitration at the request of any party if the Act requires arbitration, or if all the parties consent to arbitration.) Settlement agreements reached in conciliation proceedings may be converted into arbitration awards upon the agreement of the parties or request of one party (see section 142A of the Labour Relations Act). Arbitration awards are enforced in courts through a writ of execution.

Mediation is not considered a separate procedure, but only a technique that is sometimes used in conciliation. There is no court-referred ADR system for labor disputes in South Africa—all cases in CCMA are referred by lawyers, individual employees, or employers.

CCMA commissioners are given wide statutory functions in conciliation—they may determine a process, which may include mediation, facilitation, or making recommendations in the form of an advisory arbitration award. A commissioner may cause persons and documents to be subpoenaed, and has the power to enter and inspect premises and seize any book, document, or object that is relevant to the dispute.

Between 2009 and 2010 153,657 cases were referred to CCMA (12,804 per month). In 2009 and 2010 the average rate of successful settlements through conciliation was 59 percent. On average, it takes 27 days from the date of referral to the date of settlement agreement to resolve a case through conciliation (96 percent of conciliation cases are resolved within this time frame). On average, it takes 53 days from the start of arbitration proceedings to the issuance of an arbitration award to resolve a case through arbitration.

All cases in CCMA are referred to commissioners who conduct both conciliations and arbitrations.⁸ There are 605 commissioners in CCMA—125 full-time and 480 part-time. Part-time commissioners are not employees of CCMA, but are contracted by CCMA and work on contingency. Thirty percent of CCMA's work is performed by full-time commissioners and 70 percent by part-time commissioners.

8. Case referral forms, information sheets, and CCMA annual reports can be found on CCMA web site: <http://ccma.org.za>

Completion of a six-month training program consisting of seven modules is required for certification as a commissioner in CCMA (the training programs are provided by CCMA). The successful completion of the training program is followed by a mentorship program. The mentorship program was introduced about three years ago and successful completion of it is a condition to practice as a commissioner.

CCMA is publicly funded. Its budget is allocated by the Department of Labor and authorized by the Treasury. CCMA does not charge fees for its regular dispute resolution work (except in exceptional circumstances), but may charge for its discretionary functions.

