



Alternative dispute resolution— when it works, when it doesn't

Initial results from alternative dispute resolution programs in developing and transition economies suggest that reformers do not appreciate the programs' limitations.

Alternative dispute resolution encompasses arbitration, mediation, conciliation, and other methods—short of formal litigation—for resolving disputes. Alternative dispute resolution offers several advantages over a lawsuit. It is less adversarial and in some cases can be faster and less expensive. It can also reduce court workloads. For these reasons its use is being promoted by court reformers in many developing and transition economies.

But unlike a court, arbitrators, mediators, and other third parties cannot force the parties to a dispute to appear before them or to comply with the decision rendered. They must rely instead on the litigants' willingness to submit the dispute to them and respect the resulting decision—a key limitation when devising an alternative dispute resolution program, and one that too many designers ignore.

Different approaches

Alternative dispute resolution can be tied to the filing of a lawsuit or freestanding. When connected to the filing of a lawsuit, a judge or court employee will examine the dispute and suggest—or in some cases order—the parties to attempt to resolve their differences through alternative dispute resolution. This may take the form of mediation, conciliation, or even a mini-trial. Under each approach a neutral third party will try to get the disputants to reach an amicable settlement. If they do, the case is dismissed, saving the court and the parties the time and expense of litigation.

One common form of freestanding alternative dispute resolution is commercial arbi-

tration. The disputants agree on a neutral third party to resolve the matter or on a process for naming the third party. They also agree on the rules the arbitrator will follow in deciding the case and whether the decision will be binding or simply advisory. Complex contracts, such as those for construction of a power plant, often contain arbitration provisions spelling out in advance how disputes will be handled. In other cases the parties do not decide to arbitrate a dispute until it has arisen.

To facilitate commercial arbitration, most countries have enacted legislation based on the Model Law on International Commercial Arbitration, published in 1985 by the United Nations Commission on International Trade Law. This law makes arbitral awards legally binding, grants broad rights to commercial parties in choosing how they will arbitrate disputes, and directs courts to overturn awards only in the narrowest of situations.

To serve their members, chambers of commerce in Argentina, Colombia, and Peru have established commercial arbitration centers. The centers resolve cases more quickly and cheaply than if they had been taken to court. Moreover, the courts in these three countries are becoming more comfortable with arbitration and so resisting the temptation to second-guess arbitration awards.

Community-based alternative dispute resolution is a second freestanding form. It builds on traditional models of popular justice that rely on elders, religious leaders, or other community figures to help resolve conflict. In the 1980s India embraced *lok adalats*, village-level

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TABLE 1 OUTCOMES OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS IN ALBANIA, ECUADOR, AND THE WEST BANK AND GAZA

<i>Economy</i>	<i>Months program in effect</i>	<i>Cases submitted</i>	<i>Cases resolved (percentage of total)</i>	<i>Cases pending</i>
Albania	16	8	0 (0)	1
Ecuador	10	888	214 (24)	0
West Bank and Gaza	12	13	3 (23)	6

Source: World Bank data.

Alternative dispute resolution can succeed only if claimants and defendants have incentives to make it work

institutions where trained mediators seek to resolve problems that earlier would have gone to councils of village or caste elders. In the Philippines the leader of the local *barangay*, or neighborhood, tries to resolve minor disputes between residents. In Latin America the *juece de paz*, an officer of the state, can use informal procedures to conciliate or mediate small claims.

Common drawbacks

Although commercial arbitration is working well in Argentina, Colombia, and Peru, alternative dispute resolution programs have not fared as well in many other developing countries. One problem with many community-based systems is that norms controlling dispute resolution can contradict national laws.

In Bangladesh village justice systems often recognize oral divorces despite a 1962 law requiring that all divorces be in writing. A second problem with community systems is that those deciding the cases are often biased—against women, poor people, and other underprivileged groups.

Training, outreach, and legal awareness programs can help solve these problems. But these programs cannot solve the larger problem of incentives. In most developing and transition economies the courts are not strong enough to enforce contracts requiring that disputes be submitted for alternative dispute resolution or that the losing party pay the resulting award. Alternative dispute resolution can succeed only if claimants and defendants have incentives to make it work.

In Argentina, Colombia, and Peru any firm that fails to arbitrate a dispute after agreeing to do so—or refuses to pay an award—quickly becomes known as an unreliable business partner. Thus a firm’s concern about its reputation provides a powerful incentive to participate in alternative dispute resolution and respect the outcome.

Role of incentives

The absence of such incentives can seriously undermine such efforts, as indicated by the results of donor-sponsored alternative dispute resolution programs in Albania, Ecuador, and the West Bank and Gaza (table 1). The programs in Albania and the West Bank and Gaza are freestanding, while Ecuador’s is court-connected. In Albania and the West Bank and Gaza less than one case a month has been submitted to an alternative dispute resolution panel. Although the number of cases is much higher in Ecuador, the percentage resolved remains low. Yet in all three projects significant investments were made in training mediators and arbitrators and in publicizing the advantages of alternative dispute resolution—to both the legal community and the general public.

Why such poor results? Project documents reveal that designers ignored incentives: cases were referred to alternative dispute resolution when defendants had little or no interest in resolving disputes.

A dispute that arose in the West Bank and Gaza program illustrates this principle. The dispute was between a Turkish manufacturer and a Palestinian buyer that paid in advance using a letter of credit. When the buyer

received the goods, it found that they were defective and called the manufacturer to complain. The manufacturer said that the goods were fine when they left its plant, so the damage was not its problem. The Palestinian buyer then requested mediation at the recently established mediation center in Ramallah. But the Turkish firm ignored repeated requests to visit Ramallah to mediate the dispute. The administrator of the alternative dispute resolution program concluded that the problem was lack of awareness of the program's benefits—that if the Turkish company had better understood the advantages, it would have come.

In reality, the failure here was one of case selection. The Turkish firm had no interest in any other outcome. It had already received its money from the buyer. Why would it risk going to Ramallah, where the best outcome would be a decision that it could keep the money?

Had the initial circumstances been slightly different, the outcome would likely have been much different as well. Suppose the order that the Palestinian buyer placed was the first of what the Turkish manufacturer expected to be many, spanning several years. Or suppose the manufacturer had a thriving business with other Palestinians. In either case, as with the members of the chambers of commerce in Argentina, Colombia, and Peru, it would have had a concrete reason for wanting to resolve the dispute: to ensure that it did not lose future business opportunities. True, in such cases the two disputants often negotiate a deal without requiring a third party. But in close cases a skilled mediator can prevent a bargaining impasse.

Court-connected alternative dispute resolution projects in developing and transition economies are almost always paired with judicial reform programs that include improvements in case management systems. Well-functioning case management systems increase the certainty that cases will be heard and resolved by the courts by introducing deadlines for filing necessary papers and presenting evidence. Such certainty provides an incentive to resort to alternative dispute resolution. If both litigants know that there is

no way to avoid a trial by using repeated adjournments and other delay tactics and that an accurate decision will be entered on a certain date, alternative dispute resolution is often a more desirable alternative.

Without such certainty, the defendant—the party usually content with the status quo—may agree to alternative dispute resolution simply to delay final resolution. In such cases the defendant hopes that the claimant will grow weary and abandon the claim or that inflation will devalue the worth of any recovery. Recent research in India confirms that this is happening in some *lok adalats*. Many claimants are poor people who cannot wait years to receive compensation for motor vehicle accidents or for being wrongfully fired or laid off.

Reformers introducing a combined program of alternative dispute resolution and improved case management must therefore monitor the effectiveness of the case management reform to avoid abuse of the alternative dispute resolution element.

Voluntary or mandatory?

One question that often arises with court-connected alternative dispute resolution is whether it should be voluntary or mandatory. Should the courts allow one or the other side to reject a recommendation to submit to the process and instead proceed with a lawsuit? Or should the court have the power to order the two parties to try alternative dispute resolution even if one thinks it will be futile?

Forcing both sides to participate in such a process can prejudice creditors, victims of motor vehicle accidents, and other claimants seeking speedy recovery. When a judge requires the two sides to submit to alternative dispute resolution and the case is not resolved, it goes back to court. Thus, as India's experience shows, mandatory alternative dispute resolution simply becomes another hurdle blocking just resolution of claims.

On the other hand, mandatory alternative dispute resolution can overcome differences in interests between lawyers and their clients that block speedy resolution. This partly explains the contrasting expe-

Forcing both sides to participate in such a process can impede a speedy recovery

Reformers must understand when alternative dispute resolution is appropriate

periences of the Philippines and Venezuela in using alternative dispute resolution to resolve employment disputes. In such disputes lawyers for the firm and for the disgruntled employee have their own interests. For example, both may wish to drag out the dispute to increase their fees.

Accordingly, the Philippines and Venezuela require that an effort be made to mediate an employer-employee dispute before litigating it. But whereas Venezuela requires both the employer and employee to attend the alternative dispute resolution session, the Philippines requires neither to do so. Not surprisingly, in Venezuela nearly 95 percent of such cases are resolved through such sessions—while in the Philippines the figure is closer to 5 percent.

Why? When both the employer and the employee attend, the real interests of both are put ahead of those of their two lawyers. For example, the employee likely just wants his or her job back (not a lawsuit), and the employer probably wants an experienced worker back on the job (not a distracting court case). Again, a skilled mediator can get the two to recognize their mutual interests and work out a deal.

Conclusion

Under the right conditions, alternative dispute resolution can be an important part of judicial reform. But as programs in Albania, Ecuador, and the West Bank and Gaza show, reformers must understand when such an

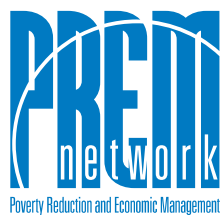
approach is appropriate and when it is not—and tailor their projects and expectations accordingly.

Further reading

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This note was written by Richard E. Messick (Senior Public Sector Specialist, Public Sector Group, PREM Network).

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Prepared for World Bank staff