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# Alternative Dispute Resolution Manual: Implementing Commercial Mediation

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*Lukasz Rozdeiczer*  
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Small & Medium Enterprise Partnership  
MIDDLE EAST AND NORTH AFRICA (PEP-MENA)

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# **Alternative Dispute Resolution Manual: Implementing Commercial Mediation**

Small and Medium Enterprise Department  
The World Bank Group  
November 2006

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First printing, November 2006

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## **Acknowledgments**

The publication of this Manual was made possible due to the generous support of the Government of the Netherlands under the Partnership program between the Netherlands Ministry for Development Cooperation and the International Finance Corporation.

This Manual was produced thanks to the inspiration of Mehnaz Safavian, who initiated the project and handed it over to the authors to complete it. The authors are indebted to the following individuals for their excellent and thoughtful contributions to the content of the Manual with their knowledge and documentation:

Lada Busevac, IFC

Ajla Dizdarevic, IFC

Karl Mackie, Center for Effective Dispute Resolution (CEDR)

Richard Messick, WB

We are also grateful to Gordana Alibasic, Daniel Bender, Benjamin Herzberg, Navin Merchant, Mehnaz Safavian and David Satola for the helpful comments provided during the preparation of this Manual. This Manual was edited by Vandana Mathur. Henry Rosenbohm was in charge of the production.

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# Introduction to the Manual: Step-by-Step Mediation Project

## Goal of the Manual

The main goal of this manual is to provide practical advice and an overview of good practices for projects introducing commercial mediation to any legal system (the “project”). The manual seeks to facilitate a more informed approach to the design, implementation, and monitoring of mediation and other alternative dispute resolution (ADR procedures) in the World Bank Group, other multilateral and bilateral development institutions, and non-governmental organizations (NGOs).

## Form of the Manual

The task of making mediation and ADR work is very complex. There are hundreds of books and other resources on mediation, legal and judicial reform, and transitional justice. This manual is not one of them. Instead, it is a tool for development institution professionals working in the field. Such tools must be both useful and user-friendly. This manual is structured to achieve maximum usage. The “lessons-learned part” is concise, with additional information presented in the appendices.

## Target Users

The manual is primarily directed at project managers and practitioners involved in projects related to resolving commercial disputes. For the purpose of this manual, the term “project manager” refers to any person who manages or is part of the team that manages the project. The manual is designed to be particularly helpful to task managers running projects with a mediation component.

## Goals of an ADR Project

An ADR project’s broad goal is to improve the business environment by providing a business-friendly dispute resolution mechanism. To achieve this goal, an efficient (appropriate) dispute resolution system must be introduced, and must also be sus-

tainable over a long period of time. The best way to ensure sustainability is by building the capacities of local stakeholders. Therefore, an ADR project's goal goes beyond just "introducing mediation" to the court system, and focuses more on building capacities of local stakeholders to establish mediation mechanisms that can be sustained over a long period of time.

## The Art and Science of Mediation

Mediation is both a science and an art. *The science* of mediation consists of many academic disciplines, such as: legal theory, game theory, economics, and psychology. The greatest challenge in introducing mediation is *the art of applying* this broad and interdisciplinary body of knowledge to the dispute resolution system in a given country and later to a particular dispute. For the end users of mediation – parties to the dispute – mediation is largely about the art of effectively and efficiently resolving their conflicts. Therefore, ADR and particularly mediation should serve as tools for behavioral changes of the parties to help them more effectively resolve their disputes. This manual takes this practical approach of applying best practices of mediation to help the parties achieve their goals.

## Content of the Manual and Methodology Used to Produce it

Data used for the research and subsequent conclusions in the manual come from various sources:

- General Dispute Resolution theory.
- Analysis of case-studies of mediation methods introduced in other countries.
- Analysis of how mediation works in developing and developed countries.
- Interviewing parties involved mostly in projects in the Balkans and other WBG employees<sup>1</sup>.

## Challenges for the Manual

*Scarce and inconsistent data.* Limited and often inconsistent quantitative data on ADR and particularly on mediation in different countries was probably the biggest challenge faced in developing this manual. Most of the available data focused on different research questions and measured different outcomes. Some projects evaluate different kinds of ADR processes without really distinguishing between them<sup>2</sup>.

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<sup>1</sup> Since interviews were partly confidential, often the source of information is not disclosed.

<sup>2</sup> For example, there are many successful projects in Latin American countries – Chile, Brazil, Colombia that have established arbitration and mediation centers. However, since these centers provide information on both mediation and arbitration cases without distinguishing which one is mediation and which one is arbitration, such data is not useful in comparing with data on mediations from other centers.

In some situations where similar issues were measured, the lack of a complete set of conditions made it risky and often impractical to directly compare such data. For these reasons, available partial data from many developing countries was used for the analysis, supported by general ADR knowledge from mostly developed countries with substantial ADR experience.

*Practical Applications.* This manual is general enough to be used in many countries with different legal systems, cultures, and preconceptions about mediation and dispute resolution, and various sets of incentives for the parties involved. The manual often suggests what the dominating strategy or choice would be (if any), but this is meant to be only a presumption that can be rebutted by a set of particular conditions in a country. A strong prescriptive advice to that is to “*listen to and learn from your local partner*”<sup>3</sup> to make the general advice presented in the Guide better fitted to particular circumstances. Thus, the general advice and suggestions presented here can be accommodated to specific conditions. On the other hand, it is important to educate the local partner about the variety of possibilities and best practices existing elsewhere. It is particularly important for any project design to be based on a detailed assessment of the country’s needs and tailored to its unique environment, not replicated from any other system or this manual.

*“Everybody knows mediation”.* Many people, particularly judges, lawyers, some of the parties, and government officials think they already know mediation. These are some of the most common remarks regarding mediation: “Oh sure \_ settlement (mediation, conciliation) \_ we’ve had it for years.” “I do it every day and have compromised hundreds of cases,” or “I know it from the news.”

Because of this approach, it is difficult to make some people understand what mediation really is. Mediation may seem simpler and more intuitive than other projects that the World Bank Group is involved in, which sometimes makes it more difficult to research or talk about. Therefore, some of the advice given in this manual may seem obvious or simplistic. But sophisticated professionals, including accomplished lawyers or economists, often have strong misconceptions that need to be clarified, even at a risk of saying the obvious.

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<sup>3</sup> Although, it is essential to listen and learn from your local partner, one should always bear in mind that often times local parties are unaware of how much change can be achieved compared to traditional habits, or conversely are unrealistic, investment and time required to see through a change in professional practices.



# Chapter 1: Understanding ADR and Mediation

## 1. What is ADR?

ADR is usually used as an acronym for alternative dispute resolution, which is defined as any process or procedure other than adjudication by a presiding judge in court – litigation, in which a neutral third party participates to assist in the resolution of issues in controversy<sup>4</sup>. However, for the purpose of this manual, it seems more useful to think of ADR not as *alternative* dispute resolution, but *appropriate* dispute resolution. There are a few reasons why we should think of appropriate and not just alternative processes.

The main idea behind mediation projects is not only to provide alternatives to litigation but to modify the whole dispute resolution system, including litigation, to make it more suitable for the parties in commercial disputes. Introducing mediation or arbitration is one way of making the system more appropriate for end-users. Mediation and other ADR methods are not *alternatives* to the formal justice system in the sense that they aim to replace it. Their goal is to *complement* the scope of court procedures so that the parties can choose between these processes. However, this choice does not have to be exclusive. In many cases, parties may choose mediation along with litigation or arbitration and conduct them in parallel, until they settle, withdraw, or get a court decision or arbitration award. Moreover, litigation is and must remain a crucial part of the ADR system in any country. Litigation is particularly vital for the existence of mediation and other non-binding processes because one of the stronger incentives to mediate is often to avoid adjudication.

The word “appropriate” also emphasizes two other important aspects of the problem: creating a dispute resolution system that is *appropriate for a given legal system* and culture and matching a case to an *appropriate dispute resolution procedure*.

ADR has become a buzz word in recent years. One of the problems with its application is the wide variety of ADR processes that have diverse rules and dynam-

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<sup>4</sup> 28 U.S.C. § 651(a) (Supp. 1998)

ics that can accomplish a range of goals. As a result, there is a lot of confusion about various ADR methods. Much of the confusion seems to occur when people speak of ADR but actually mean different processes, very frequently confusing mediation and arbitration. It is, therefore, particularly important for people to recognize that mediation is qualitatively very different from arbitration.

### 2. Some Key ADR Distinctions<sup>5</sup>

Understanding the key concepts and distinctions described below can be important in using ADR effectively and in understanding some of the concepts discussed later in this manual:

#### ***Non-binding/binding***

These words describe the type of commitment that parties make when entering the ADR process. When they are bound to accept and respect the agreement of the ADR process, such as a third-party decision in arbitration, that agreement is *binding*<sup>6</sup>. In *non-binding* processes, such as mediation or mini-trial, the arbitrator cannot force the other parties to accept any agreement, and it is only the parties who can jointly agree on a certain outcome. Once the parties agree to a contract, they are bound by their contractual obligations. Any resolution resulting from a non-binding process culminating in contractual obligations of the parties can be enforced by the courts either as a contract or as a court decision.<sup>7</sup>

#### ***Voluntary vs. mandatory referrals to mediation***

These terms describe the method by which cases enter mediation (or other ADR procedures). If a judge or court refers cases to mediation only at the parties' request or with consent of the parties, the referral is *voluntary*. As a general rule, mediation is voluntary. However, in circumstances prescribed by law, participation in mediation is required by the court, whether by an individual judge's order or by a court rule. This is known as *mandatory* mediation. Regardless of whether parties entered ADR with their consent or because of a court order (mandatory mediation), they can decide whether to settle the case. Therefore, the parties are not mandated to enter into settlement (as mediation is non-binding), but are obliged only to discuss in good faith, with the other party settlement opportunities. More detailed information on voluntary vs. mandatory mediation is provided in Chapter 3.

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<sup>5</sup> Applied with changes from Robert J. Niemic, Donna Stienstra, Randall E. Ravitz (2001), Guide to Judicial Management of Cases in ADR, Federal Judicial Center, p. 9-10.

<sup>6</sup> Rarely parties may agree to a binding mediation or non-binding arbitration.

<sup>7</sup> A party can have a court enforce mediation settlement, only when that jurisdiction has a law recognizing the direct enforceability of such decisions by the court system or if the (mediation) settlement is done in relation to court proceedings and after court approval has a power equal to the court judgment (most jurisdictions have such provisions). Otherwise such mediation settlement will be enforced through the litigation as a regular contract.

### *Interest-based vs. rights-based*

These terms describe the main criterion that a procedure applies to resolve the dispute. *Interest-based* dispute resolution processes expand the discussion beyond the parties' legal rights to look at underlying interests, deal with emotions, and seek creative solutions. The focus of these processes is on clarifying the parties' real motivations or underlying interests in the dispute and is future oriented. Mediation, for example, is a process that traditionally focuses mainly on underlying interests. Interest-based processes often provide the possibility of value-creation.

*Rights-based processes*, on the other hand, narrow issues, streamline legal arguments, and predict judicial outcomes or render decisions based on assessments of the legal rights of the parties. An example of a rights-based process is arbitration. ADR processes can contain both interest-based and rights-based elements, depending on the structure of the process (e.g., a summary jury trial can involve both outcome prediction and facilitated negotiation) or the style of the neutral (e.g., some mediators predict legal outcome as well as facilitate negotiations). Mediation, in particular, is a type of a process that usually encompasses interest-based and rights-based elements. However it is suggested that facilitative, interest-based mediation is less expensive and more likely to produce value-creating results. The distinction between right and interests-based criterion is explained below.

## 3. The Continuum of Dispute Resolution Processes<sup>8</sup>

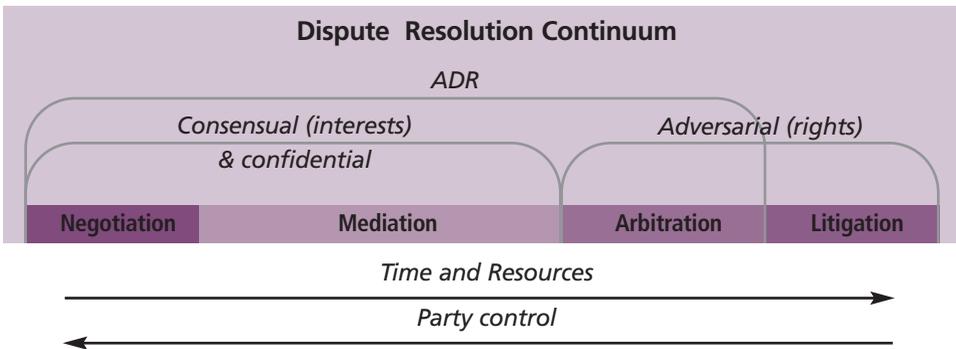
The main types of ADR processes include: negotiation, mediation, and arbitration. Each of them includes numerous "hybrid"<sup>9</sup> processes that can be ranked in terms of the time and resources needed to use them and reduction of the parties' control (refer to Figure 1). It should be emphasized that there is no one type of any dispute resolution procedure. Each type of procedure is not a point on the continuum, but an area (segment) encompassing a variety of modifications or other similar processes. Mediation is a particularly broad procedure and has many variations such as *facilitative*, where the mediator (facilitator) seeks to assist the parties improve their communications and clarify the issues between them, as well as re-evaluate their positions, without passing an opinion on the merits. A mediation can also be *evaluative* or directive, where the mediator gives a view on the merits of the case. Mediation is also a base of other processes characterized by a non-binding intervention of a neutral third party, such as conciliation or mini-trial<sup>10</sup>.

<sup>8</sup> The continuous structure of dispute resolution processes was presented by Sander, F.E.A. (1976). "Varieties of Dispute Processing." *EDR*, 70(111). later modified by various authors e.g. Moore, C.W. (2003 3ed.). *The Mediation Process: Practical Strategies for Resolving Conflict*. San Francisco, Jossey-Bass.. This graphic display taken from Satola, D. "Dispute Resolution in the Telecommunications Sector: Current Practices and Future Directions, World Bank 2006." with subsequent contributions by Rozdeiczner, L.

<sup>9</sup> Hybrid ADR processes are briefly described in Appendix B.

<sup>10</sup> See Appendix B for examples and Appendix J for further bibliography.

**Figure 1: Dispute Resolution Continuum**



The table below provides different aspects of each process to allow for a quick comparison between them and to determine what can be achieved with each of them.

**Table 1: “Primary” Dispute Resolution Processes<sup>11</sup>**

Characteristics	Negotiation	Mediation	Arbitration	Adjudication
<b>Voluntary/ involuntary</b>	Voluntary	Voluntary, In some cases involuntary (mandated mediation)	Voluntary (when based on contract clause—mandatory)	Involuntary
<b>Binding/ non-binding</b>	If agreement, enforceable as contract	If agreement, enforceable as contract, sometimes agreement embodied in court decree	Binding, subject to review on very limited grounds.	Binding, subject to appeal
<b>Third party</b>	No third-party facilitator	Party-selected outside facilitator	Party-selected decision maker often with specialized expertise	Imposed, third-party neutral decision-maker, generally with no specialized expertise in the dispute subject
<b>Degree of formality</b>	Usually informal, unstructured	Usually informal, partly structured	Procedurally less formal than litigation; procedural rules and substantive law may be set by parties	Formalized and highly structured by predetermined, rigid rules
<b>Nature of processing</b>	Unbounded presentation of evidence, arguments and interests	Unbounded presentation of evidence, arguments and interests	Opportunity for each party to present proofs and arguments	Opportunity for each party to present proofs and arguments

<sup>11</sup> See Goldberg, S. B., Frank E.A. Sander, et al. (2003 4th.ed). *Dispute Resolution: Negotiation, Mediation, and Other Processes*. New York, NY, Aspen Law & Business., pp. 4-5 with subsequent modifications by Rozdeiczer, L.

**Table 1: “Primary” Dispute Resolution Processes (continued)**

Characteristics	Negotiation	Mediation	Arbitration	Adjudication
<b>Outcome</b>	Mutually acceptable agreement sought	Mutually acceptable agreement sought	Sometimes principled decision supported by reasoned opinion; sometimes compromise without opinion	Principled decision supported by reasoned opinion; rarely compromise without opinion
<b>Orientation</b>	Future-oriented	Future-oriented	Past-oriented	Past-oriented
<b>Private/public</b>	Private	Private	Private, unless judicial review sought	Public

#### 4. Mediation Defined

*Mediation*<sup>12</sup> is a flexible, non-binding dispute resolution process in which a neutral third party (the mediator) assists two or more disputants to reach a voluntary, negotiated settlement of their differences. The parties have ultimate control of the decision to settle and the terms of resolution. The mediator uses a variety of skills and techniques to help the parties reach a settlement, but has no power to make a decision. The parties remain the decision makers.

Mediation is generally referred to as an interest-based process – in contrast to a rights-based process – because it is designed to help the parties clarify any underlying motivations or interests. The mediator also may help the parties prove the strengths and weaknesses of their legal positions, enhance communications, explore the consequences of not settling, and generate settlement options. Mediation sessions sometimes result in creative solutions, including those where both sides can profit from the settlement terms. Thus mediation changes the distributive, zero-sum game into a value-creating situation. Mediation sessions also are generally confidential. The parties sometimes enter into formal confidentiality agreements before the start of the mediation. Such agreements can preclude a party from later using in litigation or arbitration the documents or information obtained during mediation which they did get elsewhere. This confidentiality provision is often a part of mediation law, and such a confidentiality agreement is not necessary. Also the parties often meet with the mediator separately, which encourages them to share some of their sensitive information.

*Conciliation* is usually understood as a type of mediation where the parties to a dispute use a neutral third party (a conciliator), who meets with them separately

<sup>12</sup> Applied from Robert J. Niemic, Donna Stienstra, Randall E. Ravitz (2001), Guide to Judicial Management of Cases in ADR, Federal Judicial Center pp. 128-130, and CEDR. [http://www.cedrsolve.com/index.php?location=/dispute\\_resolution\\_services/mediation.htm](http://www.cedrsolve.com/index.php?location=/dispute_resolution_services/mediation.htm)

in an attempt to resolve their differences. Conciliation differs from arbitration in that the conciliation process, in itself, has no legal standing. The conciliator usually does not have authority to seek evidence or call witnesses, and does not write decisions or make an award. The main goal of conciliation is to conciliate, most of the time by seeking concessions. In mediation, the mediator tries to guide the discussion in a way that optimizes parties' needs, takes feelings into account and reframes representations. In conciliation, the parties seldom, if ever, actually face each other across the table in the presence of the conciliator. Instead, a conciliator meets with the parties separately ("caucusing"). Such form of conciliation that relies exclusively on caucusing is called "shuttle diplomacy."

Conciliation means different processes in various countries and many people use it interchangeably with mediation. The project manager should generally avoid using this term as it may be confusing for other stakeholders and the parties. Because of the lack of consistency in the usage of the term "conciliation," "mediation" has emerged as a more generic term to refer to assisted negotiations where the role of the third party can take a variety of forms with a view to helping the parties reach an agreement. Therefore, unless there are important reasons to distinguish conciliation from mediation, we recommend the use of the term "mediation" instead of "conciliation." In the course of training, mediators will learn different forms of mediation (including conciliation) and will be able to apply it depending on the circumstances, without confusing the parties and other stakeholders.

For definitions of other ADR processes, see Appendix B.

# Chapter 2: Diagnostic Phase

## 1. Key Elements of an ADR Diagnostic

Before deciding whether to begin a mediation project in a country, and what the project should look like, a detailed analysis must be conducted of the country's needs and its legal and business environments. The following questions must be addressed in this assessment phase:

1. What are the problems with the resolution of commercial disputes in the country?
2. Can these problems at least partly be ameliorated by introducing mediation or other ADR methods?
3. Are there appropriate preconditions to start a mediation project in the country?, and if yes:
4. What is the detailed plan of action?
5. What are the obstacles to implementation and what is the plan to overcome those obstacles?

There are a few factors that should be carefully assessed when deciding whether to begin a mediation project in a country: existing laws, practice and culture of dispute resolution, perceived need of mediation, ADR experience, key stakeholders, NGOs and international organizations, and sustainable financing. These factors, which can be modified according to the country's specific features, are<sup>13</sup>:

- **Existing laws and regulations** creating a legal environment for resolving commercial disputes. Does the country comply with international standards?
- **Practice of dispute resolution in civil cases:** functioning of (commercial) courts and other legal institutions and professionals associations (e.g. bailiffs, attorneys); number of procedures needed for contract enforcement; time needed for enforcement; court fees and legal fees; access to justice; geographical access to the courts; corruption; other strength and weaknesses, etc.

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<sup>13</sup> There are many more possible problems that can and should be assessed, depending on the circumstances. Also note that answers to these and other questions may differ depending on the regional differences between the parts of the country (and cities).

- **Culture (of dispute resolution).** Litigious-ness; social acceptance of the settlement; rate of settlement within and outside of courts; trust in the court system and judiciary; perceived and real corruption; approach to legal and judicial reform; economical and social background; legal and cultural background of the region, etc.
- **ADR experience.** Existence of traditional or modern alternative methods; successful and unsuccessful attempts of introducing ADR; public awareness of ADR and particularly mediation; former ADR trainings; the pool of trained and trainable mediators.
- **Perceived need to introduce mediation** and identification of areas where it would be particularly helpful. When do the parties give up on court proceedings and why, what disputes are perceived appropriate for mediation? Is the country obliged/pressured to modify its system (by international organizations, neighboring countries, etc.)?
- **Key stakeholders and political support.** Key groups and individuals holding stakes in ADR and their declared and potential support for the project, particularly. Judiciary, Ministry of Justice, small and medium enterprises (SMEs), bar associations, and business organizations. What are their strengths, weaknesses, successes; key opponents; areas requiring capacity building?
- **NGOs and international organizations interested or involved in ADR.** Past, present, and future projects with ADR component. Areas of common interests, possible financial contributions or projects involving economy of scale (e.g. common mediation trainings).
- **Sustainable financing.** Available sources; restrictions and goals of donors; financial needs of the project, etc. The duration of the project is not likely to be shorter than three years.

Generally, mediation is most needed and should work best where transactional costs of litigation and other court procedures are particularly high. “High transactional costs of litigation” can be understood broadly, as any obstacle to efficient resolution of dispute, whether dilatory, monetary or other costs that raise the expense of resolving a dispute for a party. Mediation should also be introduced where the level of settlement is particularly low. Although such low settlement level may mean a culture that is adverse to mediation, even gradual change in this type of culture will be an important achievement.

An important exception to that rule is where the court system is so inefficient and the justice is delayed to the point that it poses no or little threat to the parties. The consequences of delayed justice take away incentives to settle for many

parties. This phenomenon of no “shadow of the law (court)” is described later in this chapter.

Assessment of the above issues should be made through analysis of legal documents, statistical data and, most importantly – interviews with and polls of key stakeholders (particularly judges, bar members, potential mediators, legal experts, and SMEs).

## 2. Limitations of Mediation

Project managers have to understand when mediation is appropriate and when it is not. The right conditions have to be in place in the country for a mediation project to be successful and to achieve the intended objectives. Unlike a judge, a mediator cannot force the parties that are in dispute to resolve their dispute through mediation (as mediation is a non-binding procedure). The parties need to have the right incentives to choose mediation over litigation or arbitration. This is something that is often ignored and is the main cause of many failed mediation projects.<sup>14</sup>

### Box 1: No Incentives for Parties, No Mediation

The following is an illustration of what could happen when the right incentives for the parties in dispute are not in place:

“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 ADR 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?”<sup>15</sup>

The absence of these incentives along with other prerequisites and conditions will jeopardize the success of the project. Under such circumstances, it is not advisable to engage in a reform project. The experience of the WBG in implementing ADR projects confirms that creating the right incentives for the party is critical for the success of the project.

There are a number of ADR projects in which the WBG participated that have shown meager results (see table 2 below). The common explanation in most of these projects is that they failed because there were no incentives for the parties to resolve their disputes, or the parties were not aware of the incentives. In other words, in these countries, most of the parties referred to mediation did not have or

<sup>14</sup> See “Alternative Dispute Resolution – when it works, when it doesn’t”, PREM notes, WB 2005, Richard Messick, with subsequent changes by L. Rozdeiczer, and Alejandro Alvarez de la Campa.

<sup>15</sup> Extract from “Alternative Dispute Resolution – when it works, when it doesn’t”, PREM notes, WB 2005.

did not see enough incentives to attempt to mediate their disputes with other companies. Usually, the way to mitigate these problems is to establish an appropriate mechanism for case selection (the case involving the Turkish manufacturer and a Palestinian buyer would not have been selected for mediation if these mechanisms were in place), introducing awareness about the benefits of mediation or other ADR mechanisms and other incentives described in Chapter 4 of the manual. In other successful WBG projects (as we will show later in the manual) the parties had the incentive to mediate and the appropriate cases were referred by the courts to mediation/arbitration. Further in the manual, in Chapter 4, it is explained how to establish the right incentives and methodology to select appropriate cases for mediation.

**Table 2: Results of mediation and arbitration projects in Albania, Ecuador, the West Bank and Gaza and an arbitration project in Sri Lanka**

Country	Months program in effect	Cases submitted	Cases resolved (% of total)	Cases pending
Albania	16	8	0 (0%)	1
Ecuador	10	888	214 (24%)	0
West Bank and Gaza	12	13	3 (23%)	6
Sri Lanka	60	317	84 (26%)	N/A

Source: World Bank

It must be noted that one of the key differences between mediation and arbitration is the way in which parties enter the process. While mediation is usually a voluntary process, most parties go to arbitration because they had committed to it through the arbitration clause in the contract establishing the transaction that was a ground for the dispute (i.e. before the dispute arose). If there is an enforceable arbitration clause, the parties do not have a choice in participating in the arbitration proceedings, and later are bound by the arbitration award.

SMEs should also be encouraged to include mediation clauses in their contracts. Parties to such agreements will be obliged to meet for mediation and attempt to mediate (in some jurisdictions there is also a requirement to mediate “in good faith”). Since mediation is a non-binding process, parties still can decide whether they want to settle and cannot be forced to do it. It is not clear whether mediation clauses are enforceable and how the sanctions for non compliance will vary under different jurisdictions<sup>16</sup>. For examples of Mediation Clauses and Corporate Pledges, see Appendix C.

<sup>16</sup> See e.g. Singapore Journal of Legal Studies, (July, 2001), Joel Lee, Mediation Clauses at the Crossroads; Texas Journal of Business Law (2004) D. Ryan Nayar, TEXAS ADR 101: ANALYZING THE USE OF COMPULSORY MEDIATION CLAUSES IN COMMERCIAL CONTRACTS: ADVANTAGES, ENFORCEABILITY, AND DRAFTING GUIDELINES.

The lack of incentives is possibly the most common reason for failed ADR projects – the *lack of demand* for mediation. The biggest problem in most countries is a low perceived demand for mediation services and the small number of appropriate cases going to mediation. Thus, in designing and executing the project, more attention and resources should be directed to creating greater incentives to participate in mediation, selecting appropriate cases, and informing parties of potential benefits and limited risks of mediation.

### 3. Which Problems Can Be Ameliorated by Introducing Mediation or Other ADR Mechanisms?

Mediation is a good tool to, at least partly, achieve the following objectives:

- Reduce court backlogs.<sup>17</sup>
- Reduce time necessary for contract enforcement.<sup>18</sup>
- Reduce costs of dispute resolution (e.g. by limiting court and legal fees).<sup>19</sup>
- Increase number of in-court settlements (facilitated by judges or mediators).
- Reduce formality and complexity of the existing processes.
- Reach geographically dispersed population.
- Teach judges some elements of case management.
- Increase satisfaction with dispute resolution.

<sup>17</sup> Most data supports the claim that mediation reduces backlog in courts in various countries. Most of the parties and their counsel (65-80%) believe that mediation and arbitration reduce the time and costs of resolving commercial disputes, as compared to litigation. See Lipsky, D. B. and R. L. Seeber (1998). *The Appropriate Resolution of Corporate Disputes; A Report on the Growing Use of ADR by U.S. Corporations*, ICR Cornell/Peric Institute on Conflict Resolution, at 15-19, and AAA (2003). *Dispute-Wise Business Management*. New York, American Arbitration Association, at 9-10. But see Mack, K. (2003). *Court Referral to ADR Criteria and Research*. Melbourne, Australian Institute of Judicial Administration Incorporated and the National Dispute Resolution Advisory Council, Ch. 4. However not all data is consistent. Particularly one study concludes that mediation has no impact on reducing delays in courts – see Kokkali James et al (1996) *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act Santa Monica, CA: RAND*.

<sup>18</sup> Although mediation itself is not an enforcement mechanism and mediators alone do not possess powers of compelling the disputants to enforce a contract there are different ways in which mediation can shorten the time necessary to enforce a contract. Successfully mediation can drastically shorten the time necessary for reaching a solution (mediation usually is resolved in one session). Mediation out of court system can resolve the conflict at a very early stage (before the case is brought to the court).

<sup>19</sup> The subject of cost savings for various ADR procedures is a complex one, and the results vary significantly depending on the types of cases and court settings, as well as the sophistication of the research. In addition, a distinction must be drawn between cost savings to the disputants and savings to the legal system. In general, there has been no persuasive evidence of the latter, but some evidence of the former. See McEwen, Note on Mediation Research, in Goldberg, Sander, Rogers and Cole at 162-164. Compare Kokkali James et al (1996) *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act Santa Monica, CA: RAND*, with Ontario study (Han, Robert and Bar, Carl (2001) *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive Summary and Recommendations Ontario, Canada: Queen's Printer*). See also AAA survey p. 19 - 20 (91% of corporate counsel surveyed believed that mediation saves money, 71% thought so about arbitration) and Brett, Barsness and Goldberg 12 *Neg. Journal* 3 1996 at p. 263) who conclude that mediation is far less expensive than arbitration. Litigation costs in civil law countries are generally lower than in civil countries – see description of mediation in Germany in Appendix E, page 68.

- Effectively handle complex multiparty disputes.
- Effectively handle disputes where sophisticated expertise is needed.
- Increase access of disadvantaged groups.<sup>20</sup>
- Support case management and create models for further court reform.
- Reduce high level of tension in business communities<sup>21</sup> and promote long-lasting relationship between business partners.
- Modify the “culture of dispute resolution” based on adversarial proceedings and the assumption of the zero-sum game, and hostile mindset.
- Respond to the concerns of equity and relationship.
- Bypass discredited and/or corrupted courts, and assist in eliminating corruption.

When considering the introduction of commercial mediation, it is important for the project manager to consult extensively with firms in the country about the main reasons they should go to mediation instead of litigation. Firms will be the main beneficiaries of commercial mediation and therefore are the best positioned to determine which problems can be solved by introducing mediation. An interesting perspective on this is that of American firms in choosing mediation over litigation (see Appendix D).

Mediation may be an efficient tool in eliminating corruption. By avoiding litigation, parties have a choice to bypass the courts. For example, it has been observed that mediation projects (including but not limited to commercial court systems) in a few Latin American countries, such as Argentina, Bolivia, Ecuador, Nicaragua, and Peru,<sup>22</sup> could directly have a positive impact in the serious problems of systemic corruption in the judicial system, violence, and an inability to communicate peacefully within society at large.

Another form of mediation that has proven to be successful in reducing corruption is that of the ombudsman.<sup>23</sup> The meaning of “Ombudsman” differs depending on the jurisdictions. In the United States, it is a form of mediation. This notion is differently understood in Europe, where ombudsmen are often found around indus-

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<sup>20</sup> This particularly concerns illiterate and/or poor population who cannot afford to navigate conventional legal channels. In this case, however, there is a danger that these groups may receive a “second class” justice and be in fact forced to settle on less advantageous terms. See Grillo, T. (1991). “The Mediation Alternative: Process Dangers for Women.” Yale L.J. 100.

<sup>21</sup> This may be particularly significant in post conflict regions where ADR models can emphasize the importance of reconciliation and relationships over retribution and “winning” in dispute resolution.

<sup>22</sup> See Moyer, T. J. and Emily Stewart Haynes (2003). “Mediation as a Catalyst for Judicial Reform in Latin America.” Ohio St. J. on Disp. Resol. 18. Part IV of this paper provides descriptions of actual mediation programs in place in Argentina, Bolivia, Ecuador, Nicaragua, and Peru.

<sup>23</sup> See Ibid, Erbe, N. D. (2006). “Appreciating Mediation’s Global Role in Promoting Good Governance.” Harvard Negotiation Law Review 11(Spring).; Transparency International, <http://www.transparency.org> (last visited Feb. 28, 2006).

try sector consumer *adjudication*, or public authority adjudication, for example, over financial or health services, or pensions or government administration - sometimes legally binding on the organization or created by statute. Some such ombudsmen use mediation as part of their preliminary handling of such cases.

However, a note of caution is necessary because mediation is not always useful in eliminating corruption. Parties are normally not compelled to mediate and to settle. A party may refuse to settle and try to “benefit” from the corrupted court system. Therefore, both parties must want to avoid the corrupted system and choose mediation as an alternative.

One crucial goal of any mediation project that is often overlooked is raising the awareness and capacity of judges to facilitate settlement and judicial management. One of the results of the project should be an increase in the rate of in-court settlement facilitated by the judge (not by mediators). Through proper training and better understanding of mediations, judges should be capable of not only effectively choosing cases for mediation but also settling more cases during court proceedings. The institutionalized ADR-judicial mediation, where sitting judges act as mediators in programs closely integrated with the traditional adjudicative system mechanism is probably most developed in Quebec. This model is particularly important and interesting. Unlike the various experiments with pilot projects or limited initiatives in mediation that other jurisdictions have tried, the Quebec justice system now integrates adjudicative and mediational justice at every level and in virtually every area of law, including family matters, civil and commercial law, administrative matters, and, recently, criminal law<sup>24</sup>.

Some of the objectives that mediation is not likely to achieve include<sup>25</sup>:

- strengthening the rule of law,
- setting precedent and establishing legal framework,
- promoting consistent application of law,
- addressing power imbalances between the parties,
- addressing discrimination or human rights problems,
- forcing parties to participate in ADR or court proceedings, and
- causing punitive or deterrent results.

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<sup>24</sup> See Otis, L. and E. H. Reiter. (2006). “Mediation by Judges: A new Phenomenon in the Transformation of Justice.” *Pepperdine Dispute Resolution Law Journal* 6: 351. and literature cited therein.

<sup>25</sup> See literature on when mediation works cited above and Messick, R. E. (2005). *Alternative Dispute Resolution: When It Works, When It Doesn't*. Washington, DC, The World Bank, Public Sector Group: 1-4.

***Weak “shadow of the court”***

The effectiveness of mediation projects can be seriously limited by an inefficient court system that produces particularly long delays in making enforceable decisions. Frequently, one of the most important incentives for the parties to mediate is to avoid court decisions. When a potential court decision is postponed many months and often years, at least one of the parties (usually a debtor) has no incentive (no threat) to pursue mediation. If this party can successfully use dilatory tactics or rely on court’s inaction, such party will not be willing to settle in mediation. In other words, the disputants realize that they mediate “in the shadow of the court,” meaning that the court is an alternative (or a threat) in case they don’t reach settlement in mediation. Therefore, mediation may not be effective when the court system is so inefficient that it does not provide a credible threat of a court resolution in a foreseeable future.

However, there are ways to minimize the risks of failure under these circumstances, if the project manager still thinks that introducing mediation makes sense. Because one of the main goals of the project is to speed up enforcement of contracts (e.g. through clearing of the court dockets) one should not argue that the mere existence of the problems to be corrected should prevent the project from taking place<sup>26</sup>. The goal of the project is not to channel all or even most cases to mediation, but to select a relatively small percentage of cases that are suited for this procedure and help parties achieve settlement. Once the mediation starts working and clearing out the dockets, the shadow of the court will likely become stronger and more parties (threatened with foreseeable court decision) will likely agree to mediate.

The lack of court threat may be also present when there is high corruption in courts (e.g. case of Albania). But high corruption in a country should not automatically hold up a mediation project. Even though the corruption may be widespread, it is probably not equally present and accepted in all courts. Therefore, finding a less corrupted court or president of the court, who is willing to monitor the flow of cases and fight corruption might be a good argument for starting a pilot project there. Also, corruption is not likely to concern all cases, and those corruption-free cases may be more likely to settle. In case of corruption, mediation may start up other court reforms including closer monitoring of cases, and case management that can battle corruption more effectively. As proved by successful reduction of corruption in Latin American countries, mediation may be a useful tool in achieving this objective.<sup>27</sup>

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<sup>26</sup> As shown in most research mediation can successfully limit costs and delay of the contract enforcement.

<sup>27</sup> See Moyer, T.J. and Emily Stewart Haynes (2003). “Mediation as a Catalyst for Judicial Reform in Latin America.” *Ohio St. J. on Disp. Resol.* **18**.

If mediation, in theory, seems to be the right solution for improving some of the problems with commercial dispute resolution, one has to see if the conditions are in place for starting a mediation project.

#### 4. Preconditions/Prerequisites for Beginning the Project

As soon as it has been determined that mediation, in theory, could rectify some of the problems with the resolution of commercial disputes in a country, the project manager should decide whether there are necessary conditions to begin a mediation project. Potential preconditions to the project can result from any of the problems identified in the assessment. However, at this stage, it is crucial to decide at the inception of the project which of many difficult conditions in a country make it hard to succeed or too risky to try. In other words – what are the prerequisites for beginning a mediation project?

Out of the many potential obstacles, there are a few conditions necessary for a mediation project to begin. If the following conditions are present, the project has a fairly high probability of succeeding:

- Private sector demand for alternative ways of resolving disputes. Incentives for the parties to choose ADR over litigation.
- High transaction costs” of resolving commercial disputes through courts and/or perceived need for mediation.
- Support of the critical group of key stakeholders, most importantly the judiciary and particularly the president of the pilot court (or other key stakeholder group if there is a plan to establish a “private” mediation center<sup>28</sup>).
- Possibility of securing financial resources for at least three years to implement the project.
- Possibility of establishing enforcement mechanisms for ADR and realistic chances of passing and enforcing laws on mediation in a reasonable time. (This will be the case where there is no law directly regulating mediation and local stakeholders in the country, particularly the judiciary and the Ministry of Justice believe that a law introducing mediation is necessary).

If any of these preconditions are not viable, then chances for project success will decrease. There are, of course, ways to make these conditions a reality, but the project manager should know that they are the most critical elements for a project to be successful and that most of the energy at the beginning of the project has to focus on these conditions.

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<sup>28</sup>The establishment of a mediation center will be discussed later in the manual. Since in this manual we argue that beginning with a court-connected mediation center is usually the best option, at this point we presume the need of judicial support.

# Chapter 3: Design Phase

## 1. Key Elements of the Design

All the research and interviews show a crucial need for a precise and detailed assessment of a mediation project at the planning stage, before committing to and designing the project. It should be first decided whether the necessary preconditions exist for carrying out the project (see previous chapter). Only if they do should planning begin for the project design<sup>29</sup>. The plan should contain the assessment presented in the previous chapter and at least the following elements:

- Detailed analysis suggesting actions and steps leading to achieving a self-sustainable efficient, institutionally coordinated, environment for commercial ADR.
- List of all existing (and potential) key stakeholders, their roles and incentives in the project, and how to approach (and organize) them.
- Legislative campaign.
- A selection of courts associated with the project.
- A mediation center.
- A public awareness campaign.
- Cooperation with NGOs and other organizations interested in development of ADR.
- A system of evaluating the project.
- Trainings of mediators, judges, and other stakeholders (including intensive trainings and general awareness seminars and workshops).
- A detailed cost estimate for each recommended option and the budget implications.
- Defining indicators and measurable development targets that monitor the potential impact of introducing each recommended option.

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<sup>29</sup> Please note that most of the advice relating to planning of the project is also applicable in the implementation phase and vice versa. Often distinction between both phases is not very clear.

## 2. Identifying Local Stakeholders: Building the “Support Coalition”

### 1. Main Stakeholders: support coalition

Having strong local partners was identified as the most important element in the success of the project, according to interviews conducted during preparation of this manual and other collected data<sup>30</sup>. Creating a strong stakeholder/leader group is not only the way to introduce mediation but a goal in achieving sustainable mediation in a country. Therefore, one of the most important tasks of the project manager is to identify the key stakeholders, support them, and increase their mediation capacity.

The most obvious stakeholders include:

- the Ministry of Justice;
- judges, and particularly the President of the pilot court;
- chambers of commerce and other business organizations;
- micro and small and medium enterprises (MSMEs);
- bar associations;
- the Ministry of Finance;
- NGOs and international organizations, including donors;
- representative of mediators (or mediators’ association);
- center administrators and staff; and
- representatives of academia (local university or country expert).

It is important to choose a good organization mix and a committee consisting not only of the top officials but also people who would be actively involved in the project. As observed by a few local stakeholders, sometimes a local party has more credibility than an international organization. Therefore, when seeking partners, the credibility should be an important aspect to consider.

After identifying the most appropriate stakeholders, the involvement of other interested parties (both individuals and institutions) in the projects should be discussed with them. These can be other organizations or individuals not directly working on ADR but dealing, for example, with families, civic movements, post-war reconciliation bodies or other entities that might use mediation and ADR to achieve their goals other than introducing commercial mediation. Finally, there are members of the general public potential parties to the disputes.

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<sup>30</sup>The importance of the stakeholders and the goal of the project was nicely summarized by the head of the mediation projects in the Balkans who said: “*We are in the business of spreading enthusiasm*”.

## 2. Choosing the leading local champion(s)

The local champion will be the key driver of the project. The project manager will only lead them in the right direction and will offer advice on what to do. However, if the local champion is not convinced of the reform and does not fully support the reform, the implementation and overall success of the project will be at risk. Therefore, it is critical for the success of the project to secure the support of a strong local champion in the design phase. If there is no support from the local stakeholder, it is better to drop the project than to try and convince them little by little through the development of the project. There is no ideal local champion, as we will see with the examples below. However, these are some basic characteristics to look for in the local champion:

- Strong political clout.
- The ability to make decisions and implement them.
- Good understanding of the judiciary, ADR and its benefits.
- Possession of financial resources that could be devoted to the project if needed.
- Support and acceptance as champion from other stakeholders.

Before implementing the project, it is highly recommended to sign a Memorandum of Understanding (MOU) with the local champion to ensure commitment. An MOU is basically an agreement between two or more parties to execute a joint project. The MOU will describe the responsibilities of each party to achieve the desired results. See Appendix E for an example of an MOU.

In Box 2 are very brief descriptions of various choices of local champions that were pursued by five Balkan countries. Note that the projects in Bosnia, Serbia, and Macedonia were designed to pursue a very similar model. Although they operated in supposedly very comparable environments, shared the same legal culture, had similar training, and the same type of public awareness, the final project designs were different because of the choice of different leaders/champions.

A note of caution is necessary regarding the election of stakeholders who are too strong and have their own agenda. Sometimes, such stakeholders may be detrimental for mediation or may even cause some damage to the mediation process. This is because, at some point, the stakeholder may care more about his or her own interests (e.g. as mediators) and less about the mediation process itself and the benefit to the parties. An example of a very strong and effective stakeholder is the Association of Mediators in Bosnia. The association quickly drafted and effectively pushed for the mediation law that gives the association very broad powers, including provisions giving them the right to set mediators' fees and certifying mediators.

## Box 2: Securing the Support of Local Champions

**Bosnia & Herzegovina**, which was the model pilot project for other countries, had an inclusive type of an NGO “The Mediation Association” as the main player. This association encompassed other main stakeholders so that no one would be excluded. One of the benefits of this model is the flexibility to select a champion/s within the association. One or more groups involved in the association (like judges, NGOs, ministries or mediators) can easily become the champion/s. With such a structure, it is also possible to have more than one champion or different champions for different activities. For example, the Ministry of Justice could lead on the issue of legislation, mediators and academics on training, and bar representatives on ethics. In fact, all activities of the project in Bosnia (drafting laws, mediating, training, etc.) happened through or with a strong involvement of the Mediation Association. Another flexible and highly recommended option is an advisory board at the Ministry of Justice that can play a role of “an association” with a stronger national standing and support of the Ministry.

In **Serbia and Montenegro**, judges wanted to have more control over the mediation process, so they pushed for a court-annexed model. Only judges were trained in mediation and they are the ones who perform the mediation. Thanks to the strong support of the president of the municipal court and the engagement of many judges, the program produced very good results. On the negative side of this approach, it has to be noted that one of the consequences of the strong judicial domination is little data regarding some aspects of the project, which judges might be reluctant to evaluate.

In **Macedonia**, no association was strong enough to push the law and the judges did not seem to be interested in mediation, so the project team decided to work with the Ministry of Justice. They also received support of the Macedonian business lawyer association and strong opposition from the bar association.

In **Albania**, the mediation and arbitration center managed to gather great support from leaders of the Ministry of Justice, the bar association, local universities, and the business community. But it was not supported by the local judges and courts. They created a private mediation/arbitration center, which did not cooperate with the court. This was a critical element that influenced the success of the project. This is the least successful project of ADR in which there was WB participation (for a detailed case of the WB’s Albanian project, see Appendix F).

In **Slovenia**, very few institutions supported the introduction of mediation. Among the institutions against it were the Ministry of Justice and the bar association. However, the whole process was finally driven by the president of one of the courts who was absolutely convinced of the benefits of mediation to the point that he allocated his own budget, time, and enthusiasm to implement the project. He also encouraged judges in his court to pursue mediation. The project was based on general rules of civil procedures, and was very successful.<sup>31</sup>

To strengthen the position of mediators, the association also proposed a provision that would give mediators the power of the court, allowing them to give final approval of settlements and provide the execution clauses of contracts. By giving mediators court’s authority, they also passed on to them a great responsibility and potential liability for damages. Such provision, in fact, excluded non-lawyers from being mediators in most cases, as they would not be able to decide whether the agreement is legal and can be enforced. This provision also makes mediators potentially liable for erroneous confirmation of the settlement without giving them the appropriate tools to protect themselves and the parties against fraud, misrepresentation, or ignorance of the law.

Although champions are crucial for the project, the system should not rely just on one strong leader (see Box 3). Stakeholders may change, and so can their plans and priorities. Sometimes they turn out to be unreliable or may start pursuing their

<sup>31</sup> It should be noted that according to the project managers from Bosnia, Serbia and Slovenia, the projects would have not been implemented without the support of the president of the pilot court.

**Box 3 : Choosing the Right Stakeholders in Pakistan**<sup>32</sup>

**Project Clients**

- Ministry of Law, Justice & Human Rights
- High Court of Sindh

**Project Champions**

- Minister of Law, Justice and Human Rights
- Chief Justices of Pakistan and Sindh
- Attorney General
- President of the Bar Association
- President of the Karachi Chamber of Commerce & Industry

**Project Stakeholders**

Ministry of Law, High Court of Sindh/District & Sessions Court, Bar Association, Federal Judicial Academy, Small and Medium Enterprise Development Authority (SMEDA) & the Karachi Chamber of Commerce and Industry (KCCI)

own interests at the cost of the broader perspective. Therefore, if possible, it is good to have at least two champions who can keep the balance and take over in case of withdrawal of the other one. Having said that, the risk is of giving too much power to a leader may be worth it, if this seems to be the most reliable chance for success of the project.

Additionally, the project manager will need to consider the possibility of coordinating with other institutions or/and NGOs. Because of the very broad scope of ADR use in many legal and non-legal areas, there is some probability that other institutions or NGOs will be engaged in some sort of ADR initiative. This was the case in the Balkans, where after the war there were many organizations interested in developing ADR in many fields such as: sustaining the peace, strengthening civil society, human rights work, political mediation, legal and judicial reform in many sectors, etc. Because of the comparable goals and tools utilized by many projects, there is also a substantial chance that there will be possibilities for creating value through joint actions, cross-marketing, cross-training and exchange of experts. Such possibilities should be identified in the project assessment and monitored throughout the course of the project.

Finally, once the main stakeholders have been identified, it would be advisable to create an advisory committee or advisory board to monitor the project. The creation of this committee or board will give ownership to the main stakeholders and champions and will serve as a management and monitoring tool. This body should be created in the design phase of the program to allow the board to be involved in all important decisions about the project.

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<sup>32</sup> IFC - PEP MENA ADR project in Pakistan

### **Box 4: An Advisory Board Will Create Ownership. Experience from Bosnia-Herzegovina**

#### **Functions of the Advisory Board**

- Initial briefing, review, and advice on the overall procedures and forms.
- Strategic guidance in all aspects of pilot project implementation.
- Convening of regular bi-monthly meetings to review progress of the pilot project.
- Reviewing pilot project results in the final phase and providing recommendations for further activities.

#### **Members of the Advisory Board**

The Ministry of Justice (chair or co-chair), the President of the partner court (chair or co-chair) or its representative, the IFC, the Association of Mediators, Mediation Center Coordinator/Manager, Court Administrator, the Judicial Association, industry associations.

*Source: Mediation Project in Bosnia, IFC's PEP SE*

### 3. Potential opposition to the project: how to avoid it or mitigate it

Many ADR projects have ended up failing because of the lack of support or even opposition of interest groups or constituencies to the implementation of the project. There might be many reasons for an interest group or stakeholder to oppose the project, but the main reason is usually that they see the implementation of ADR mechanisms as a threat to their interests. However, the reasons that a stakeholder is against the reform should be identified during the diagnostic to find solutions or avoid confrontation with the specific stakeholder.

Opposition can come from all the different stakeholders. Here are some key elements to bear in mind when encountering detractors of the proposed system:

1. A stakeholder who is initially opposed might become supportive later on if the right messages are delivered to this opposition group and the right incentives created. More information on this is provided further in the manual (Chapter 4).
2. Not all stakeholders are needed for the project to be successful (although the more supporters the merrier), and there are alternative ways to approach the project. For example, if there is a strong opposition from judges to the establishment of ADR mechanisms, the project manager should consider establishing the system outside the court. Likewise, if there is strong opposition from the national government, the project manager should consider a regional or local approach<sup>33</sup>.

It is highly recommended, though, to first try to understand the reasons for opposition to be able to offer solutions and get the support of as many stakeholders as possible. Only after this has been tried, it would be advisable to consider not involving stakeholders in the project.

<sup>33</sup> See Scott Brown, Christine Cervenak, and David Fairman "Alternative Dispute Resolution Practitioners Guide", March 1998.

### 3. Designing the Type of Mediation Center

One of the key decisions in the project is what kind of mediation center should be created. It is very important to ask this question at the beginning of the project. The answer will, to a large extent, determine the structure of the project. The three basic options for the relation between the center and courts include:

**1. Free-standing (private) mediation** – centers or programs organized without any court connection or component. This is usually run by a Chamber of Commerce, NGOs, Trade Associations, international organization such as the WBG, or for-profit organizations. Agreements arising out of private mediations are enforced like contracts. The following box provides some insight on the advantages and disadvantages of such a system that should be carefully considered by the project manager before deciding that this is the appropriate system for the country.

#### Box 5: Pros and Cons of Free-Standing Mediation<sup>34</sup>

**The main advantages for establishing such a system:**

- Flexibility in setting the timetable for resolving the dispute.
- The case does not have to be registered with the court.
- The parties do not have to meet with the judge.
- There are no court fees.

**However, a free-standing mediation needs to address the following issues:**

- There is no steady and predictable inflow of cases (probably the most serious problem).
- The parties are not informed properly by a judge about mediation and what it entails.
- Finding a qualified and certified mediator.
- Agreement is not directly enforceable, unless otherwise specified in the legal system of the country.
- No use of courts' resources.

Source: Mediation Project in Bosnia, IFC's PEP SE

**2. Court-referred systems** – There are two possible court referred systems:

- **Court-annexed** – These are ADR programs or practices authorized and used within the court system and controlled by the court. Cases are referred to mediation by courts only. Often judges or other court officials serve as mediators. An agreement arising out of court-annexed program is enforceable as a court order (unless otherwise decided by the parties).
- **Court-connected<sup>35</sup> mediation** – These are mediation centers that are linked to the court system but are not a part of it. Cases are either referred by the appro-

<sup>34</sup> See "ADR Platform; Pilot Project Management Manual for Court-Referred Mediation" IFC/SEED, 2005.

<sup>35</sup> This type of mediation center is sometimes called "court-referred mediation". However, in this Guide we want to emphasize that such center may and should also admit cases that are not referred by the court but come independently from the court system. Please note that court-connected mediation is not necessarily court-annexed. Court-connected mediation does not have to be a part of the court system. Quite often it is an independent legal entity co-operating with the court on the basis of an agreement.

appropriate courts or from out of the court (without having the case filed in the court, or after filing but without judge's intervention)<sup>36</sup>. Agreements arising out of court-connected mediation are usually enforceable as court orders. In most cases establishing pilot court-connected mediation systems will be superior to other options.

### Box 6: Pros and Cons of Court-connected Mediation

**Court-connected mediation would usually be superior to a private center or free-standing mediation because of the following reasons:**

- It allows cases both from inside and outside of the court system.
- It provides a steady flow of cases from the courts.
- It can achieve objectives of mediations that are not likely to be attained by private centers, such as:
  - reduced court backlogs;
  - increased level of in-court settlements (facilitated by judges);
  - changes to civil procedure and legal culture;
  - reduced formality and complexity of the existing processes;
  - lessons for judges on some elements of case management;
  - support for case management and other court reforms;
  - modification of dispute resolution culture and hostile mindset within courts;
  - creation of a model for further court reform.

**Some of the obstacles to court-connected mediation include:**

- necessary approval and support of judges;
- parties' perceptions that mediation is a part of the court system and litigation process; and
- geographical limitation to places where there are courts (unless cases can be referred to other cities/venues).

Court-connected mediation would usually be more beneficial than court-annexed mediation because of the possibility of admitting cases from out of the court system and because of the need for a less rigid legal framework. Court-connected mediation easily permits the establishment of many centers and the creation of competition among them. In such case, judges and parties would select mediation providers with the highest skills and quality of services. Ideally, after some time, a competitive market for such services should be formed.

For the above reasons court-connected mediation facilities should be preferred, unless co-operation with judiciary is not possible or other stakeholders that are able to facilitate establishment of private ADR seem to have dominating power. For example, in certain Latin American countries (Argentina, Bolivia, Ecuador, and Colombia) the Chambers of Commerce have such a strong position that they are able to effectively support development of both arbitration and mediation.

It has to be noted that the stakeholders in the country are not always willing to establish a court-connected mediation system. In some countries, judges will want to have mediation under their control (e.g. Serbia, Slovakia, and Uganda). Under such circumstances, court-annexed mediation may be the only option to get support from the judiciary.

<sup>36</sup>We assume that court-connected mediation centers encourage and admit cases referred from outside of the court system, and thus performing the function of the private ADR provider. In practice, some court-connected centers do not admit such cases, except for organizational difficulties there seem to be no serious arguments for such approach.

Finally, if a court-annexed or court-connected mediation center (both systems are court referred systems) is going to be established, a decision should be made on whether mediation will be **voluntary or mandatory** (in all or certain cases). In a voluntary system, the judge would offer the parties the possibility of resolving the dispute through mediation or another method. If both parties agree, the judge refers the case to the mediation center. A mandatory system means that the judge has the power to order the parties to attempt to resolve their dispute through mediation or another method.

### **Box 7: Practical Outline of How a Court-referred Voluntary Mediation System Would Work**

A fully operational court-referred mediation process with an enabling legislative framework is relatively straightforward. It involves the following steps:

*Step 1:* Judges who are trained to know which cases are amenable to mediation refer such case to be mediated.

*Step 2:* The court invites the parties to use mediation, usually by letter of invitation followed by an initial briefing by the judge. If either party refuses mediation, the case proceeds through the court in the normal manner.

*Step 3:* If both parties accept mediation, the court passes the names of the parties to a designated Mediation Center. The Center then contacts the parties to arrange a mutually convenient date and time for the mediation session.

*Step 4:* The mediation takes place at the Mediation Center. An experienced mediator guides the process, helping both parties understand the other's perspectives and find a mutually agreeable resolution. Most mediated cases can be resolved within a three-hour period, with occasional follow-up sessions being required.

*Step 5:* If there is a resolution, a mediation agreement is drawn up at the end of the mediation session, and either signed then or at a later date after parties have had time to review the agreement. The court is informed and closes the case.

*Step 6:* If there is no resolution from the mediation, the court is informed and the case continues through the normal court process.

*Step 7:* Data is collected throughout the process to monitor its impact.

*Step 8:* If there is no enabling legislation in place to legitimize the process described above, the judge may have to ratify the mediated agreement, likely involving an additional session with the parties.

In a country that does not have the required supporting infrastructure, this process would be applicable after the following elements are in place: (i) enabling legislation; (ii) a governance and management structure for the project; (iii) a mediation center; (iv) trained mediators; (v) trained judges and; (vi) awareness of the value of mediation in the judicial sector, business sector, and general public.

*Source: ADR Platform; Pilot Project Management Manual for Court-Referred Mediation, IFC/SEED, 2005*

At first sight, the concept of mandatory mediation appears to be an oxymoron. How can you force someone into a non-binding procedure? Since we say that mediation is voluntary, shouldn't it be up to the parties to decide whether to enter into it?

### ***Mandatory mediation***

The idea that a good-faith, non-binding process may be mandatory seems to be an oxymoron. How can a non-binding procedure be mandatory? To understand that question, a sharp distinction needs to be drawn between the outcome of the mediation and its process. Mandatory mediation still remains non-binding in a sense that nobody can force the parties to come **to a binding resolution – to settle**. It is, however, mandatory because the parties, without their consent, can be required to

**try to resolve** the dispute. Mandatory mediation can take place in a court-annexed mediation, and must be based on a clear statutory authority.

Mandatory mediation has many benefits, including higher efficiency<sup>37</sup> and the ability to bring parties to the negotiation table, which often involves overcoming the reluctance of the party to initiate settlement discussions for fear that the other side will perceive this as a sign of weakness on the part of the initiating party<sup>38</sup>. Mandatory mediation can also work in cases where a party does not really understand mediation or is not aware of the benefits that it can bring. It can also work well in cases where mediation would be beneficial to the party that is ill advised by its counsel not to try it. The greatest detriment of mandatory mediation is negation of the party empowerment and the principle of voluntary consent to participate in mediation. Parties may also think that mediation is similar to litigation<sup>39</sup>. Examples of projects where mandatory mediation have not worked well include India, and the Philippines<sup>40</sup>.

Civil courts in Ontario, Canada, are examples of successful, mandatory mediation programs<sup>41</sup>. In these programs, all civil cases (except for family cases) were directed to mandatory mediation. A thorough evaluation of all the civil cases during a 23-month period provided strong evidence that mandatory mediation has resulted in:

- significant reductions in the time taken to dispose of cases,
- decreased costs to the litigants, and
- a high proportion of cases (roughly 40 percent overall) being completely settled earlier in the litigation process – with other benefits being noted in many of the other cases that do not completely settle.

Additionally, both litigants and lawyers have expressed considerable satisfaction with the mediation process.

Research results show that the settlement rates of mandatory and voluntary mediations are similar, even though the cases that are voluntarily referred to mediation parties expect the settlement and in mandatory ones not<sup>42</sup>. There are also some results that show a lower rate for mandatory settlement. In one recent survey, the settlement rate for voluntary mediation was 71 percent and for mandatory medi-

<sup>37</sup> For detailed empirical research see: Hughes, P. (2001). "Mandatory Mediation: Opportunity Or Subversion?" Windsor Y.B. Access to Just. **19** (161): 188-202. See also Hutchinson, C. C. (1996). "The Case for Mandatory Mediation." Loyola Law Review **42** (85).

<sup>38</sup> For a detailed discussion of the benefits and detriments of mandatory mediation see e.g. Ibid. Menkel-Meadow, C. (1985). "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference." UCLA L. Rev. **33**, Hutchinson, C. C. (1996). "The Case for Mandatory Mediation." Loyola Law Review **42**(85).

<sup>39</sup> Boettger, D. I. U. (2004). "Efficiency Versus Party Empowerment - Against a Good-Faith Requirement in Mandatory Mediation." Review of Litigation **23**(1).

<sup>40</sup> See "Alternative Dispute Resolution - when it works, when it doesn't", PREM notes, WB 2005, Richard Messick.

<sup>41</sup> For details see Evaluation of the Ontario Mandatory Mediation Program: Executive Summary and Recommendations (March, 2001), Robert G. Hann et. Al, Queens Printer.

<sup>42</sup> For detailed empirical research see: Hughes, P. (2001). "Mandatory Mediation: Opportunity Or Subversion?" Windsor Y.B. Access to Just. **19**(161): 188-202. See also Hutchinson, C. C. (1996). "The Case for Mandatory Mediation." Loyola Law Review **42** (85).

ation, it was 50 percent<sup>43</sup>. However, even assuming a lower settlement rate in mandatory mediation, this does not have to decrease the overall number of settlements. On the contrary, in many cases mandatory mediation will increase the number of settlements. The table below shows the settlement in the IFC’s mediation pilot project in Bosnia and Herzegovina. Although as many as 62 percent of mediation cases were settled, this constituted only 8 percent of the number of all the cases that were referred to mediation.

**Table 3: Cases Referred Vs. Mediations Held Vs. Cases Settled (IFC’s Bosnia & Herzegovina Mediation Project)**

Bosnia Herzegovina (Voluntary Mediation)	
Cases Referred	2,632
Mediation Held	345 (13%)
Cases Settled	213 (62% <sup>44</sup> )
Satisfaction	98%

Source: IFC-PEP SE

In the case of mandatory mediation, all or almost all cases referred would attempt to mediate. In the case of Bosnia (see Table 3), assuming a fairly low settlement rate of 40-50 percent, this would give 1,052 to 1,316 cases settled, which leads to five or six times higher number of settlements than the cases that actually settled in the voluntary mediation system (213 cases).

Therefore mandatory mediation should be considered particularly in places where there is a big discrepancy in the number of cases referred vs. mediations held. However, at all times, project managers should remember that it is particularly crucial at the time of introducing mediation that the parties and all other stakeholders still see mediation as a true alternative to litigation and are never coerced to settlement. Mandatory mediation can be introduced for all cases, certain types of cases or it can be left to judicial discretion which cases should be mandated to go to mediation. In any case, such solutions should be introduced as pilot projects.

#### 4. Various Types of Mediation and Other ADR Processes to Be Considered.

One of the objectives of introducing ADR is to provide a choice of dispute resolution processes for the parties. As shown in Figure 1, there is no single kind of medi-

<sup>43</sup> See Jeffrey M. Senger, *Evaluation of ADR in United States, U.S. Attorney's Bulletin*, Nov. 2000. Survey of 828 cases.  
<sup>44</sup> Only 8% of the cases referred to mediation by judges were settled.

ation in the continuum of dispute resolution processes, but an array of mediation processes that might require different timing and resources.

### ***Facilitative style of mediation***<sup>45</sup>

In a classic mediation, the mediator's mission is purely facilitative. The mediator does not give an opinion on the likely outcome at trial or legal issues, but only seeks to help the parties find solutions to the underlying interests or problems giving rise to the litigation. Generally, in this kind of mediation, the mediator's expertise in the process of mediation, rather than in the subject matter of the litigation, is viewed as paramount. Some mediation professionals view facilitative mediation as the preferred approach because the mediator preserves the principle of complete impartiality by not giving an assessment or prediction of the outcome of the case at trial.

### ***Evaluative style of mediation***

In the evaluative approach, the mediator is more likely to give a view of the case. The mediator's opinion – including, for example, a legal and/or factual evaluation of the case, and sometimes an assessment of potential legal outcomes – is used as a settlement tool. This approach generally requires mediators who are experts in the subject matter of the case. Most evaluative mediators also consider the interests of the parties in attempting to facilitate a settlement. Many mediators blend facilitation and evaluation, applying each approach in varying degrees at different times during the mediation process, depending on the needs of a given case.

### ***Broadening the mediator's toolbox and the scope of ADR***

At the initial stage of a project, when mediators do not have much experience, the facilitative style is preferred. The evaluative style, while being an opportunity to create value for the parties, can also cause them harm, if improperly used by an inexperienced mediator. However, with time, experience, and further training, mediators usually expand their repertoire and add a more evaluative approach to their toolbox. They also learn which situation can be better for using either of the two styles or some kind of the combination of the two.

Another avenue of adding more dispute resolution processes is through continuing training of mediators who can learn not only how to use different styles of mediation but also how to use other ADR methods, such as mini-trial, med-arb, arb-med, Michigan mediation etc. (for description of these methods see Appendix B). Thus, without a formal introduction of new procedures or passing new laws,medi-

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<sup>45</sup> Adapted from Robert J. Niemic, Donna Stienstra, Randall E. Ravitz (2001), Guide to Judicial Management of Cases in ADR, Federal Judicial Center pp. 128-130.

ators can cover more continuum of the dispute resolution processes from pure facilitation in some cases to non-binding arbitration in others.

### ***Arbitration***

Unlike mediation, arbitration is binding for the parties and has a much more formalistic procedure (see Appendix B) including the possibility to appeal arbitration awards in court. Introduction of arbitration requires detailed legal regulation of its procedures and enforcement. Being an arbitrator requires different and more demanding training and much more expertise in the subject matter of the dispute. Arbitration is usually more independent from courts than mediation, and therefore the choice of local partners would usually be different.

Finally, an arbitration project would have a different timeframe than a mediation project. In practice, parties can commit to arbitration both at the time of signing the contract or when the dispute arises. But, in practice, when there is a conflict, at least one party doesn't have the incentives to submit to a quick and binding procedure such as arbitration. Therefore, in practice, a vast majority of referrals and commitments to arbitration occurs during drafting of the contract and the dispute resolution clause. Therefore, such disputes take a long time to reach the arbitration court, and the results of the project are not likely to be seen for a few years.

Some project managers indicated that they never even considered broadening the scope of the project by providing alternatives to one kind of mediation. However, since the broad mission for the project is to improve business-enabling environments through better dispute resolution, it seems that providing more alternatives for SMEs, if efficiently done, would serve this purpose.

Mediation (Conciliation) and Arbitration centers were successfully created in many Latin American countries (e.g. Argentina, Bolivia, and Ecuador). Their local partners were national Chambers of Commerce, which have a very strong, almost monopolistic position in each of these countries.

## **5. Budgeting and Sequencing the Project**

Each ADR project is different and so will be the budgets for each of them. In other words, it is extremely difficult to determine how much the implementation of a mediation or ADR project will cost. Specific factors related to the country where the project is being implemented can mean considerable differences in the budgeting of different project components. Factors such as the costs of local consulting or legal services; the need for a strong awareness campaign; the prices for leasing office space; the need to hire international consultants due to the lack of local ADR knowledge or the need for reforming the legal framework can make a huge difference in budgets.

It is however possible to estimate what could be an approximate budget for implementing commercial mediation in a given country by breaking down the budget into all the different components of the project. Based on this overall budget, project teams will be able to adjust it to their particular context. For example, they can eliminate from the overall budget the costs estimated here for reforming the legal framework when it is not needed for that specific project. The table with the budget breakdown below is based on estimates of IFC mediation projects in the Balkans.

The following table illustrates how the project could be budgeted in the different phases of the project cycle. It is important, if possible, to secure all of the funding at the beginning of the project to avoid possible risks of not having funding to implement all the phases. Most of the budget allocations are single allocations for the duration of the project, except for costs associated with the mediation center that are accounted per year. The budget does not include overheads, and the salaries and benefits of the team implementing the project.

**Table 4: Estimated Budget and Sequencing for Implementing Commercial Mediation in Emerging Markets**

Sequencing	Project Component	Activities	Cost Elements	Estimate Cost in US\$
<b>1st Phase: Diagnostic and Design (0-12 months)</b>	<b>1. Initial Diagnostic / Assessment</b>	<ul style="list-style-type: none"> <li>• Detail analysis of ADR in the country</li> <li>• Surveys</li> <li>• Focus groups</li> <li>• Meetings with stakeholders</li> </ul>	<ul style="list-style-type: none"> <li>• Local and/or international consultants and their travel expenses and fees</li> <li>• Survey experts (fees)</li> <li>• Expenses for meetings and focus groups</li> </ul>	\$50,000
	<b>2. ADR/Mediation Legal Framework</b>	<ul style="list-style-type: none"> <li>• Analysis of existing legal framework</li> <li>• Meetings with legislators, members of parliament</li> <li>• Drafting or amending laws and regulations</li> </ul>	<ul style="list-style-type: none"> <li>• Local legal experts (fees)</li> <li>• International legal experts and their travel expenses and fees</li> </ul>	\$40,000
<b>2nd Phase: Implementation (12 to 24 months) and Monitoring and Evaluation (0 to 36 months and local monitoring thereafter)</b>	<b>3. Awareness and Communications Campaign</b>	<ul style="list-style-type: none"> <li>• Organization of events</li> <li>• Public relations campaign, advertising</li> </ul>	<ul style="list-style-type: none"> <li>• Conferences and seminars</li> <li>• Press conferences and press releases</li> <li>• TV &amp; radio broadcasts</li> <li>• Articles in newspapers</li> <li>• Posters and brochures</li> <li>• Publications</li> <li>• Study tour</li> <li>• Etc.</li> </ul>	\$70,000 <sup>46</sup>

<sup>46</sup>The cost of many of these PR tools will be covered by PR agencies or newspapers. Once the project has produced results, there will be articles in the local press, and perhaps in radio or TV. Most of the expenses are related to the organization of workshops, conferences, production of brochures, in the initial phases of the project.

**Table 4: Estimated Budget and Sequencing for Implementing Commercial Mediation in Emerging Markets (continued)**

Sequencing	Project Component	Activities	Cost Elements	Estimate Cost in US\$
	<b>4. Training and certification of mediators</b>	<ul style="list-style-type: none"> <li>• Basic and advanced trainings to judges, mediators<sup>47</sup></li> </ul>	<ul style="list-style-type: none"> <li>• International trainers and their travel expenses and fees</li> <li>• Local trainers</li> <li>• Logistics and costs for training facilities</li> </ul>	\$100,000
	<b>5. Creation of Mediation Center</b>	<ul style="list-style-type: none"> <li>• Technical assistance in the set up of the mediation center</li> </ul>	<ul style="list-style-type: none"> <li>• International consultants and their travel expenses and fees</li> </ul>	\$40,000
		<ul style="list-style-type: none"> <li>• Furnishing and equipping the center<sup>48</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Furniture (tables, chairs) and technical equipment (computers, phones, printer, server, etc) for the center</li> </ul>	\$15,000
		<ul style="list-style-type: none"> <li>• Payment of overhead costs for the center (per year)</li> </ul>	<ul style="list-style-type: none"> <li>• Rent, staff salaries, miscellaneous</li> </ul>	\$60,000 <sup>49</sup>
		<ul style="list-style-type: none"> <li>• Payment of mediators fees (at least for the first year)</li> </ul>	<ul style="list-style-type: none"> <li>• Fees for mediators (normally the fee is paid when the case is settled and can go from \$50 to \$100 per case)</li> </ul>	\$30,000 <sup>50</sup>
	<b>6. Monitoring and Evaluation</b>	<ul style="list-style-type: none"> <li>• Initial baseline surveys (at the beginning of the project)</li> <li>• Monitoring through program records, surveys</li> <li>• TA/ training to mediation center and courts on how to track indicators</li> </ul>	<ul style="list-style-type: none"> <li>• Databases for tracking indicators</li> <li>• Data and M&amp;E experts fees and travel expenses</li> </ul>	\$40,000
<b>TOTAL PROJECT COST</b>				<b>\$445,000</b>

## 6. Collection of Data and Design of a Monitoring and Evaluation Framework

It is essential at this stage to start planning the results measurement strategy for the project. The most important task will be to determine which indicators will be chosen to monitor the project during its implementation and which ones will be used for the evaluation of results once the project has been implemented.

<sup>47</sup> Assuming that each person is trained for a minimum of 40 hours, and the number of mediators or judges trained is around 100.

<sup>48</sup> Estimate for a mediation center with two mediation rooms and one or two offices.

<sup>49</sup> This cost is per year.

<sup>50</sup> The cost is per year, assuming an average of 35 settled mediations per month and a fee of \$70; (35mediationsx\$70)x12months= \$29,400.

During the design phase, the project team will need to ensure that performance is measured from the very inception of the initiative to guarantee that performance targets are met. Without accurately recording data, the project team will not be able to determine whether the introduction of ADR/mediation has met its goals. To determine whether a reform process has been successful, it is necessary to conduct an evaluation, essentially taking “before” and “after” snapshots of performance. To do this, the diagnostic phase should include a benchmarking exercise to capture performance indicators prior to the process design.

“Faster and cheaper resolution of disputes,” “amount of funds released,” “reduction of backlog” and a “better business environment” are obvious candidates for being the main indicators to measure, but there must be a clear framework and specific performance indicators for measuring the project.

The following are factors that should be considered when measuring the introduction of ADR mechanisms:

- Backlog of commercial courts (in number of cases).
- Cost born by companies to resolve disputes through litigation, including government/court fees, payment to attorneys or other third parties and unofficial payments.
- Average time spent by companies to resolve commercial disputes through litigation.
- Average time to enforce contracts in the country.
- Percent of company satisfaction on the resolution of disputes through litigation.

The reform team should undertake baseline surveys in the design phase to obtain statistics regarding these indicators. These baseline indicators will be used then to compare results after the reform process.

## 7. Planning – Key Lessons Learned<sup>51</sup>

***Establishing a realistic timeframe.*** Every project manager indicated that planning and co-ordination was far more time-consuming than anticipated. Long-term planning is crucial for success of the project and particularly for attracting good leaders. Business cycles of the WBG and other donors should be synchronized with the needs of stakeholders who want to see a long-term plan and not only year-to-year budgeting of certain tasks. Some of the IFC managers noticed that this project had a longer time frame than most projects that they worked on. In order to attract

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<sup>51</sup> Certain lessons may seem to some readers obvious or simplistic, however even though many practitioners interviewed had similar impressions, they still found some of these points important to emphasize and extremely hard to follow.

good stakeholders (some of them probably are very busy and successful professionals who can choose among many different activities), we need to offer them a vision, predictability, and security of a long-term plan. Therefore, it is a real challenge to both coordinate the project cycles of donor institutions and help the local parties understand the benefits of the project in the long term (e.g. judges will have fewer cases to deal with, mediators will start a new, profitable, and exciting practice, etc.).

**Information and data are key.** As indicated in reports of certain projects managers, many of them did not have enough information at the stage of planning (including not enough information about various mediation procedures, background conditions in the country, stakeholders etc.). Some of the managers also indicated that they lacked flexibility in budgeting and performing an assessment. The success of the project will be determined in part by the amount of data that is available at the beginning of the project. For example, it is critical to have data about the court procedures in a country, the backlog, the existing legislation, and ADR mechanisms so that it can be later used to track improvements.

**Creating demand for mediation.** A mediation project is both about creating a supply of high-quality mediation services and the demand for such services. In planning the project, both sides of the equation need to be emphasized. As described further in this manual (see Chapter 4) creating demand for mediation services making parties aware of such demand and benefits of mediation in their case, and encouraging them to participate is usually more difficult to achieve than supplying high-quality mediation services.

**Sequencing of the activities.** One of the strongest messages from ADR practitioners and project managers is that the success of the project as a whole depends on synchronization of the various parts of it. Planning must be at least partly executed in the place where the project will be performed. Data gathered locally cannot be replaced by any other source of information. A good plan requires cooperation of local staff members, local stakeholders, and staff in the headquarters. It is important to involve key stakeholders in the planning process, as early as possible and to the extent possible. Once involved in the design of the process, they will accept and execute the plan more eagerly.

Every practitioner interviewed before writing this manual reported that synchronizing various parts of the plan and stakeholders was more complex and time consuming than they had expected. For example, a public awareness campaign will strengthen enthusiasm of the stakeholders and encourage potential parties. However, it should be carefully considered whether to start it before the law is passed or before some mediation services can actually be performed. As many elements of the plan are hard to predict, there must be considerable flexibility and con-

tendency plans. It seems particularly important in the case of planning for mediation legislation, which can be unpredictable.

If the plan is to implement mediation projects in a few countries of the regions – think and plan regionally, and act locally (in a country). It is likely that some of the same problems and similar culture will be common throughout the region. There may be opportunities for some synergy in terms of planning, using experiences and examples of success, exchanging experts and trained mediators, etc. For example, experience from a pilot project in Bosnia & Herzegovina was used to develop programs in Serbia & Montenegro, Albania, and Macedonia. Likewise, experience from Ghana and Uganda is being used in Nigeria, and experience from India is being used in Pakistan.

***Choosing the right court.*** The choice of court is a very important decision. It seems that the best option might be pitching a few courts and assessing what support and what kind of “package” each of them can offer. One of the questions is whether one should start from the capital or a smaller city/court. Starting from the capital has many advantages including: better access to stakeholders, likelihood of getting many of the most important cases in the country, likely higher prestige and bigger size of the court. However, in choosing the court, the most important factor seems to be the support of local judiciary and particularly the president of the court. Another critical element that should be taken into account when choosing the court is the capacity of the court to collect data and the availability of historical data on the number and types (family, labor, commercial, etc) of cases that are being held in the court, the existing backlog, etc. This will make monitoring and evaluation easy for the project managers and will definitely have an impact in the success of the project.

***Resources needed.*** In terms of the *human resources* needed to start a pilot project, at least one full-time person must be in place. Depending on the development of the project and other resources available in the office (analyst, monitoring and evaluation expert, etc.), two people may be necessary. Most of the project managers reported that the project was much more time consuming than they had expected. Particularly demanding was the coordination and managing of all the stakeholders and the public awareness campaign.

As for the *financial resources*, it is essential to have enough resources from the beginning rather than build up the budget through approaching different donors or funding sources “as the project evolves.” Also essential is to secure funding for a period of at least two or three years depending on the timeframe established to implement the project (which will probably be between two and three years). See previous table for details on specific funding needs.

***Stand-alone project vs. a component of a larger project.*** The project manager will need to decide whether mediation should be a part of the larger judicial reform project or a stand-alone project. The benefit of being part of a bigger project might be more lobbying and pressure to have the mediation law passed. However, while mediation reform is not likely to be opposed by any strong group (except perhaps the bar association), a bigger legal reform may provoke more opposition from interested groups (the judiciary, the Ministry of Justice, etc.). If it is decided to make mediation part of a bigger project, the implementation phase needs more attention and support than many other parts of the reform, and needs individual treatment in the implementation and rolling out stage.

# Chapter 4: Implementation Phase

## 1. “Mediate” the Mediation Project

Probably the most important role of a mediator is managing the deal or dispute process in a way that would best satisfy the interests of the parties. The role of the project manager is similar to that of a mediator – mediating or facilitating a transaction i.e. introducing mediation<sup>52</sup>. Therefore learning what a mediator does should be helpful for managing the project.

The Mediator is a non-partisan third party who facilitates negotiation between interested parties to reach a voluntary outcome that will best satisfy their interests. Here is what mediators do:

- Manage the process and decide procedural issues.
- Listen to the parties (stakeholders).
- Recognize different interests and incentives, and help align them to create value.
- Give ownership of the issue to the stakeholders.
- Bring value to the table (know-how, financial resources).
- Create value for the parties (stakeholders).
- Teach “mediative” approach by giving example.

All the above goals and roles of a mediator are perfectly aligned with the roles and values of the World Bank/IFC, and particularly with maximizing value for the

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<sup>52</sup> Please note that mediation should not only be narrowly defined as just a dispute resolution process, but can also serve a consensus building or deal-making mechanism. An interesting example of such very broad usage of mediation is the definition of “governance” created by the UN Economic and Social Commissions for Asia and Pacific. According to this definition “governance is the process of decision-making and the process by which decisions are implemented. ( ) It is the complex mechanisms, processes, relationships and institutions through which citizens and groups articulate their interests, exercise their rights and obligations, and mediate their differences.” Here, mediation might represent the contemporary paradigm for governance. More on the governance and mediation see Erbe, N. D. (2006). “Appreciating Mediation’s Global Role in Promoting Good Governance.” *Harvard Negotiation Law Review* **11**(Spring).

local stakeholders. Therefore the project manager should act and be perceived as a non-partisan third party who facilitates negotiation between interested parties to create value for them. The project manager, like a mediator, is responsible for the process and should decide procedural issues.

Since the role of a project manager is similar to the one of a mediator, he/she could benefit considerably from training on mediation. These are some of the reasons that project managers would benefit from this type of training:

- Although mediation may seem simplistic, it is actually a complex technique and can be much better understood through training. A thorough understanding of mediation will allow project managers to better identify incentives and interests of the parties, plan and manage the project in a more strategic way, and introduce mediation to other stakeholders by acting like a mediator.
- There are strong strategic and interpersonal arguments for going through mediation training. One of them is to get to know other key actors in the process. Mediation and negotiation courses are bonding experiences that create trust among the participants. It would be very helpful for any project manager to get to know well and gain trust and appreciation of the main actors (e.g. judges and mediators).
- Mediation can strengthen the capacity of the task manager in working with others and working as part of a group. It will strengthen as well the capacity to resolve project conflicts in a more friendly and effective way.

Most project managers do not go through the training, although a lot of them have had previous experience in the field before. However, it is highly recommended for task managers to go through the training, preferably together with the key stakeholders, before or at the beginning of project implementation.

Finally, since introducing mediation in a country can result in a “major change management project”<sup>53</sup> for the society and its legal system, the project manager will need to make sure that the planning, design, and implementation of the project fits the current legal system mindset, the countries practices and peculiarities.

## 2. Legal Framework: What Are the Rules and Regulations Needed?

Before drafting the legislation and regulations, the project manager should respond to the following questions: What will we accomplish by passing a law on mediation/arbitration? Why and what kind of law on mediation/arbitration is needed?

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<sup>53</sup> Karl Mackie and Eileen Carroll, “International Mediation: the Art of Business Diplomacy”, 2006.

These questions are important, because some forms of ADR *can work with no legal foundations* whatsoever. The necessity of passing a law and regulations will depend on the needs found in each specific country.

Having said this, ADR might not need laws or regulations to work, but it will definitely need an enforcement mechanism. An enforcement mechanism can be formal, normally coming from the courts, in which case, laws and regulations specifying this might be necessary. Alternatively, an enforcement mechanism can be informal, coming from the community, the village, etc. For example in Bangladesh, ADR has worked with informal enforcement. In Bangladesh, traditional “shalish agreements” were enforced through village peer pressure. Similarly, traditional village mediation systems in some countries in the Middle East rely upon family honor for enforcement<sup>54</sup>. Generally, an out-of-court settlement of the parties will have a power of a private contract and as such can be enforced through the court system, in case if one or both parties’ noncompliance.

Certain countries (e.g. the Netherlands, Slovakia) have decided that a mediation law was not necessary to introduce mediation to the court system. Most civil and common law jurisdictions have a procedural rule indicating that judges should encourage parties to settle and later to recognize this settlement and give it the authority of a court decision. In many countries, courts will decide that this rule gives them enough authority to advise a party to mediate. Similarly, most legal systems have a rule allowing parties to settle their cases in court. Those two general rules should clearly be identified during the project assessment. Sometimes the existence of a rule may not be sufficient for it to be applied in a given country. In Bosnia and Herzegovina, stakeholders of the mediation project strongly felt that they needed a law on mediation in order for mediation to be accepted by the general population.

A good approach to assess the practical impact and importance of these rules would be to interview judges and make sure that: (i) judges are allowed and willing to advise parties to mediate with the existing legislation, and (ii) judges are allowed to consider a mediated settlement agreement<sup>55</sup> as a court decision and enforce that decision. If there is a prevailing opinion from the judiciary (particularly from the judges of the chosen pilot court) that mediation can be developed without introducing any legislative changes, then the mediation practice could probably begin based on the existing law.

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<sup>54</sup> See Scott Brown, Christine Cervenak, and David Fairman “Alternative Dispute Resolution Practitioners Guide”, March 1998.

<sup>55</sup> In most legal systems, the settlement of the parties must go through a final approval of the judge before it turns into the court settlement. The judge’s role is to make sure that the agreement is not against the law, or not entered into under fraud, misrepresentation or duress.

Against this background, most project managers will find that most times it is necessary to have some legal or regulatory foundation to introduce mediation in a country. There will be many countries where the main stakeholders will want to have a specific mediation or arbitration law to provide all the details about the process. There will be other countries where developing mediation will require the passing of a new law because the existing legislation does not have the preconditions to introduce mediation or arbitration.

For the countries in which this is the case, the project manager will have to work on drafting the legislation in collaboration with local legislators and ADR experts. As shown in the box below, there are really no perfect mediation laws, and the local context and legal system of the country will be critical in the drafting of the law. Nonetheless, project managers will have to make sure that certain aspects of mediation are included in the law.

**Box 8: Critical Features to Include in a Mediation Law**

There is no perfect model law on mediation that could be applicable to any country. There are some laws (see below for examples) that can be helpful in determining which essential elements should be included in the draft law, but the project manager should take into account the local context of the country and work with local legislators and ADR experts in the preparation of the law. However, when drafting the laws, the project manager should consider including the following features:

- Explicit authority and support of mediation within and out of the court system.
- Type of mediation procedures (in court-connected mediation).
- Confidentiality of communication during the mediation process.
- Mediator’s code of ethics.
- Court fees, mediation and mediators’ fees.
- Certification of mediators by a specialized body.
- Enforcement of mediated agreements (settlements).

Often, the most important reason for stakeholders to introduce a new law or laws is the credibility that this process gives to the project and the fact that mediation will be “officially and publicly recognized”. Therefore, it is important to consider this aspect when assessing the need for drafting mediation legislation.

Some international organizations have produced model ADR laws (arbitration, conciliation, mediation) and very good examples of mediation procedures exist indicating how the mediation should be conducted (for examples of model mediation procedures please see Appendix G). For more details on some of the model laws and regulations, consult the following Web sites<sup>56</sup>:

- Arbitration and mediation Rules, World Intellectual Property Organization (WIPO) <http://www.wipo.int/amc/en/publications/>

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<sup>56</sup> Other helpful sites including examples of Rules and Regulation on mediation can be found in Appendix I (Selected ADR and Mediation Resources on the Web).

- The Uniform Mediation Act, New York Bar Association <http://www.nysba.org/>
- Mediation Procedures, London Court of International Arbitration and Mediation <http://www.jurisint.org/en/ctr/63.html>
- Model Mediation Procedure & Agreement, Center for Effective Dispute Resolution (CEDR) [http://www.cedr.co.uk/index.php?location=/library/model\\_documents.htm](http://www.cedr.co.uk/index.php?location=/library/model_documents.htm)
- Model Rule for the Lawyer as Third Neutral Party, International Institute for Conflict Prevention & Resolution (CPR) <http://www.cpradr.org/>

There are generally very few bilateral or multilateral treaties binding countries with regard to mediation. An exception to that rule is a Convention on Settlement of Investment Disputes. Parties to that Convention must solve their investment disputes between member states and foreign investors through conciliation or arbitration at the International Center for Settlement of Investment Disputes (ICSID), which is part of the World Bank Group. It is important to highlight, though, that the parties can never be forced to settle the dispute through mediation, as it is a voluntary procedure.

There are, however, international guidelines regarding mediation. The most important of them is the Model Law on Conciliation and Mediation, from the United Nations Commission on International Trade Law (UNCITRAL): [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html)

Although this law is not binding, it is an important guideline on which other countries often base their legislation and interpretation of conciliation and mediation rules.

There are also some regional guidelines regarding mediation. A good example of such document is a “*Green Paper on Alternative Dispute Resolution in civil and commercial matters*”<sup>57</sup> (presented by the European Commission on April 19, 2002). The European Union has also prepared a “Directive on certain aspects of mediation in civil and commercial matters.” Although the directive has not yet been enacted, it can serve as a guideline for the EU members as well and other countries.

While international mediation laws cannot force parties to settle, international arbitration laws can force them both to arbitrate and then to enforce the award given by the arbitration tribunal. The most important of international arbitration laws is the United Nations Convention on Commercial Arbitration – “New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, June 10th, 1958. To see the New York Convention please visit:

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<sup>57</sup> To see the “*Green Paper on Alternative Dispute Resolution in civil and commercial matters*” please visit: [http://europa.eu.int/eurlex/lex/LexUriServ/site/en/com/2004/com2004\\_0718en01.pdf#search=%22SEC\(2004\)%201314%20certain%20aspects%20of%20mediation%20in%20civil%20and%20commercial%20matters%22](http://europa.eu.int/eurlex/lex/LexUriServ/site/en/com/2004/com2004_0718en01.pdf#search=%22SEC(2004)%201314%20certain%20aspects%20of%20mediation%20in%20civil%20and%20commercial%20matters%22)

[http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf)

It is crucial to establish whether the country where the mediation project is being implemented is a member of the New York Convention or other regional convention that provides an effective enforcement mechanism through the courts of other member states.

For countries that have to draft their arbitration rules from scratch, the most important guidelines should be the UNCITRAL Model Law on International Commercial Arbitration. As in the case of the model conciliation law, although not binding, is an important reference for drafting and interpretation of international arbitration or mediation rules. UNCITRAL Model Law on International Commercial Arbitration can be found at:

[http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf)

Finally, other important arbitration conventions include:

- The Inter-American Convention on International Commercial Arbitration<sup>58</sup>
- The European (Geneva) Convention on International Commercial Arbitration<sup>59</sup>

### 3. Creating Incentives for Mediation

Unlike litigation or arbitration, mediation is based on the principle of voluntary compliance. Therefore, the success of a mediation project to a large extent depends on creating incentives or making them clear for all the key stakeholders so that they decide to (1) participate in mediation; (2) choose settlement over litigation.

In case of incentives to participate in mediation, it is not only the problem of their real existence but more often of the parties' awareness that such incentives exist. It is therefore crucial to make the stakeholders aware of the incentives (and lack of risks) for participating in mediation.

#### *Incentives for the private sector (companies in dispute)*

The existence of the right incentives is particularly important in case of the disputing parties who first need to agree to participate in mediation and then be willing to settle. There are obvious incentives that should be used when creating awareness about the introduction of mediation or other forms of ADR (see Box 9).

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<sup>58</sup> <http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp>

<sup>59</sup> <http://www.jus.uio.no/im/europe.international.commercial.arbitration.convention.geneva.1961/>

### Box 9: Incentives for the Private Sector<sup>60</sup>

When discussing the introduction of new ADR mechanisms with the private sector, it is essential to highlight the benefits that mediation or any other form of ADR can have over litigation. Remember that mediation will only be used if the private sector is convinced of its benefits, and therefore, the project will only be successful if the right incentives exist for companies to settle their disputes through mediation. These are some of the main benefits:

- Lower cost for both of the processes for resolving the dispute.
- Shorter process for resolving the dispute.
- Creation of value for both parties through an amicable way of resolving the dispute, as opposed to a litigious way of resolving it.
- Assurance of confidentiality.
- Informality of the process compared to the formal process of litigation.
- Release of funds or assets that are in dispute. Obviously only one of the parties will benefit from the release of funds or assets. The other party will have to pay or release the funds or assets. However, even for the party that is releasing the assets, the process could produce positive outcomes, like for instance, the improvement of business relations with the other party, and not putting at risk its commercial reputation.
- More control of the process by the parties.
- Possible creative and value-creating solutions.

Some other interests of the parties or groups of parties may not always be obvious and it may be particularly important to inquire about interests and incentives of the parties and other stakeholders. Incentives of the parties can be understood also as the goals that they want to achieve through the resolution of their dispute. For examples of the goals that the parties might pursue, see Table 5. Appendix D contains a list of reasons that American companies would choose mediation or arbitration instead of litigation.

These incentives to companies have to be reflected in the discussions between the project managers and the private sector. Another tool used to provide incentives to the parties is using intermediaries, such as lawyers, legal counsels, and judges and business associations to create awareness about the benefits of commercial dispute resolution through mediation.

In addition, another type of incentive is the *early commitment of the parties* to engage in mediation. A way of increasing incentives for the parties to mediate is through the use of mediation clauses or multi-step ADR clauses in their contracts, before the dispute arises.

Thus, an important issue of raising awareness of all the stakeholders, and particularly prospective parties, should be encouraging the use of mediation clauses (for examples of such clauses see Appendix C). Similarly corporations and law firms should be encouraged to pledge that in case of dispute they will pursue ADR and particularly mediation. Below is an example of a corporate pledge (for more examples see Appendix C):

<sup>60</sup> See also benefits of mediation at Chapter 2.

*“In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that that dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation.”*

Some countries have decided to pledge that in their disputes they will also pursue mediation before litigating. The Lord Chancellor’s Department of the United Kingdom pledged to promote mediation and other forms of non-litigious dispute resolution in place of litigation. As specified by the Lord Chancellor, all government departments will go to court as a last resort and mediation and other forms of non-litigious dispute resolution will be used in all suitable cases, wherever the other party accepts it.

### ***Incentives for other stakeholders***

*Lawyers.* The bar or any other lawyer association can become one of the most important enemy or ally of the reform in the introduction of ADR. Therefore, it is essential that lawyers are supportive of the reforms, and for this, the task manager will need to make clear that the introduction of ADR can also benefit the legal community. A good start could be to provide lawyers with mediation training and to help them understand that mediation will not diminish their profits and has the potential to increase their clients’ satisfaction.

An additional incentive would be supporting a contingency fee system for lawyers in certain cases, instead of the hourly fee that is paid usually in most of the countries. One of the reasons that lawyers usually oppose mediation is their fear of a lower income fee when the case settles early as opposed to what they would receive in case of a long court battle. If lawyers receive a contingent fee in case of settlement (based on the constant remuneration or constant percentage of the value of settlement) they would prefer to settle the case sooner. This, however, may create an ethical problem as parties’ counsel having an additional incentive for settling the case they may be tempted to pressure their client to settle (even against the clients’ best interest). The same problem may exist if a mediator would receive a contingency fee or any additional “bonus” for settling the case<sup>61</sup>. Finally, another way of motivating lawyers might be through the establishment of a legal code of ethics by which lawyers will be forced to advise their clients to take into account the possibility of mediating their case.

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<sup>61</sup> It must be remembered that the goal of a mediator is not to settle the case, but to come to a solution that would best serve the parties. A “bonus” fee for settling the case may unduly influence a mediator’s objective.

*Judges.* Judges are another key group whose incentives should be carefully considered. Judges can be an excellent vehicle to encourage the parties to mediate. In order to get judges' cooperation, it is crucial to understand their incentives. It is likely that the most important incentive for many of them will be reducing the amount of their work without sacrificing their performance and overall results. Judges might fear that if they send cases for mediation they will hear fewer cases than other judges and be evaluated negatively based on this. It is therefore critical to understand how the work of judges is delegated and evaluated. When choosing the court, the project manager should talk to the president of the court about the evaluation system for judges and whether cases settled by a mediator and approved by a judge would count as a case decided by the judge.

One way of creating the right incentives is to give "*judicial credits*" to judges for resolving cases through judicial mediation or for those cases resolved outside the court by mediation but that were referred by them. Although each country has established its own system for evaluating the work of judges, it is usual in many countries to get some "credits" each time a judge writes a judicial opinion or decides (or closes) a case. Judges may fear that, by promoting ADR, they will decrease their opportunity to gain credits and advance their careers. If credits are given for participation in ADR, judges will be more likely to encourage the parties to use it. This could actually create a situation where judges can increase their "credits" while at the same time decrease their own work load.

Another idea highly recommended, although not used regularly when implementing these types of projects, is measuring the settlement rate of cases directed to mediation by each judge. After the end of the fiscal or calendar year, judges with the highest settlement ratio could get additional judicial credit. Such judges might also share with their colleagues at the court or at a conference, the techniques they use to select the appropriate cases. Please note that the organization of the judicial work is usually the prerogative of the president of the court, who organizes the work based on the existing internal rules. Therefore, special consideration should be given in order to deal with these matters with sensitivity and not to undermine the competence or authority of the court's president.

Despite the importance of incentives and the existence of them, there are still many cases in which even when all the incentives for the parties are in place, parties will not choose mediation if they don't understand it well or don't know enough about it. This is one of the reasons why public awareness (explained in the next section) is also a critical element of the project and is directly related to the incentives.

## 4. Public Awareness

Public awareness of the existence of ADR and its benefits constitute an essential element of the project. Contrary to what people may think, a public awareness campaign is not an expensive exercise. Public awareness can determine the success or failure of a project. Many ADR projects have failed because there was not enough information about the new ADR mechanisms and its benefits, and the parties and/or stakeholders did not know about it. The public awareness campaign should be developed taking into account the following elements:

### 1. Communications Strategy

It is important to set clear objectives before starting the awareness campaign, specifying the strategy used, the objectives of the communications campaign, and needs to be achieved. Usually, some of the key objectives of these campaigns include the following:

- Increase the knowledge and understanding of ADR/Mediation as an alternative to litigation and the formal court system among the legal community, civil society and the private sector. Inform them of the benefits of commercial mediation or any other form of ADR.
- Secure the commitment and support of stakeholders to the introduction of ADR
- Advertise the role and importance of the Mediation Center (if there is one) and the mediators and judges in the process of settling disputes through commercial mediation.

Communication campaigns often use a creative logo to draw people's attention and make them think. Sometimes, the audience will not read an information brochure but would pay attention to a headline. The IFC technical assistance team in Bosnia Herzegovina used the following logo for its public awareness campaign: "Mediation, or when a dispute becomes an agreement. Cheaper, faster and creative dispute resolution"<sup>62</sup>. The IFC technical assistance team in Pakistan chose the following headline to attract private sector's attention: "Unlock your dispute. Back to business," using the very creative design shown here.



<sup>62</sup> From a presentation by IFC - PEP SE's public awareness campaign in Bosnia Herzegovina, Ajla Dizdarevic.

## 2. Key Audiences and Right Messages

When identifying the key audiences, the project manager might want to differentiate between internal and external audiences. Internal audiences here are referred to the organization to which the implementing team has to report, while external audiences refer to local stakeholders, other donors, etc. This section focuses mostly in the external audiences, since there is a whole chapter on monitoring and evaluation which gives some insights on what the project team should monitor and what type of results and messages should be communicated to the internal audiences.

It is crucial to identify the key target audiences that should be persuaded by the campaign, what message they want to hear, and whether there is some data that can support these messages. Each of these groups has different interests and may require a different message that should be based on a good understanding of the incentives offered to each of them. Usually, during the project design, very little data is available to show, but the messages should mention the collection of data to reach the goals that stakeholders are interested in achieving. The table below illustrates what some of these messages could look like.

**Table 5: Appealing Messages to Stakeholders**

Stakeholders	What is important to them? Your message to them should take these elements into account	How to achieve what stakeholders want?
<i>Judges</i>	<ul style="list-style-type: none"> <li>• Reduction of workload.</li> <li>• Improved efficiency of courts.</li> <li>• Resolution of more cases in less time.</li> <li>• Attribution for improvement of justice and reduction of backlog.</li> </ul>	<ul style="list-style-type: none"> <li>• Provide data on the effectiveness of mediation in reducing the backlog.</li> <li>• Give credit to the judiciary for the success of the project.</li> </ul>
<i>Mediators</i>	<ul style="list-style-type: none"> <li>• Positive image in general</li> <li>• Successful and prestigious career.</li> </ul>	<ul style="list-style-type: none"> <li>• Gather feedback on mediator's performance.</li> <li>• Provide data on the effectiveness of mediation.</li> </ul>
<i>Counsel and other legal professionals</i>	<ul style="list-style-type: none"> <li>• Avoid increasing competition from mediators.</li> <li>• Avoid a decrease in revenue due to the introduction of ADR.</li> <li>• Increase their demand for clients with the introduction of ADR.</li> <li>• Make clients more confident of their possibilities to resolve a dispute.</li> </ul>	<ul style="list-style-type: none"> <li>• Involve the legal community in the design of the project since the beginning.</li> <li>• Offer lawyers to become mediators if they are interested and get trained.</li> <li>• Show data to lawyers on the satisfaction of parties with mediation and their legal counsels.</li> </ul>

**Table 5: Appealing Messages to Stakeholders (continued)**

Stakeholders	What is important to them? Your message to them should take these elements into account	How to achieve what stakeholders want?
<b>Government officials, law-makers</b>	<ul style="list-style-type: none"> <li>• Improve the business climate.</li> <li>• Provide better access to justice.</li> <li>• Create confidence in voters with a better legal and judicial system.</li> <li>• Increase in investments in the country due to good dispute resolution systems.</li> </ul>	<ul style="list-style-type: none"> <li>• Provide data on the effectiveness of mediation in improving access to justice.</li> <li>• Provide data on the effectiveness of mediation in improving the business climate.</li> <li>• Gather data on client satisfaction with the judicial system.</li> <li>• Give credit to the government for the introduction of reforms and its willingness to improve the business environment.</li> </ul>
<b>Business community and end users (the "Parties")</b>	<ul style="list-style-type: none"> <li>• Save time needed to resolve disputes.</li> <li>• Save money to resolve disputes.</li> <li>• Improve its business relation with clients other companies.</li> <li>• Improved business environment and judicial system.</li> </ul>	<ul style="list-style-type: none"> <li>• Create the mechanisms so that they have the possibility of accessing alternative ways of resolving disputes that will be less costly, less adversarial, and more efficient.</li> </ul>
<b>Donors</b>	<ul style="list-style-type: none"> <li>• Development impact</li> <li>• Results measurement</li> <li>• Funds well managed</li> <li>• Visibility</li> </ul>	<ul style="list-style-type: none"> <li>• Monitor results and disseminating them properly among donors</li> </ul>
<b>Media</b>	<ul style="list-style-type: none"> <li>• Deliver news &amp; stories</li> </ul>	<ul style="list-style-type: none"> <li>• Provide the media with specific successful cases settled and stories that can sell</li> </ul>

It must be stressed that a communications campaign is very important not only during the design and implementation, but also after the implementation in order to communicate results to stakeholders. As soon as the first positive results on the project are collected (whether interesting cases settled, good statistics or evaluation), it is important to make them widely known to the public. The credibility of the project will be partly based on the success rate.

### 3. Communication Tools

The communications strategy devised by the project team could involve different ways of creating awareness and communicating project results<sup>63</sup>:

- *Through Media relations*, which include press conferences; press releases; TV and radio broadcasts; articles in local and regional newspapers; interviews and client success stories.
- *Through publications and promotional material*, which could include posters (like the left figure below designed for IFC’s Private Enterprise Partnership Southeast Europe (PEP SE) project in Bosnia); brochures; leaflets; dissemination

<sup>63</sup> Based on PEP SE’s public awareness campaign in Bosnia Herzegovina.

of various reports; academic publications, newsletters (see right picture example below on the newsletter for IFC's PEP SE project in Bosnia); comics, etc.

- *Through direct communications*, which could be in the form of trainings; presentations; round tables; direct meetings with stakeholders; conferences; workshops; study trip; cocktails; E-mails; Web page.



A note of caution should be given about study tours. Although they are considered to be very effective teaching and stimulating tools for leaders of the project, the donor community may debate the effectiveness of spending relatively large funds on trips for a few individuals. Nevertheless, most practitioners interviewed were unanimous in their opinion that results of such trips, if well organized, are worth the resources spent. The study tour has at least three primary goals: (i) raise the interest and enthusiasm of the key stakeholders; (ii) teach how a mediation system works; and (iii) build a stronger bond and sense of ownership among the participants – local leaders of the mediation movement.

Regarding the organization of the study tour, it is particularly important that the participants are very thoughtfully selected. It is also crucial that the destination of the trip not only presents very professional mediation services, but also that the ADR system of the country be very similar to that the one which will be implemented by the project team. The ideal timing to do the study tour would be after the design and before or during the implementation of the project. Finally, the hosting party for the study tour should be well informed of the project design and plan the trip accordingly. Ideally, the type of mediation project of the hosting party should be similar to the mediation of the project. The host should also be open to talk about the strengths and weaknesses of the project.

- *Through education and university-based programs* established at local law and business schools. Such programs could accomplish goals such as: scholarly

research and publications on the topic, creating support group among scholars, training mediators and educating lawyers understanding mediation. Most of the results of such programs are long-term. It should be noted that in some countries, academics are very conservative and uninterested, or even hostile towards mediation. However, in other cases they are becoming avid supporters of the ADR movement. Therefore, it is recommended that for each country an assessment is made at local universities and interested scholars. Often times, their interests (such as publishing, organizing conferences, evaluating courts, etc.) will be in line with those of the project.

When using these communication tools, the project team must determine which are the most effective tools for creating awareness among the different stakeholders. One size does not fit all. For example, promotional material will have very little influence on the government and judges, but can have a considerable impact in informing companies (end users) about ADR mechanisms. Table 6 provides some guidance on what are the most efficient communication tools to create awareness among the different stakeholders.

**Table 6: Using the Right Communication Tools for Different Stakeholders**

Stakeholders	Communication tools
<i>Judges</i>	Workshop, training, presentations, official meetings, study trips, newsletter, academic publications, Web page, conferences.
<i>Mediators</i>	Workshops, trainings, study trip, newsletter, conferences, Web page, academic publications.
<i>Counsel and other legal professionals</i>	Workshop, training, presentations, official meetings, study trips, newsletter, publications, academic publications, web page
<i>Government officials, lawmakers</i>	Official meetings, presentations, conferences, TV & radio broadcasting, business environment publications ( <i>Doing Business</i> ), articles in newspapers, cocktails
<i>Business community and end users (the "Parties")</i>	Judges and courts, promotional materials, TV & radio broadcasting, brochures, articles in newspapers, press conferences
<i>Media</i>	Conferences, informal meetings, publications
<i>Donors</i>	Conferences, presentations, official meetings, press conferences, publications and reports, cocktails

Direct communications are the best way to create awareness among the end users, the parties (companies, in the case of commercial mediation) that will be using ADR mechanisms. Apart from the promotional materials and all the tools mentioned in Table 6, the parties in the dispute can be referred to mediation in two basic ways: 1) from the judge’s oral explanation in their first appearance in court,

or 2) from a notice sent by a court. The notice from the court should include at least the following basic information:

- Parties names, subject of the dispute and case number.
- Proposed date and time of a first mediation session or a process by which the date can be agreed.
- Brief description of the mediation process.
- Rules of confidentiality.
- Need to show documents and other evidence that may facilitate exchange of opinions.
- Making sure that people who attend have authority to settle (*e.g.* “*All persons with full settlement authority are required to attend unless excused in writing by the mediator*”).
- Sanctions for not appearing for the session (if any).

An explanation from a judge is usually a more effective way of convincing the parties. Judge’s should be trained in this skill and in advising parties whether to choose litigation, mediation or other dispute resolution procedure (more information on training the judges is provided further in the manual). Aside from court-mandated mediation, the parties on their own can also voluntarily agree to mediate.

#### 4. Budgeting Communications and Awareness Raising

Contrary to what most people would think, an effective awareness-raising and communication campaign does not require large amounts of financial resources, although the need for human resources is quite considerable. Experience from other projects shows that public awareness campaigns are very time consuming. As mentioned by one of the project managers interviewed: “*I did not expect that PR will take 70 percent of my time*”. Therefore, it is advisable to appoint someone other than the project manager with expertise in marketing and communications if possible, to work at least part time on this component of the project.

As for the financial resources needed, experience from other projects implemented by the IFC shows that a lot of noise can be made with a small budget. Although, awareness and communication campaigns can be extremely expensive, if the strategy is good and there is support from the local media, the budget allocation for this activity can be considerably reduced. Even though we have estimated that the average awareness campaign for an ADR project could be around US\$70,000 (see Table 4 related to the project budget), the reality is that within certain conditions and a budget of around US\$20,000 a strong awareness can be conducted (see Box 10 for example of IFC project in Bosnia).

### **Box 10: Public Awareness Campaign in Mediation Project in Bosnia & Herzegovina**

The mediation project in Bosnia had an important media coverage during its implementation. While the project team used funds and part of the project budget (around US\$20,000) for awareness and communications, most of the references to the project in the public media were financed directly by the publisher. These are some of the statistics of the project:

Until 2005, the media provided information about the project in different formats in 180 occasions. Out of these 180, 34 percent of them appeared in newspapers, 32 percent on TV & radio, 19 percent on news agencies and 15 percent in Web sites and newsletters. The total cost of all this coverage would have cost around 60,000, but it was directly covered by the publishing agencies, TVs, newspapers, etc.

The triggers for this media coverage were conferences, presentations, press conferences, success stories and trainings. Therefore, it is essential to think about these types of trigger when designing the strategy for the awareness and communications campaign.

*Source: IFC-PEP SE*

## **5. Selection of Mediators and Mediation Training**

Another important element that will influence the success of the project is the quality of the mediators and the effectiveness of mediation training. The project team should think about establishing clear procedures for selecting mediators and establish local reliable trainers or institutions to train future mediators.

### **1. Selection of Mediators**

Contrary to many people's beliefs, most of the best mediators around the world are not lawyers or judges. Some professions that proved to be very successful as mediators include: managers, architects, engineers, union representatives, health care workers, education professional or psychologists. We need to take into account that mediation is not about following the laws and regulations but is about offering solutions acceptable for both parties. Therefore, depending on the type of mediation case (commercial, labor, etc) the best mediator could be someone who understands the specifics of the underlying substance of the dispute and not a legal expert. One of the most important advantages of mediation is a choice of the mediator that would be most appropriate for a particular case. Therefore representatives from various professions should be encouraged to become mediators.

The following criteria could help determine appropriate candidates for becoming mediators<sup>64</sup>:

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<sup>64</sup> See Scott Brown, Christine Cervenak, and David Fairman "Alternative Dispute Resolution Practitioners Guide", March 1998.

a) Extensive knowledge of the law and local legal system is not a requirement.

Familiarity with legal issues might be important depending on the type of case. However, it is not essential that the mediator is a legal expert. Generally, the mediator will be informed of the legal aspects of the case by the parties, but the solutions that the mediator offers will not necessarily be based on the law. Besides, most training programs include some kind of limited awareness and references to law relating to mediation, so the candidate does not need to be an expert in legal issues beforehand. On the other hand, the mediator's knowledge of the law relating to the case in question is usually a big advantage.

b) Local credibility and respect are important.

Notables or well-respected citizens in the community might become excellent mediators. Even if their legal knowledge or ADR is non-existent, with the appropriate training, these people can become excellent mediators because they are seen as the community as someone with credibility and authority to propose solutions. Successful ADR projects in Sri Lanka, China, and Bangladesh have targeted local notables and respected local citizens as mediators. The downside of having mediators who are such strong authority figures might be actual or perceived intimidation on the part of mediator for the parties to settle.

c) Cultural issues should be taken into account.

In countries that have gone through a recent conflict or in which there are acute cultural or religious differences between population groups or ethnic groups, special attention should be paid to the type of mediators selected.

d) Appropriate ethical background.

Ethics and an appropriate code of ethics are critical elements for the success of mediation. This element of mediation cannot be stressed too much. For obvious reasons, candidates that have been involved in scandals, corruption trials, or have some type of criminal record should be excluded from the possibility of becoming mediators.

The most successful mediators usually possess a combination of knowledge, skills and personal qualities. Other qualities that make a person a good mediator are included in Box 11. Mediators are a critical element for the success of the project. Having good mediators will create confidence in the system. Mediators will have to sign a Code of Ethics, which will serve them as: (i) a guide to perform mediation; (ii) a tool to inform the mediating parties, and; (iii) a tool to promote public confidence in mediation. For a sample of different Codes of Ethics, see Appendix H.

**Box 11: Qualities That Define a Good Mediator<sup>65</sup>**

- The patience of Job.
- The sincerity of a bulldog.
- Characteristics of the English.
- The wit of the Irish.
- The physical endurance of the marathon runner.
- The broken field dodging abilities of a halfback.
- The guile of Machiavelli.
- The personality-probing skills of a good psychiatrist.
- The confidence-retaining characteristic of a mute.
- The hide of a rhinoceros.
- The wisdom of Solomon.
- Demonstrated integrity and impartiality.
- Fundamental belief in human values and potential, tempered by the ability to assess personal weaknesses as well as strengths.
- Hard-nosed ability to analyze what is available in contrast to what might be desirable.
- Sufficient personal drive and ego, qualified by willingness to be self-effacing.

It is recommended that once the country has a good number of certified mediators, that they create an Association of Mediators with the objective of promoting mediation in the country, creating awareness, as well as to serving their needs and interests.

## 2. Mediation Training and Quality Control

Usually when introducing ADR or mediation in a country, the project team will find that there are no mediators or experts who could train future mediators. Most ADR projects have used international experts and organizations at the initial stage to train local mediators who in the future would become local trainers (train the trainer approach)<sup>66</sup>. Such training should be conducted rather early in the project. Mediation training should be a gradual process consisting of the following steps:

1. A basic mediation training consisting of at least 40 hours (including comprehensive mediation ethics<sup>67</sup>).
2. After completion of the training, trainees should have the opportunity to observe several mediation sessions.
3. For gaining additional experience, a mediation trainee (apprentice) should then co-mediate with senior mediator (“mentor mediator”) and later with another junior mediator. Only then mediator trainees may be ready to mediate on their own.

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<sup>65</sup> Maggiolo, W.A. (1985). “Techniques of Mediation”.

<sup>66</sup> The following are some of the most prestigious organizations with considerable experience in providing ADR training in developing countries: the Center for Effective Dispute Resolution (CEDR) <http://www.cedr.co.uk>; the Canadian Institute for Conflict Resolution (CICR) <http://www.cicr-icrc.ca/>; the Center for Dispute Settlement (CDS) <http://www.cdsusa.org/>; School of International Arbitration, Queen Mary College, University of London <http://www.schoolofinternationalarbitration.org/>; JAMS <http://www.jamsadr.com/>; or the International Institute for Conflict Prevention & Resolution (CPR) <http://www.cpradr.org/>

<sup>67</sup> The importance of training in ethics should be emphasized. There are many cases in which the importance of ethics is not sufficiently emphasized.

4. More senior mediators would then become “mentor mediators” and would help other trainees become mediators (also trainees from other locations within the same jurisdiction).

Except for the training of mediation principles, practice and communication skills the mediation training should include such elements as: ethics<sup>68</sup>, local mediation law, and other rules and regulations that are relevant to the mediation process. Should mediations be performed in cooperation with courts, mediators need to learn some of the internal court mechanisms and necessary paperwork.

Most ADR systems have established some type of mechanism to allow for quality control and oversight of mediators/arbitrators, including observation by case managers, investigation of complaints from parties, and monitoring of results<sup>69</sup>. To keep the quality of the mediation and public enthusiasm for ADR high, ADR practitioners must meet the strictest training and certification standards. Therefore an accreditation commission should be formed to supervise the quality of mediators. However, such a commission must not unduly limit access to the newly established profession. One of its roles should be also the supervision of mediation ethical standards and enforcement of rules of ethics.

It is advisable that mediators/arbitrators retake training after two or three years to maintain their interest and commitment on the subject. A useful quality control tool is mediating in pairs – co-mediation, which is recommended particularly for less experienced mediators. Co-mediation is also useful for more experienced mediators as a quality control, to perfect their skills and to give and receive reciprocal feedback.

### 3. Extending mediation training to other stakeholders

Not only should the future mediators be trained in mediation or other ADR techniques. In fact, it is highly recommended that other stakeholders who would probably not end up mediating are trained. Among these people we should mention project team members who are implementing the reform, lawyers and members of the legal community, officials from the Ministry of Justice, judges, etc.

As mentioned earlier, project teams would benefit tremendously from taking mediation training. It should be noted that an overwhelming majority of judges, project managers, lawyers and other individuals who go through mediation training often find it an eye-opening experience.

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<sup>68</sup> Ethics is a particularly important part of the mediation training. For a comprehensive ethical rules with commentary see e.g. CPR Georgetown Model Rules for Lawyer as Third Party Neutral <http://www.cpradr.org/pdfs/CPRGeorge-ModelRule.pdf>. For other rules and ethical standards see Appendix H.

<sup>69</sup> For more information on quality control see Scott Brown, Christine Cervenak, and David Fairman “Alternative Dispute Resolution Practitioners Guide”, March 1998.

## 6. The Role of Judges

Judges play a crucial role in the court-connected and court-annexed projects. Their most important functions concerning mediation include:

- Selecting the appropriate cases for mediation.
- Explaining mediation to the parties and encouraging them to choose it<sup>70</sup>.
- Enforcing the settlement agreement.

Judges will in most cases need to be trained in mediation. Irrespective of the general mediation training that judges could get to better understand mediation and acquire mediation skills, a special training needs to be designed for judges that would focus on the elements of mediation that are most pertinent to their work, i.e.:

- Settling cases during the court session.
- Selecting appropriate cases for mediation.
- Informing parties about the benefits of mediation and encouraging them to mediate (in selected cases).

The process of selecting cases for mediation is crucial for the efficiency of the whole system. If cases are not skillfully selected, the court, parties, and mediators lose a lot of time for administrative work on cases, in which the parties will surely refuse to mediate or will not settle. Therefore, it is very important that judges know how to select cases and want to use their time to do so. Many judges do not perceive case selection as a process that can decrease the amount of work they do and often have no incentives to spend time in learning case selection. In most cases, they do not get any credit for selecting the right cases. To the contrary, time spent on case selection was “wasted,” as the only result of referring cases to mediation would be getting a new case instead of the one he referred to mediation. Interviews with judges have shown that since sending cases for mediation actually gives them more work (selecting cases and administrative duties plus a new case), and no profits, therefore they were sending the required number of cases for mediation without any selection, or with very little interest or effort.

When mediating, judges are usually very directive and sometimes tend to coerce parties to achieve a certain outcome. Therefore, during the training emphasis must be put on unlearning certain directive judges’ behaviors. Another skill which judges might need to strengthen is case management. Depending on how managerial the judges are in their practice some basic case management training or discussion may be needed during the training. In some Balkans ADR projects, some judges com-

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<sup>70</sup>This is the case with voluntary mediation.

plained that the training, while interesting, was too long (two weeks). A shorter training more focused on judicial issues and judges' role would be recommendable. For example, in the United States, many mediation trainings for judges take four days.

Many non-judge interviewees observed that after the training most of the judges were very enthusiastic about mediation, and this would be a good time to encourage them to take further steps to implement it.

## 7. Selecting the Appropriate Cases for Mediation: What Are the Criteria<sup>71</sup>

Every legal system has a set of specific incentives for the parties to litigate or settle. Judges are probably one of the most experienced experts on these issues in their countries. Although any model needs to be fitted to the local reality and specifics of the court system, there are, however, general rules that help decide what kinds of cases would be best suited for mediation and other ADR processes.

In a recent article<sup>72</sup> Frank E.A. Sander and Lukasz Rozdeiczer propose a revised comprehensive system, in which they distill the key factors affecting the choice of the dispute resolution process down to three main categories – “goals,” “facilitating features,” and “impediments” – in order to assess which dispute resolution procedure is most useful for a case. The tables below summarize the research and prescriptive advice on matching cases with appropriate dispute resolution processes and can be used to establish a specific methodology for the selection of cases.

### a) Goals

The first question regarding the choice of the most appropriate process relates to the kind of objectives the party would like to achieve during or at the end of this process. In other words, this future-oriented approach asks what should happen as a result of the choice of the particular dispute resolution process. Since a party will usually have more than one objective, it should also prioritize its various goals. See Table 7 for more details.

### b) Facilitating features

When the party determines the desired (future) outcome, it should reflect on its present resources, i.e., the attributes of the case that make it particularly suitable or unsuitable to solving the case. Therefore, the party should focus next on the attributes of the process, the case, and the parties that are likely to facilitate reaching

<sup>71</sup> The table is taken, with some modifications from Frank E.A. Sander & Lukasz Rozdeiczer “*Matching Cases and Dispute Resolution Procedures; Detailed Analysis and Mediation-Centered Approach*”, 11 Harvard Negotiation Law Review, Spring 2006. For more information and detailed explanations see the article.

<sup>72</sup> See Frank E.A. Sander & Lukasz Rozdeiczer “*Matching Cases and Dispute Resolution Procedures; Detailed Analysis and Mediation-Centered Approach*”, 11 Harvard Negotiation Law Review, Spring 2006.

**Table 7: Matching Criteria for Cases Based on the Goals of the Parties**

Process Goal	Mediation	Mini-trial	Summary Jury Trial	Early Neutral Arbitration	Arbitration/Private Judging	Adjudication
Speed	3	2	2	3	0 – 2 <sup>73</sup>	0
Privacy	3	3	1	2	1	0
Public Vindication	0	1	1	1	2	3
Neutral Opinion	1	1	2	2	3	3
Minimize Costs	3	2	2	3	0-2	0
Maintain/Improve Relationship <sup>74</sup>	3 <sup>75</sup>	2	2	1	1	0
Precedent	0-1 <sup>76</sup>	0-1	0-1	0-1	2	3
Max/Min Recovery	0 (3)	1	1	1	2	3
Create New Solutions <sup>77</sup>	3	3	1	2	1	0

<sup>73</sup> Since there are so many forms of arbitration (e.g. single v. multiple arbitrators), speed and costs will vary depending on length of proceedings, arbitration provider, number of arbitrators and their fees, etc.

<sup>74</sup> According to the survey of American Arbitration Association (2003). *Dispute-Wise Business Management*. New York, American Arbitration Association AAA survey (p. 7) one of the distinguishing features of companies that efficiently deal with their disputes (“Dispute-Wise Companies”) is that they highly value maintaining relationships with their customers and suppliers.

<sup>75</sup> 59% of attorneys surveyed by Cornell indicated that “preserving good relationship” was an important reason for choosing mediation. (see Cornell survey at 17). Mediation is particularly important for parties who would benefit from continuing business or professional relationships. See Lewicki Saunders Minton, 1999 and Rahim 2001 cited in CPR (2001). *ADR Suitability Guide (Featuring Mediation Analysis Guide)*. New York, CPR Institute for Dispute Resolution at 6.

<sup>76</sup> Although generally mediation and related processes are not good for establishing precedent for the world at large, they can serve to establish precedent for the parties involved.

<sup>77</sup> Sometimes, a party may realize that the court or some other existing procedure may not offer any good solution for the problem. In this circumstance, inventing a new solution itself becomes a goal for the parties. For example, in a dispute over ownership of an indivisible object, the judge will usually be limited to awarding the object to one side. To avoid the risk of losing and to increase the utility of the resolution, parties could agree to a creative time-sharing solution that would increase the value for both of them.

**Table 7: Matching Criteria for Cases Based on the Goals of the Parties**  
(continued)

Process Goal	Mediation	Mini-trial	Summary Jury Trial	Early Neutral Arbitration	Arbitration/Private Judging	Adjudication
Party Control of Process	3	2	1	1	1-2 <sup>78</sup>	0
Party Control of Outcome	3	3	1	2	1	0
Shift Responsibility for Decision to a Third Party <sup>79</sup>	0-1 <sup>80</sup>	1	2	2	3	3
Court Supervision or Compulsion	0-2 <sup>81</sup>	0	1	1	2	3
Transformation of the Parties <sup>82</sup>	3	1	0	0	0	0

Source: Frank E.A. Sander & Lukasz Rozdeiczer

Legend: 0 = unlikely to satisfy goal, 1 = satisfies goal somewhat, 2 = satisfies goal substantially, 3 = satisfies goal very substantially

effective resolution. For example, if the dispute involves lower-level representatives of the parties, but requires a broader view of the problem from the perspective of the whole company, this might suggest the use of a mini-trial, which involves high-level officials. See Table 8 for more details.

<sup>78</sup> *Ex ante*, parties have considerable freedom to select the process they want, but once they have done so, they are well locked in.

<sup>79</sup> This may be particularly important in cases where the government is involved or where there are agency issues such that lower-level agents do not feel empowered to make settlement decisions or substantial concessions.

<sup>80</sup> This depends on the type of mediation being used. In evaluative mediation, parties are subject to some of the pressure akin to a court decision and hence may be able to shift part of the responsibility to the mediator.

<sup>81</sup> "0" is the value for a private, out-of-court mediation. Higher values may be appropriate when issues of settlement approval and enforcement of the agreement are at stake. Moreover, in mandatory mediation there is arguably at least court supervision over some aspects of the process though not the outcome.

<sup>82</sup> The most important goal of a party may not be to achieve a certain outcome but to transform its own or the other party's behavior. As suggested by Bush and Folger the transformative approach to mediation does not seek resolution of the immediate problem, but rather seeks the empowerment and mutual recognition of the parties involved. See *The Promise of Mediation* (Bush and Folger 2d ed 2005).

**Table 8: Matching Criteria for Cases Based on the Attributes of the Process**

	Problem-Solving		Reality-Checking		Adjudicating	
Process Feature	Mediation	Mini-trial	Summary Jury Trial	Early Neutral Evaluation	Arbitration/Private Judging	Adjudication
Good Relationship Between the Attorneys <sup>83</sup>	3	2	1	1	0	0
Good Relationship Between the Parties	3	2	1	1	0	0
Case/Parties seem Apt for Problem-Solving	3	2	1	1	0	0
One or Both Parties are Willing to Apologize <sup>84</sup>	3	3	1	1	0	0
Eager to Settle (or Engage in ADR)	3	2	2	2	0	0
High-rank Agents Involved <sup>85</sup>	2	3	2	2	1	1
Many Issues in Case <sup>86</sup>	3	3	1	1	1	0

<sup>83</sup> Similar effect can be achieved if a particular counsel (or party) has an excellent reputation for truth and reliability.

<sup>84</sup> See Cohen, J. (1999). "Advising clients to apologize." *Southern California Law Review*(72): 1009-1069., and literature cited therein.

<sup>85</sup> Lack of power to settle is a serious disadvantage in negotiation and dispute resolution when the agent or agents involved do not have sufficient autonomy. On the other hand, involvement of an official of a higher rank than the one who feels responsible for the dispute may provide a broader perspective (more issues) and more flexibility in settlement negotiation. This advantage is particularly useful in a minitrial where high officials on each side assume an active settlement role.

<sup>86</sup> Cases with more than one issue provide more possibilities for beneficial tradeoffs and are more likely to settle. See Mack, K. (2003). *Court Referral to ADR Criteria and Research*. Melbourne, Australian Institute of Judicial Administration Incorporated and the National Dispute Resolution Advisory Council. at 26. See also Robert J. Niemic, Donna Stienstra, Randall E. Ravitz (2001), *Guide to Judicial Management of Cases in ADR*, Federal Judicial Center at 27.

**Table 8: Matching Criteria for Cases Based on the Attributes of the Process** (continued)

	Problem-Solving		Reality-Checking		Adjudicating	
Process Feature	Mediation	Mini-trial	Summary Jury Trial	Early Neutral Evaluation	Arbitration/Private Judging	Adjudication
Party would Benefit from Procedural Features of Litigation <sup>87</sup>	0-2 <sup>88</sup>	1	2	1	2	3
Specific Expertise of a Neutral Required	3	3	1	3	3	1
Other						

Source: Frank E.A. Sander & Lukasz Rozdeiczer

Legend: 0 = unlikely to satisfy goal, 1 = satisfies goal somewhat, 2 = satisfies goal substantially, 3 = satisfies goal very substantially

### c) Impediments

In the third step of the analysis, it is suggested that one should focus on the ability of various procedures to overcome impediments to effective resolution.

The lists of goals, facilitating features, and impediments are not exhaustive. Judges should be encouraged to look for other elements in their legal system and in a particular case that could be applied to the selection of cases.

After deciding which goals, facilitating features and impediments are the most important for the party (or parties), one might add together the values in tables in order to determine which process best satisfies his/her interests. Such an approach, however, assumes that all of these concerns are of equal value to the party, which may not be true. A better approach would consist of both ranking and weighting

<sup>87</sup> This is a broad category encompassing such benefits as: injunction, discovery, third-party involvement, formal hearing, court enforcement, etc. Each of these features and its benefits should be considered and valued separately. Benefits of procedural features of litigation are described in more detail in Part II.C.1.

<sup>88</sup> The result may depend on whether we are dealing with in-court or out-of-court mediation.

**Table 9: Matching Criteria for Cases Based on the Impediments of the Process for Reaching an Effective Solution**

Process Impediments	Mediation	Mini-trial	Summary Jury Trial	Early Neutral Evaluation	Arbitration/Private Judging	Adjudication
Poor Communication	3	2	1	1	1	0
Need to Express Emotions	3	1	1	1	1	0
Different View of Facts	2	2	3	3	2 <sup>89</sup>	2
Different View of Law	1	2	3	3	2	2
Important Principle	1	0	0	0	1	3
Constituent Pressure	3	2	2	2	0	0
Linkage to Other Disputes	2	1	1	1	1	0
Multiple Parties	2	1	1	1	1	1
Different Lawyer-Client Interests	2	1	1	1	1	1
Jackpot Syndrome	0	1	1	1	3	3
Fear of Disclosing True Interests, Negotiator's Dilemma <sup>90</sup>	3	2	1	1	0	0
Psychological Barriers <sup>91</sup>	2	2	1	1	0	0

<sup>89</sup> Although adjudicative processes are in fact the only way to resolve the disputed question of law, sometimes the answer comes too late for the parties to use this knowledge, and they can come to a more efficient solution if they receive an informed opinion earlier in the case. For that reason we assign value 2 (not 3) to the adjudicative processes.

<sup>90</sup> One of the key tensions in negotiation is the dilemma of whether to disclose one's own interests or preferences and thus increase chances for value creation, or conceal them and claim value and protect oneself from being exploited by the other party. See particularly Lax & Sebenius *Manager as Negotiator* p. 29-45, Korobkin, R. (2002). [Negotiation Theory and Strategy](#). New York, Aspen Publishers Inc. p. 223. Mnookin, R. H., Peppet, Scott R., Tulumello, Andrew S. (2000). [Beyond Winning : Negotiating to Create Value in Deals and Disputes](#). Cambridge, Mass., Belknap Press of Harvard University Press.. One of the solutions to this dilemma is partial reciprocal disclosures over time. Another solution would be to involve a third party neutral in facilitating exchange of information.

<sup>91</sup> Psychological barriers include for example: reactive devaluation, loss aversion, or optimistic overconfidence. For detailed description see: Arrow J. Kenneth et al (ed.), (1999) *Barriers to Conflict Resolution*. PON Books; Mnookin, R. H. (1993). "Why negotiation fail: An exploration of barriers to the resolution of conflict." [Ohio State Journal on Dispute Resolution](#) 8(2): 235-49.. Overcoming psychological barriers requires a third-party perspective. Therefore we think that a neutral such as a mediator can most effectively deal with impediments of a psychological nature.

**Table 9: Matching Criteria for Cases Based on the Impediments of the Process for Reaching an Effective Solution (continued)**

Process Impediments	Mediation	Mini-trial	Summary Jury Trial	Early Neutral Evaluation	Arbitration/Private Judging	Adjudication
Inability to Negotiate Effectively <sup>92</sup>	2	2	1	1	2	2
Unrealistic Expectations <sup>93</sup>	2	2	3	3	0 <sup>94</sup>	0
Power imbalance	1	1	3	3	2	2
Other <sup>95</sup>						

Source: Frank E.A. Sander & Lukasz Rozdeiczer

Legend: 0 = unlikely to satisfy goal, 1 = satisfies goal somewhat, 2 = satisfies goal substantially, 3 = satisfies goal very substantially

<sup>89</sup> Although adjudicative processes are in fact the only way to resolve the disputed question of law, sometimes the answer comes too late for the parties to use this knowledge, and they can come to a more efficient solution if they receive an informed opinion earlier in the case. For that reason we assign value 2 (not 3) to the adjudicative processes.

<sup>90</sup> One of the key tensions in negotiation is the dilemma of whether to disclose one's own interests or preferences and thus increase chances for value creation, or conceal them and claim value and protect oneself from being exploited by the other party. See particularly Lax & Sebenius *Manager as Negotiator* p. 29-45, Korobkin, R. (2002). *Negotiation Theory and Strategy*. New York, Aspen Publishers Inc. p. 223. Mnookin, R. H., Peppet, Scott R., Tulumello, Andrew S. (2000). *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. Cambridge, Mass., Belknap Press of Harvard University Press.. One of the solutions to this dilemma is partial reciprocal disclosures over time. Another solution would be to involve a third party neutral in facilitating exchange of information.

<sup>91</sup> Psychological barriers include for example: reactive devaluation, loss aversion, or optimistic overconfidence. For detailed description see: Arrow J. Kenneth et al (ed.), (1999) *Barriers to Conflict Resolution*. PON Books; Mnookin, R. H. (1993). "Why negotiation fail: An exploration of barriers to the resolution of conflict." *Ohio State Journal on Dispute Resolution* 8(2): 235-49.. Overcoming psychological barriers requires a third-party perspective. Therefore we think that a neutral such as a mediator can most effectively deal with impediments of a psychological nature.

<sup>92</sup> Inability to negotiate effectively may be caused either by a very hostile negotiation style or, at the other extreme, by being extremely yielding. Sometimes, otherwise good negotiators may be very ineffective with certain other parties. For example, in a family/divorce dispute each spouse should carefully consider the past patterns of decision-making of divorcing parties, and make sure that he/she can face the other spouse and effectively advocate his/her own interest. Inability to do so may suggest a procedure where a third party makes a binding decision, instead of a mediation that might be otherwise advisable. Another approach here would be to use agents. Mnookin, R. H., L. Susskind, et al. (1999). *Negotiating on Behalf of Others: Advice to Lawyers, Business Executives, Sports Agents, Diplomats, Politicians, and Everybody Else*. Thousand Oaks, Calif., Sage Publications.; See also Goldberg, S. B., Frank E.A. Sander, et al. (2003 4th ed). *Dispute Resolution: Negotiation, Mediation, and Other Processes*. New York, NY, Aspen Law & Business., p 66.

<sup>93</sup> According to many economists trial is caused by excessive optimism on the part of one or both parties of the dispute. For economic analysis of incentives to settle see John. P. Gould, *The Economics of Legal Conflicts*, 2 J. Legal Stud. 279 (1973); William M. Landes and Richard A. Posner *Adjudication as a Private Good*, 8 J. Legal Stud. 235 (1979). Cf. Cooter, Marks and Mnookin (1982) "Bargaining in the shadow of the law: a testable model of strategic behavior" J. of Legal Studies vol. XI.

<sup>94</sup> Although arbitration and litigation, in fact, most effectively can show parties whether their expectations were realistic, after such binding resolution it is generally too late for the parties to use this knowledge to arrive at a better result. We think that the benefit for the party of having a realistic expectation is to be able to settle rationally. An arbitration or a court award often precludes the possibility of such later settlement.

<sup>95</sup> For more examples of impediments and their descriptions see e.g.: Arrow J. Kenneth , Robert H. Mnookin , et al., Eds. (1999). *Barriers to Conflict Resolution*. Cambridge, MA, PON Books., Watkins, M. a. P., S. (1996). "Analyzing Linked Systems of Negotiations." *Negotiation Journal* 12., Mnookin, R. H. and L.A. Kornhauser (1979). "Bargaining in the shadow of the law: The case of divorce." *Yale Law Journal* 98(950), Mnookin, R. H. (1995). *Barriers to the negotiated resolution of conflict*. New York, W.W. Norton. ROBERT H. Mnookin, R. H. (1995). *Barriers to the negotiated resolution of conflict*. New York, W.W. Norton. (1995), Mnookin, R. H., Peppet, Scott R., Tulumello, Andrew S. (2000). *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. Cambridge, Mass., Belknap Press of Harvard University Press., WATKINS, M. AND S. ROSEGRANT (2001). *BREAKTHROUGH INTERNATIONAL NEGOTIATION : HOW GREAT NEGOTIATORS TRANSFORMED THE WORLD'S TOUGHEST POST-COLD WAR CONFLICTS*. SAN FRANCISCO, CA, JOSSEY-BASS. (2001), GOLDBERG, S. B., FRANK E.A. SANDER, ET AL. (2003 4TH.ED). *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES*. NEW YORK, NY, ASPEN LAW & BUSINESS., Lax, D.A., Sebenius, James K. (1986). *The Manager as Negotiator: Bargaining for Cooperation and Strategic Gain*. New York, N.Y., Free Press., Bazerman, M. H. and M.A. Neale (1992). *Negotiating Rationally*. New York, N.Y., Free Press.; Susskind, L., Geoffrey Cruikshank (1987). *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*, Basic Books.

the interests. Therefore, a party could assign a weight, in points, to each of her concerns, and then multiply them by the measure by which such procedure satisfies these goals, facilitating features or impediments<sup>96</sup>.

In selecting appropriate cases, attention should also be given to the types of cases that are going to be judged. For the purpose of this manual, judges should focus on commercial cases. Creating a list with the types of cases that the court handles could help determine more clearly which cases could be referred. For example, in the Commercial Court of Ljubljana (Slovenia), the following types of cases were distinguished: (i) disputes related to contractual relationships; (ii) cases related to establishing the extent and the share in joint property; (iii) law of property disputes; (iv) disputes with inheritance elements; (v) copyright disputes; (vi) housing cases; and (vii) family disputes<sup>97</sup>. Mediators and Judges should decide what categories of cases make the most sense for them. Another good example is the Multi-Door Division of the Superior Court in Washington, D.C.<sup>98</sup>

## 8. How to Organize a Mediation Center<sup>99</sup>

Regardless of the type of Mediation Center the project manager decides on (free-standing or court-referred), this section provides general guidance on how a mediation center could be organized in a given country. Depending on the size of the project, the elements can be adjusted, but in general these are the aspects that should be considered.

### 1. Choosing the location and setting up the offices

The location of the mediation center depends on the type of system that will be established. For free-standing mediation projects, the center could be located anywhere in a city or urban area with good communication access. For court-referred systems, it is advisable to locate the mediation center near the court or tribunal that is referring the cases. For court-annexed projects, the mediation room will obviously be located inside the court or near it and the costs/organization of would be normally driven by the court.

As for the characteristics of the mediation center, the following should be sufficient for a pilot project. Ideally, the mediation center should have two or three mediation rooms<sup>100</sup>, a training/conference room and one or two offices/cubicles for

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<sup>96</sup> For details of this procedure see Sander, F.E.A. and L. Rozdeiczer (2006). "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach." *Harvard Negotiation Law Review* 11. p. 17.

<sup>97</sup> See Sekirnik, T. and M. Kociper (2005). Report On Statistical Data of Alternative Dispute Resolution Program with Mediation at the District Court in Ljubljana for 2004. Jjubljana, District Court in Ljubljana, Department for alternative dispute resolution.

<sup>98</sup> See. <http://www.dccourts.gov/dccourts/superior/multi/index.jsp>

<sup>99</sup> This section includes extract from "ADR Platform; Pilot Project Management Manual for Court-Referred Mediation" IFC/SEED, 2005. Please see document for more details.

<sup>100</sup> The mediation rooms could be use for conducting the mediation but also for a mediator to use for reflection, for sub-group meetings or for a third arty in multiparty cases.

the staff of the mediation center. If possible, the training/conference room should be large enough to accommodate at least 15-20 people, so it could be used for training mediators, judges, and other stakeholders, as well as for individual meetings with the parties and their representatives. Although it may seem irrelevant to many, the decoration, furniture and ambience of the mediation rooms should be carefully analyzed. Parties have to feel comfortable and confident in the room. There should be a quiet environment, with natural light if possible, and relatively new, comfortable furniture.

The mediation center should be established as the center for operations for the pilot project, and as a permanent institutional legal entity with the necessary organizational requirements of the specific country. All the expenses related to the mediation center (except in court-annexed systems), such as the office rent, salaries of the staff, training of mediators and sometimes the mediators' fees could be financed by the project budget (donor) at least for the first two to three years to allow the center to become financially sustainable.

## 2. Staff of the mediation center

For a pilot project, the mediation center could be managed by two full-time permanent staff (a manager/coordinator and an administrator). Depending on the volume of cases that the center has to deal with and at a later stage of the project, some mediation centers might need more resources. The mediators should not be considered staff of the mediation center. The mediation center should have a pool of mediators from which to choose for resolving cases. The mediators should receive fees from the center for participating in the resolution of cases, but should not be in the payroll of the center. The mediator's fees should be paid by the center (with the project budget at the beginning and with the center's own resources once the center is sustainable or with the fees paid by the parties).

The center should be run by a *manager/coordinator*, who would be in charge of the daily operations of the center. Some of the responsibilities the manager/coordinator should have include: (i) coordinating the establishment of the mediation center with the donor project team and other stakeholders; (ii) representing the mediation center; (iii) administering the budget; (iv) reporting periodically to the donor project team; (v) running the day-to-day operations of the center.

The manager/coordinator should be assisted by an *administrator* of the mediation center, who would be responsible for all administrative work required for the mediation sessions and recording of results. One of the main functions of the administrator should be creating a database of all mediations and inputting other data and indicators that will later be used to monitor results. The administrator would also be in charge of sending all the necessary documentation to the media-

tors and to the parties, organizing the schedules for the mediation sessions and scheduling meetings. If the budget allows, it would be recommended to hire a *data analyst* for the mediation center with expertise in monitoring, evaluating and collecting data. If there is such a staff member, the administrator would delegate these functions to the data analyst.

### 3. Mediation sessions

Mediation sessions usually start by the mediator asking the parties to sign a form that establishes the agreement of the parties to mediate, describing their obligations in a mediation process and stipulating that all aspects of the mediation will be confidential. The mediator will moderate the whole session and the parties can attend the session with or without their lawyers or legal representatives.

Mediation sessions are usually scheduled to last up to three to four hours, although they can last much longer. If an agreement is reached, the mediator would write up the resolution and the parties would sign the agreement. This agreement becomes a new contract. If one party violates that contract, the other party has the ability to seek enforcement of it in court, or to try to resolve that dispute as well through ADR. If an agreement has not been reached after the scheduled time, the parties can agree with the mediator to continue the discussions in another session. If the parties are not amenable to continuing the discussion, the mediation is deemed to have concluded without a settlement, and the parties continue towards litigation or arbitration. It is highly advisable to ask the parties to complete an evaluation form after the mediation session. The chances of them to fill in the form are much higher at this moment than if the evaluation is sent to them later by e-mail or mail.

### 4. Budgeting the costs for establishing a mediation center

Chapter 3 of this manual provides a detailed budget (Table 4) of the different costs that have to be considered when setting up a mediation center. Therefore, please refer to Table 4 in Chapter 3 for information on this subject

## 9. Starting with a Pilot Project

One of the key strategic questions for a mediation project is whether to create one pilot project first, and then roll it out to other places in the country, or to start the project in several places at once. It seems that the gradual approach of starting with the pilot project would be more preferable in many instances. Establishing one mediation center, performing and coordinating all other tasks described above, together with some additional activities at the national level (gathering national champions and support, passing the law, etc.) seem to be very challenging tasks

even with one pilot project. Such an approach should also limit the risks and costs of some unavoidable mistakes and allow appropriate focus on both the local and the national levels. Moreover, a pilot project allows those involved to:

- select a court that is most likely to succeed and produce a “successful story;”
- establish high standards in one place and spread them out;
- train mediators and trainers gradually so that experienced mediators’ from the pilot project may become mentors and trainers for other projects;
- learn from past mistakes and constantly improve design and execution; and
- roll out the project slowly, depending on developments, and using resources and experiences of the pilot project.

### **Box 12: Selecting the Right Pilot for ADR in Pakistan<sup>101</sup>**

**A pilot mediation centre promotes a “demonstration” effect because of the following factors:**

- It is an independent (private company) with close proximity to the courts;
- The court-referred mediation supports judicial system (reforms) by alleviating case backlog at courts where commercial cases originate.
- It promotes mediation of disputes between private parties (specially SMEs).
- It institutionalizes binding and enforceable (court-referred) mediation.

**Reasons for selecting Karachi, Province of Sindh for the pilot:**

- It is a hub for SMEs in Pakistan.
- Chief Justice, High Court of Sindh is an advocate for mediation.
- Sindh province jurisdiction permits commercial disputes above US\$50k to originate at the High Court commercial bench.
- Lawyers are relative willing to engage in ADR.

<sup>101</sup> IFC – PEP MENA ADR project in Pakistan

# Chapter 5: Monitoring and Evaluation

## 1. What to Measure?

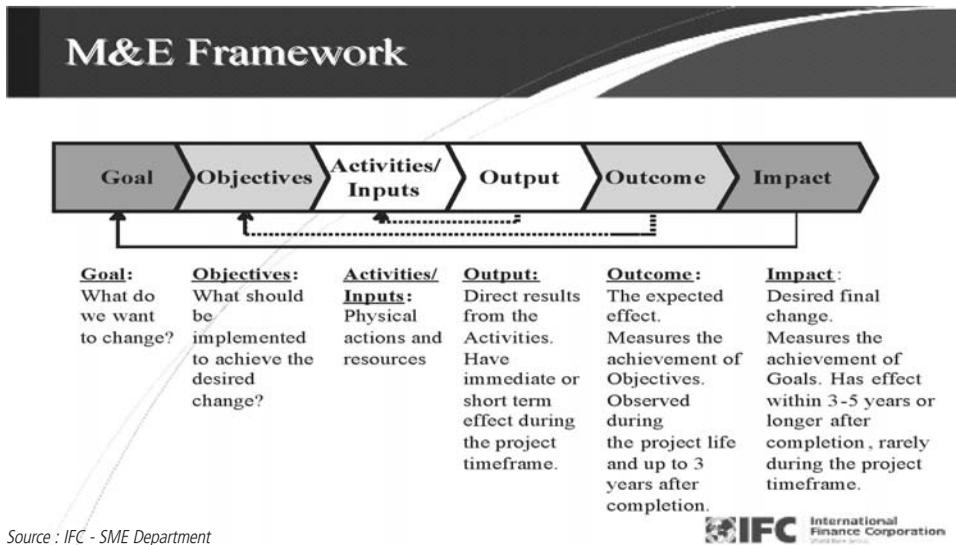
It is essential for the success of any ADR program to set performance targets and to measure them. The project manager will need to make sure that performance is measured from the very inception of the project to make sure that performance targets are met after the implementation. The monitoring of the project and the performance will serve as a reporting tool to the implementing institution, donors, the government, and main stakeholders that will give recognition to the work and to the reform. Unless there are tangible results to show, there will be no recognition to the project, no matter how much work the project manager and his/her team have done. This is why monitoring the impact is certainly the most important part of the project.

The IFC has developed a monitoring and evaluation methodology that is somewhat standard for all technical assistance projects.<sup>102</sup> There are obviously differences in the indicators that are used for each type of project, but the methodology to collect results is standard. Indicators are derived from program logic models. These models describe the sequences of cause and effect relationships that link IFC program activities to intended impacts. Each model has five basic components as illustrated in Figure 2.

*Inputs* refer to the resources used in program activities. *Activities* are the actions taken or work performed in particular projects using specified inputs. IFC technical assistance projects include activities such as assessments, advisory services, training, and public awareness campaigns. These activities are intended to result in *outputs* such as reports, advice, training events, and media coverage. In turn, these outputs are expected to yield certain *outcomes* in terms of changes in knowledge, behavior, and performance among beneficiaries in the target population. Finally, it is anticipated that programs will generate development *impacts* including higher productivity, greater income, and economic growth.

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<sup>102</sup> See “Guide to Core Output and Outcome Indicators for IFC Technical Assistance Programs”, January 2006.

**Figure 2: Basic Program Logic Model**

## 2. Tracking Impact through Indicators<sup>103</sup>

The project manager and the team need to determine during the design phase of the project which indicators they want to measure to achieve the intended results. There are many outcomes and impacts that can be measured in a project like this. Therefore, the project manager will have to choose those indicators that are most appropriate for the project, depending on the objectives and expectations of donors and stakeholders.

The project team will need to track indicators for the different elements of the log frame illustrated in the last section. This section provides some guidance on what type of indicators could be used for each of the elements of the log frame: outputs, outcomes, and impact. However, this list is not comprehensive of all the indicators that exist for measuring the impact of an ADR project. The project team might consider that some of these indicators are not appropriate and could instead replace them with others.

### *Output indicators for ADR projects*

Output indicators aim to measure the magnitude of the activities produced directly by IFC and/or third parties under contract to IFC in technical assistance projects. The following table provides indicators that can be used for activities that are considered as outputs.

<sup>103</sup> Taken from the "Guide to Core Output and Outcome Indicators for IFC Technical Assistance Programs", January 2006 with slight adaptations for ADR programs.

**Table 10: Output Indicators for ADR projects**

Activity	Indicator	Measuring Tool (Data Source)
<b>Assessment/Feasibility for introducing ADR</b>	Number of reports produced by IFC/the team and third-parties under contract to IFC/the team in the quarter	Program records
<b>Advisory Services on ADR Issues</b>	Number of unique organizations to which advisory services were provided by IFC and third-parties under contract to IFC in the quarter (by type of beneficiary)	Program records
	Number of advisory service hours provided by IFC and third-parties under contract to IFC in the quarter (by type of beneficiary)	Program records
	Number of new laws/regulations drafted or contributed to the drafting.	Program records
	Number of laws/regulations to which improvements have been recommended	Program records
<b>ADR Training</b>	Number of training events (courses, seminars, workshops, etc) conducted by IFC and third-parties under contract to IFC in the quarter	Program records
	Number of participants (mediators/arbitrators, judges, legal community, etc) in training events conducted by IFC and third-parties under contract to IFC in the quarter (by type of beneficiary)	Program records
	Number of participant-training hours provided by IFC and third-parties under contract to IFC in the quarter (by type of beneficiary)	Program records
	Number of unique organizations that sent individuals for training conducted by IFC and third-parties under contract to IFC in the quarter (by type of beneficiary)	Program records
<b>Public Awareness Campaign for New ADR Mechanism</b>	Number of substantive media reports produced in association with IFC and third-parties under contract to IFC in the quarter	Program records
	Number of press releases distributed	Program records
	Number of TV/radio spots aired	Program records
	Number of unique visitors to Web site developed by IFC and third-parties under contract to IFC in the quarter (if website is a result of the project being monitored)	Program records
	Number of public information events held or sponsored by IFC and third parties under contract to IFC in the quarter	Program records
	Number of participants at public information events held or sponsored by IFC and third-parties under contract to IFC in the quarter	Program records
<b>Satisfaction with Services Provided by IFC and/or third parties under contract to IFC</b>	Percentage of clients indicating being very satisfied or satisfied with the service (Five-point scale where 5=very satisfied, 4=satisfied, 3=neutral, 2=dissatisfied, and 1=very dissatisfied)	Client Satisfaction Survey

Source: Adaptation from *Guide to Core Output and Outcome Indicators for IFC Technical Assistance Programs*

**Outcome Indicators for ADR Projects**

Outcome indicators for an ADR project aim to measure the changes that occurred in the processes, and changes in knowledge and behavior due to the outputs. The table below provides guidance on the type of indicators that can be used to track the outcomes of ADR projects.

**Table 11: Outcome Indicators for ADR projects**

Activity	Indicator	Measuring Tool (Data Source)
<b>Change in Laws and/or Regulations related to ADR</b>	Number of laws promulgated (new or amended) during the year where IFC or third-parties under contract to IFC played a role in the process	Program records
	Number of by-laws and regulations promulgated (new or amended) during the year where IFC or third-parties under contract to IFC played a role in the process	Program records
<b>Learning in Terms of Knowledge Skills</b>	Number of participants reporting having obtained new knowledge and skills as a result of training	Training Participant Survey
	Percentage of participants strongly agreeing or agreeing with the statement that they have obtained new knowledge and skills as a result of training (Five-point scale where 5=strongly agree, 4=agree, 3=neutral, 2=disagree, and 1=strongly disagree)	Training Participant Survey
<b>Changes in the Way of Resolving Disputes</b>	Number of cases referred to ADR by judges	Court Survey or Court Data
	Number of disputes resolved through ADR/Mediation	Program records
	Number of Courts referring cases to ADR/Mediation	Court Survey
<b>Institutional Changes</b>	Number of new institutions created (ADR/Mediation Centers) where IFC or third-parties under contract to IFC played a role in the process	Program records
	Number of Business Associations promoting ADR mechanisms among its members where IFC or third-parties under contract to IFC played a role in the process	Business Association Survey
	Number of Associations of Mediators created where IFC or third-parties under contract to IFC played a role in the process	Program records
	Number of mediators/arbitrators practicing ADR	Program records

Source: Adaptation from *Guide to Core Output and Outcome Indicators for IFC Technical Assistance Programs*

### ***Impact indicators for ADR projects***

Finally, the project team will have to measure the impact, which is the desired final change and is normally associated with the development impact, which includes higher productivity, greater income and economic growth. For any business-enabling environment projects, including ADR projects, the correlation between the project outputs and outcomes and the project impact (economic growth, higher productivity, increased employment, etc) is not easy to demonstrate. Therefore, while the project should aim at achieving development impact, the main objective should be to improve the business climate. There are certain indicators that can help measure this correlation better. The table below provides some examples of what the main indicators should be when measuring the impact of a project.

**Table 12: Impact Indicators for ADR projects**

Goal	Indicator	Measuring Tool (Data Source)
<b>Business Environment Has Improved. Increased Economic Growth and Higher Productivity. More Confidence in the Judicial System</b>	Percentage of enterprises reporting that the business enabling environment is conducive to their productivity and growth	Enterprise Survey
	Reduction of backlog in the courts (in number of cases) due to the introduction of ADR mechanisms	Data from the Court
		Court Survey
	Average cost born by companies to resolve disputes, including government/court fees, payment to attorneys or other third parties and unofficial payments	Enterprise (parties in conflict) Survey
	Average time in calendar days/hours spent to resolve commercial disputes	Enterprise Survey
		Court data
	Amount of funds released from resolving economic disputes between companies through ADR/Mediation	Program records
		Enterprise Survey
	Average time to enforce contracts	Doing Business
Enterprise Survey		
Percentage of trust in the judicial system by companies	Enterprise Survey	
Financial Sustainability of Mediation Center	Program records	

Source: Adaptation from Guide to Core Output and Outcome Indicators for IFC Technical Assistance Programs

The table below provides information about some of the results measured by IFC – PEP SE in its mediation projects in the Balkans. The results were measured using the above methodology with some specific adjustments.

**Table 13: Impact of Commercial Mediation in the Balkans**

Indicator	Bosnia		Serbia and Montenegro	
Number of Cases Mediated	487		1,573	
Disputes Successfully Resolved through Mediation	278		1,400	
<b>Backlog Reduction</b>	10-15%*		10-15%*	
<b>Assets Released</b>	\$10 million		\$5,6 million	
<b>Contract Enforcement (in days) between 2004-2006</b>	2004	2006	2004	2004
	630	330	1,028	635

Source: IFC – PEP SE

\* Results are limited to the pilot courts participating in the ADR project

### 3. When to Measure?

There are three specific points in time where a measurement of performance indicators should be made throughout the ADR/mediation reform project. The first stage is at the diagnosis phase when the assessment of ADR systems is being made. The second measurement exercise should occur when results can or should be expected (e.g. 6 months) following the implementation of project. This measurement is intended to determine whether the reform introduced has actually resulted in improvements. The third measurement serves an audit function and may occur 12 to 18 months following implementation of the project. This audit is intended to ascertain whether there has been any deterioration in performance since the completion of the reform initiative.

During the *Diagnosis or Design Phase*, the project team will need to ensure that performance is measured from the very inception of the initiative to guarantee that performance targets are met. Without accurately recording data, the project team will not be able to determine whether the introduction of ADR/mediation has met its goals. To determine whether a reform process has been successful, it is necessary to conduct an evaluation, essentially taking “before” and “after” snapshots of performance. To do this, the diagnostic phase should include a benchmarking exercise to capture performance indicators prior to the process design.

As mentioned previously, “faster and cheaper resolution of disputes,” “amount of funds released,” “reduction of backlog,” and a “better business environment” are obvious candidates for being the main indicators to measure, but there are no uniformly defined performance indicators for ADR. The previous table with the indicators will help the project team in determining which indicators are more important for the team to measure, depending on the objectives of the project.

Normally, the reform team should undertake baseline surveys in the design phase to obtain statistics regarding these indicators. These baseline indicators will be used then to compare results after the reform process.

Measurement of performance indicators is also important when the evaluation process takes shape shortly after the reform process is completed. This evaluation phase begins with a *Post-Initiative Assessment Report*, which examines and documents the initiative’s outcomes, whether the original objectives were met, and how effective the management practices were in keeping the project on track. A timely and comprehensive Post-Initiative Assessment Report will identify ongoing issues to monitor, as well as provide some “lessons learned” to assist judges and mediators in planning and managing future reform process or making simple adjustments. Consideration should be given to using an objective third party to prepare the report.

The preparation of this report should occur within an appropriate period of time following the implementation of the reforms (e.g. six months). Again, in keeping with extending acceptance of the initiative as broadly as possible, stakeholders should be consulted as to their experience with the newly established dispute resolution system. Interviews and client surveys are two tools to consider when gauging views on the revised process.

In addition to formal reviews, the project team should observe the implementation of the initiative on a day-to-day basis to determine whether any fine-tuning of the process may be required. Judges and mediators may notice that minor adjustments are required in the performance of day-to-day operations. If, however, structural issues arise that were not anticipated in the planning stage, then a formal review of the initiative should be conducted at the earliest possible time to address and resolve the issues.

The Post-Initiative Assessment Report should focus on two key aspects:

- A “gap analysis” examining the differences between the planned requirements, schedule, and budget and what actually resulted, when it occurred, and the degree of deviation from the plan.
- A “lessons learned” exercise.

**Box 13: Preparing a Post-Initiative Assessment Report – A Checklist**

- Allow sufficient time to pass for an effective Post-Initiative Assessment Report to be prepared (e.g. 6 months after the launching of the simplified procedures).
- Consider retention of independent evaluator.
- Conduct gap analysis: (i) reviewing original objectives; (ii) documenting current performance indicators; (iii) comparing original objectives to results; and (iv) comparing original performance (backlog of cases, time and cost of resolving disputes) to current performance.
- Solicit feedback from internal and external stakeholders.
- Schedule and conduct a “lessons learned” exercise.
- Document positive and negative results from stakeholder feedback and lessons learned in Post-Initiative Assessment Report.
- Draft recommendations for possible changes/improvements.
- Disseminate evaluation results to key stakeholders.

A “lessons learned” exercise is the collection and analysis of feedback on events that happened during the initiative. It provides an opportunity for the reform team and stakeholders to discuss things that happened during or because of the initiative: successes, unanticipated or unintended outcomes and possible alternatives (i.e. how things might have been done differently). A major source of such information should be the ultimate beneficiaries of these reforms, the entrepreneurs.

The third measurement phase serves an audit function and may occur 12 to 24 months following implementation of the new ADR mechanism. This audit is intend-

ed to ascertain whether there has been any deterioration in performance since the completion of the reform initiative. Obviously the indicators used in the design phase will be compared with what the indicators show 1 or 2 years after the reform was completed. This evaluation should be undertaken every year as a form of keeping track of the impact of reform over time.

#### 4. How to Measure? Monitoring Tools and Data Collection<sup>104</sup>

Successful measurement depends on the quality of data collected through program records, surveys, and secondary sources. 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 following table lists the sources of data needed to calculate core indicators and the recommended frequency of data collection efforts. Program records detailing the nature and magnitude of activities undertaken by IFC 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 on an annual basis.

**Table 14: Monitoring Tools and Frequency of Data Collection**

Data Sources	Frequency of Data Collection
<b>Program records</b>	Ongoing
<b>Surveys</b>	
Client satisfaction	Upon project completion
Training participants	Upon completion of training
BDS providers (i.e., ADR trainers)	Baseline and annually thereafter
Business Organizations	Baseline and annually thereafter
Enterprises	Baseline and annually thereafter
<b>Secondary Sources</b>	
Mediation center	Baseline and annually thereafter
Government institutions/Courts	Baseline and annually thereafter
World Bank – Doing Business, Investment Climate Data	Baseline and annually thereafter
Other Reports	Baseline and annually thereafter

Source: *Guide to Core Output and Outcome Indicators for IFC Technical Assistance Programs, 2006*

<sup>104</sup> See “Guide to Core Output and Outcome Indicators for IFC Technical Assistance Programs”, January 2006.

*Program records.* The project teams should maintain complete and accurate records. This should include data on the characteristics of organizations receiving technical assistance from IFC or third parties under contract to the IFC, including intermediaries and private enterprises. It should also include data on particular projects, including the type of activity (assessment, advisory services, training and information dissemination), participants, service providers, date of initiation and completion, and budget expenditures.

*Surveys.* As noted above, the project teams will need to conduct a variety of surveys to collect requisite data. To ensure the quality of data, the following procedures are recommended:

- **Questionnaires.** Project managers should use instruments that contain questions needed to obtain data required for relevant indicators. Questions should be worded in the same manner with any translations checked to ensure that meanings have not been altered inadvertently. (This will require the development of standard survey instruments.)
- **Sampling.** The goal is to have a sample that is representative of the population and therefore can be used to make valid generalizations. Unless a census is appropriate, project managers should survey a random sample of organizations drawn from the appropriate set of program participants or the target population as a whole. A random sample is where each entity in the sample frame has a known and independent probability of being selected for the sample. The size of the sample should be large enough to provide sufficient statistical power. Although there are no formal standards for statistical power, project teams should aim to draw a sample that would provide a power of 0.8 or greater.
- **Administration.** Given the nature of the information sought, most surveys should be administered in person (as opposed to mail or telephone) with a strict promise to protect the confidentiality of the respondents and their responses. Field personnel should be trained to conduct the surveys. All survey should seek to achieve a high response rate (at least 60 percent) to reduce potential response bias. To help ensure a high response rate, the project team should obtain the commitment of participants to respond to surveys as a condition of program participation.
- **Data entry.** The team should establish specific procedures for dealing with completed surveys. This includes tracking responses so that individuals failing to respond initially can be contacted and encouraged to complete the questionnaire. The quality of data entry should be verified by checking all or a sample of questionnaires for accuracy and by carefully examining data for responses that are not consistent. All questionable entries should be checked for problems and verified. Original copies of written questionnaires should be kept on file.

- Survey schedule. March is generally a good time to administer surveys to businesses because it allows sufficient time for companies to close their books after the end of the fiscal year. (Most fiscal years end December 31st.)

*Secondary sources.* Data required to calculate certain indicators will need to be obtained from secondary sources such as government institutions, courts, and surveys conducted by multilateral organizations (WB, International Monetary Fund) and other donor organizations. The project team will need to work with these organizations to ensure that data are accurate and provided in a consistent manner.

# Chapter 6: Key Challenges and Lessons Learned

## 1. Critical Challenges in the Implementation of a Mediation Project

### 1. Creating demand (awareness of demand) and attracting quality cases

*A key challenge – creating demand and attracting quality cases.* The table below compares three projects from the same region and legal culture, each established roughly at the same time, but each having a unique design. Albania hosted a private mediation (and arbitration) center that had no links to the courts. Bosnia and Herzegovina created a court-connected mediation center that had a cooperative agreement with a local court. In Serbia and Montenegro, a court-annexed mediation program was run primarily by judges who also served as mediators. Although mediators in Bosnia and Serbia went through the same mediation training, Bosnian mediators developed a more facilitative style than judges in Serbia (who settled 89 percent of the cases referred). The projects in Bosnia and Serbia were led by the IFC (PEP SE) and were both successful and well documented (evaluated).

**Table 15: Comparison of Cases Handled in 3 Countries in South-Eastern Europe**

Country	Albania (Private)	Bosnia Herzegovina (Court-connected)	Serbia and Montenegro (Court-annexed)
Cases Referred	0	2,632	n/a
Mediations Held	3	345 (13%)	1,289
Cases Settled	2 (66%)	213 (62% <sup>105</sup> )	1,154 (89%)
Satisfaction	n/a	98%	n/a

Source: IFC - PEP SE

<sup>105</sup> Only 8% of the cases referred to mediation by judges were settled.

The satisfaction of the parties was measured by a post-mediation survey only in Bosnia, and it revealed a very high level of satisfaction with the mediation process. Ninety-eight percent of the parties who went through mediation were satisfied or highly satisfied, and said they would recommend the process to others. In Serbia, Albania, and many other countries there is also strong anecdotal evidence of high levels of satisfaction among parties as well as high marks given to mediators by mediation trainers and supervisors, which together suggest the existence of an effective cadre of mediators.

*Users love it, but potential customers don't buy it.* Surprisingly, even though those who experience mediation (“users”) overwhelmingly appreciate it, and would recommend it to others (98 percent in Bosnia and anecdotal evidence of very high satisfaction in Serbia), still the vast majority of potential users do not see the need, or are not aware of the need to use it. In Bosnia, for example, the parties agreed to participate in mediation in only 13 percent of cases already pre-selected by judges. Similarly, in many counties where private mediation services were established, there was very little interest in mediation and very few cases were mediated (e.g. Albania, Poland, West Bank/Gaza etc.). Mediation centers that were able to attract cases were either connected to the court system or had cases referred from chambers of commerce. The latter situation is particularly evident in many Latin American countries, where chambers of commerce tend to be very strong and have almost monopolistic status (e.g. Projects in Argentina, Ecuador, and Chile etc.).

As mentioned in a previous chapter, not every case is suitable for mediation. It is important to measure not only what percentage of mediated cases settles, but also what percentage of cases referred by judges to mediation are actually held – attempts to mediate. This data allows to better control the quality of case referrals (by the court and by a particular judge) and shows the flow of cases. If cases referred to mediation have a poor settlement rate, or parties do not agree to mediate appropriate measures may be taken to remedy the situation. Cases that are referred to mediation, where the parties decide not to mediate are a huge burden on a mediation center that needs to take many preparatory steps for each scheduled mediation. Such steps include: correspondence with the parties, mediator’s preparation for the mediation, booking mediation facilities, taking mediator’s time, and include loss of opportunity of dealing with cases that have higher probability of success. Therefore not selecting appropriate cases or not explaining properly to the parties what the benefits of mediation is a large economic and organizational burden to the mediation center.

In countries where a particularly low percentage of cases referred to mediation is actually held, project managers should look carefully at the quality of the cases selected and also consider introducing mandatory mediation for some or all types of cases.

Generally, mediation projects achieve a high quality of (mediation) services supplied. Mediators are well trained, centers work well, and the parties are generally satisfied with the services provided. The biggest problem in most countries is the demand, or rather low perceived demand for mediation services and low number of quality cases to mediate. Thus, in designing and executing the project, more attention and resources should be directed at creating greater incentives to participate in mediation, selecting appropriate cases, informing parties of potential benefits and limited risks of mediation, and other approaches that might increase demand for mediation.

2. Exit strategy and sustainability of the project

When designing the implementation of an ADR/mediation project, donors should also consider what is going to be their exit strategy and the long-term sustainability of the project. Improving the business-enabling environment in emerging markets usually requires that the donor finances the first two or three years of the reform project. Cost recovery in these types of project is usually a challenge, since most governments are not able to co-finance the reform process. Therefore, it is appropriate for the donor to finance the costs associated with the project at least for the first two or three years.

However, the project should be designed bearing in mind that after a specific period, the donor resources will decrease up to a point when there won't be any financial support for the project. Therefore, it is critical to design an exit strategy and a plan for the financial sustainability of the project once the donor has exited the project. Table 16 provides some guidance on how the donor could approach the issue of sustainability. By progressively asking the parties to bear the costs of mediation as well as increasing the revenues from trainings and other services offered by the mediation center, the center could become self sustainable in a period of approximately two years (see also Figure 3).

**Table 16: Subsidizing ADR but Reaching Sustainability**

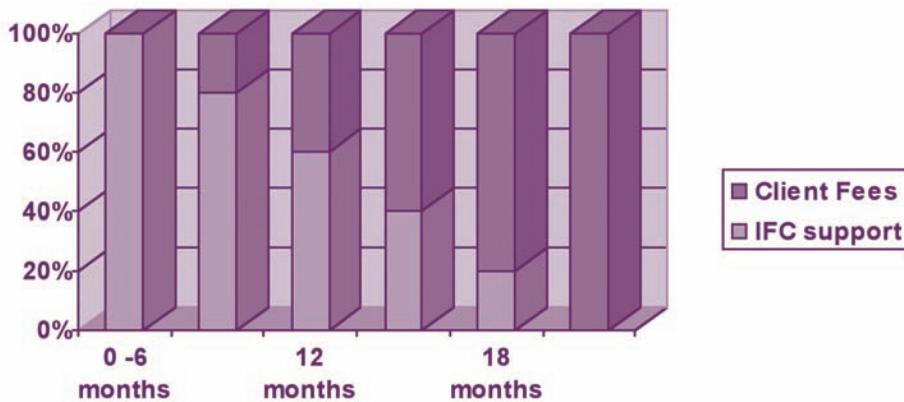
Expenses of pilot & Mediation Center	Project timeframe		
	Phase 1 (0-18 months)	Phase 2 (18-24 months)	Phase 3 (22 ≥ months)
Overhead	Financed by donor	Financed by Mediation Center	Financed by Mediation Center
Staff salaries	Financed by donor	Financed by donor	Financed by Mediation Center
Mediators' fees	Financed by donor	Financed by donor	Financed by the Mediating Parties

Source: Lada Busevac, IFC – PEP SE ADR Project in the Balkans

As for the exit strategy that would build in the future sustainability of the project, donors could establish certain parameters at the beginning of the project by:

- building awareness and creating demand through pilot initiatives,
- collecting subsidized fees throughout the entire pilot project life (the amount of the fees will depend on the specific country), and
- gradually reducing financing and transferring financial responsibility to a committed local partner.

**Figure 3: IFC's Sustainable ADR Model in the Balkans**



Source: Lada Busevac, IFC PEP SE ADR Project in the Balkans

## 2. Key Lessons for Developing a Sustainable Mediation Program

The following table provides a number of lessons drawn by ADR practitioners and project managers, and could serve as a checklist of things that should be carefully considered when introducing ADR systems in a given country.

### **Box 14: Key Lessons Learned for Developing ADR projects**

1. Detailed assessment of the project country and planning are crucial.
2. The project should aim at building the mediation capacity of local stakeholders.
3. Prerequisites for the project are: high transactional cost of litigation, key stakeholders (usually including judges), demand for ADR systems and financing.
4. Early on, organize, involve, and establish support of all key stakeholders – champions.
5. Identify and neutralize or involve veto-holders.
6. Coordination is challenging and very time-consuming.
7. Presume court-connected mediation.
8. Sustainability is about synchronizing incentives of the stakeholders and helping them succeed.
9. Creating demand is more difficult than creating supply. Incentives have to be there. To mitigate the lack of demand, attract quality cases by establishing a good mechanism for case selection and create awareness about the benefits of mediation.
10. Monitor the project from the beginning, establish indicators, and gathering data tools.
11. Mediation is a battle of cultures (mindsets) – public awareness is crucial for all the stakeholders.
12. Law on mediation is necessary when judges think that they need it.
13. Create rules and regulations that provide stakeholders (parties, judges, and the bar) with incentives to promote mediation.
14. Mediation training is essential for mediators, and highly recommendable for other parties, including project team members, judges, lawyers and government officials.
15. Recognize, and if necessary, modify judges' incentives.
16. Train judges in selecting cases and in advising parties on mediation.
17. Monitor and measure results, monitor and measure results, monitor and measure results, monitor and measure results...
18. Evaluation of results is crucial for many stakeholders as well as donors. Watch the case flow and react.
19. A pilot project will lead you. Don't be afraid to go small – it is a "retail business."
20. Recognize that mediation is very different from arbitration, but can work together in a private center.
21. Watch the standards and ethics.
22. Think ahead and prepare for the future. After the implementation of the project, new challenges will arise. Try to minimize the challenges and sustainability for the future during the implementation of the project.
23. Gather more data, and ...keep on learning.

# Appendix A: Compendium of Case Studies

## Case 1: ADR in Bangladesh: Court-Annexed Judicial Settlement

*By retired Chief Justice Mustafa Kamal*<sup>106</sup>

### 1. History & Development

In June 2000, formalized ADR was introduced in Bangladesh by means of court-annexed judicial settlement pilot projects, in an effort to decrease delays, expenses, and the frustrations of litigants labouring through the traditional trial process. The pilot program began in a collaborative effort with ISDLS in a series of Bangladeshi legal studies of Californian ADR systems. Three Pilot Family Courts were established in the Dhaka Judgeship, which exclusively used judicial settlement to resolve family cases including: divorce, restitution of conjugal rights, dower, maintenance and custody of children. An amendment to the Code of Civil Procedure was not necessary due to an existing 1985 Family Courts Ordinance, which authorized the trial judge to attempt reconciliation between parties prior to and during trial. The pilot courts were staffed by 30 Assistant Judges selected from all over Bangladesh, lawyers and non-lawyers, who were given training by a United States mediation expert (organized by ISDLS). During this assignment, the Assistant Judges were relieved of all other formal trial duties<sup>107</sup>.

All three pilot programs were fully functioning by January 2001. Once judges had begun successfully settling cases, the program was expanded slowly to additional courts throughout the country. By the end of the first year of the program, the judicial settlement procedure in family disputes had effectively been introduced in 16 pilot family courts in 14 districts of Bangladesh.

Due to the high settlement rates these courts were achieving, the Law Minister convened a conference in 2002 in order to spread awareness of the achievements

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<sup>106</sup> Paper presented on the conference organized by (ISDLS) Institute for the Study and Development of Legal Systems (2005). Report on the Turkish Civil Justice Conference: ADR Learning Program.

<sup>107</sup> As Bangladesh uses a system of judicial credits for the career advancement of judges (based on number of cases settled by trial), a similar credit system was enacted for cases settled through mediation.

of these programs. The conference brought together all District Judges, Presidents and Secretaries of all District Bar Associations, previous Chief Justices, the current Chief Justice, Judges of both divisions of the Supreme Court, and prominent lawyers from throughout the country.

In 2003, the Civil Code of Procedure was amended to introduce mediation and arbitration as a viable means of dispute resolution in non-family disputes. In addition to this amendment, the Money Loan Recovery Act stipulated the use of Judicial Settlement Conferences for money loan recovery cases. A training program led by former Chief Justice Mustafa Kamal took place at the Judicial Administration Training Institute (JATI) in Dhaka for the forty judges that have exclusive jurisdiction over money loan recovery cases. Mediations began in non-family disputes in July 2003.

### 2. Mechanisms

Bangladeshi mediation is a facilitative, informal, non-binding, confidential process directed by judicial officers. The case, once filed, is immediately assigned to either an ADR track or a trial track. For cases assigned to ADR, mediation proceedings take place within two months of filing. If a settlement is not reached within this period, the case begins a continuous trial over the course of six months. If a resolution is reached through mediation, parties can request a refund of the fees paid to the court. Under this system, each case assigned to the ADR track is resolved by adjudication or by mediation within six months of filing.

### 3. Institutional Framework

The majority of ADR in Bangladesh is court-annexed; a private mediation facility has not yet developed. Judicial mediators are compensated in the same amount as the traditional trial judges.

### 4. Coordination & Oversight

The mediation program is coordinated through the court registration process, which assigns cases to either the mediation or the regular trial track. Throughout the pilot, a legal study group appointed by the Chief Justice of Bangladesh and headed by Justice Kamal, carefully monitored the performance of settlement officers and the program. The legal study group regularly reported high rates of settlement and client satisfaction.

### 5. Implementation Strategies

Within two years, the Judiciary (or the ADR process) had successfully eliminated all opposition from the Bar Association by demonstrating that ADR did not

decrease lawyers' income; within this short span of time, ADR gained great acceptability within Bangladeshi society.

At the conclusion of the Bangladeshi ADR pilot project Justice Kamal noted the importance of adhering to a thorough plan of action when implementing an ADR program. Without a decisive plan, ADR resources can be overwhelmed by undisciplined case referral or misused by the referral of cases inappropriate to ADR, causing settlement rates to suffer. The use of pilot projects allowed the program to evolve while being closely supervised and adjusted to overcome potential difficulties. Also clear from the Bangladeshi project was the necessity of a dedicated oversight team in order to spearhead and monitor the development of the project. In Bangladesh, retired judges presented an accessible and appropriate group to fulfill this necessary function.

## 6. Success and Limitations

Two years after the initiation of the pilot Family Courts, 1322 family cases had been disposed of through mediation. Rates of disposal varied from 35%-83% of pending family cases, depending on the court.

Between July 2003 and July 2004, 3,432 non-family cases were disposed of through mediation. In money loan recovery cases, the Loan Courts have disposed of 13,157 cases between May 2003 and July 2004.

The current widespread use of mediation has necessitated consideration of a national training facility for mediators, to provide standardized training and certification for all mediators. Efforts are now being made to expand the ADR program to include commercial cases.

## Case 2: ADR in Brazil—Court Annexed “Conciliation” Sao Paulo Court of Appeals and Primary Courts<sup>108</sup>

*By Kazuo Watanabe and Paulo Eduardo Alves Silva<sup>109</sup>*

### 1. History & Development

In March 2003, the Sao Paulo Court of Appeals created a special conciliation program, as the result of a legal study of California ADR models (facilitated by ISDLS). The program sought to reduce the backlog of civil cases being appealed to the higher courts. As a result of the projects initial successes, Sao Paulo Lower Court (trial court) has since adopted a similar ADR model in August 2004.

<sup>108</sup> Paper presented on the conference organized by (ISDLS) Institute for the Study and Development of Legal Systems (2005). [Report on the Turkish Civil Justice Conference: ADR Learning Program](#).

<sup>109</sup> From the Brazilian Judicial Studies and Research Center.

## 2. Mechanisms

Under the Sao Paulo Court of Appeals ADR system, parties in every appeal receive notification for a conciliation meeting, giving the parties the first opportunity to discuss settlement with a conciliator selected by the court. All parties must be represented by counsel to participate in conciliation. In order to become a conciliator, one must be a retired Judge, a public attorney, a private attorney (with 20 years legal experience), or University professor (with 20 years of teaching experience). There are 65 conciliators working in this capacity within the conciliation division. Most dedicate 4 hours a week to conciliation proceedings.

Within the Sao Paulo Lower Court there are more than 120 conciliators distributed among forty-two Lower Courts. The City of Sao Paulo initiated Conciliation Division arranges settlement meetings between parties at the courthouse. Parties are not required to retain legal counsel for conciliation hearings. Conciliators may be retired or active judges, retired public attorneys, private attorneys, and professors with more than 5 years of experience; however, nearly all conciliators are lawyers. Cases involving ordinary collection, indemnification for car accident, indemnification for pain and suffering, summary collection and eviction for non-payment are eligible for conciliation.

## 3. Institutional Framework

Brazilian conciliation is a court-annexed program at the appellate and lower courts. Conciliators in the Sao Paulo court system are not paid for their services.

## 4. Coordination & Oversight

Within the Sao Paulo Lower Court one judge serves as the coordinator of the Conciliation Division. Conciliators are trained in 40-hour training courses.

## 5. Implementation Strategies

ADR implementation in Brazil began at the appellate level and, due to initial success, was installed in the Lower Courts.

The Sao Paulo Court of Appeals conciliation program initially faced significant resistance from the legal community due to the perception that parties that had received a favourable verdict at the court of first instance would not be amenable to conciliation. This perception proved to be unwarranted due to the long delay for adjudication of a case at the Court of Appeals; both the party filing the appeal and the opposing party have demonstrated openness to conciliation in order to settle the case in a timely fashion.

## 6. Successes & Limitations

Though parties are not required to attend these conciliation meetings, as a result of the conciliation program at the appellate level, nearly 40% of cases settled in the first year of the program (289 conciliation meetings in total), and 45% in the second year (with a total of 1063 conciliation meetings). At the Lower Courts settlement rates are approximately 30%. This settlement rate could in part be due to the voluntary nature of the hearings; as parties are not required to appear, the program faces the common problem that one or both parties will be absent at the hearing.

The Brazilian Congress currently has a mediation bill under consideration that will stipulate mandatory mediation in every civil case, establish in-house and court-annexed mediation divisions, standardize mediation training and certification (including study of mediation techniques and ADR theory), and provide compensation for mediators. Mediators will be required to be private attorneys with 3 years experience.

## Case 3: ADR in Italy: Chamber Of Commerce Mediation

By *Stefano Azzali*<sup>110</sup>

### 1. History & Development

Italy suffers from a substantial backlog of cases; by June 2003 there were reported to be over 3 million civil law cases pending before the courts. It was estimated that cases required an average of six years from the point of filing to reach final resolution in the appeals courts<sup>111</sup>. Such serious delays prompted several suits to be brought against the Italian government; in 2000 the Italian government was required to pay €600m to litigants claiming damages caused by trial delays<sup>112</sup>.

To address the severity of this problem, ADR was institutionalised in the Italian legal system in 1993 by the passage of Law 580, the “Restructuring of the Chambers of Commerce.” This law provided that mediation should be utilized as a dispute resolution mechanism for commercial disputes at the Chambers of Commerce<sup>113</sup>. Enabled by the passage of this and subsequent legislation, a national non-court annexed mediation program has developed at the Chambers of Commerce in Italy. As recently as 2003, the Italian Chambers of Commerce has developed standardized rules which govern mediation procedures, the training and selection of mediators, enforceability of the mediation agreements, and a fee schedule for mediators. Though the Chambers of Commerce are not required to utilize these standardized

<sup>110</sup> Paper presented on the conference organized by (ISDLS) Institute for the Study and Development of Legal Systems (2005). Report on the Turkish Civil Justice Conference:ADR Learning Program.

<sup>111</sup> Cases were estimated to take four years from filing to judgment, with an extra two years for appeal.

<sup>112</sup> Under Article 6 of the European Convention on Human Rights, parties are ensured the right to a timely hearing.

<sup>113</sup> A form of mandatory judicial settlement had existed as early as 1991 but was not consensual and was limited to cases valued at €2582.28.

rules, at least 70 Chambers have chosen to adopt them, forming a Mediation Services Network.

## 2. Mechanism

Italian mediation at the Chambers of Commerce is primarily facilitative (in which the neutral attempts to facilitate a resolution between parties, by identifying parties' interests and encouraging parties to develop creative solutions), voluntary, and is entirely confidential. Mediation sessions generally last several hours, with follow-up meetings if necessary. Sessions include an explanation of the nature and rules of mediation by the mediator, a joint description of the case, and private caucuses with each of the parties. If a resolution is successfully reached between parties, the terms and conditions are identified in a binding contract, signed by both parties. An additional document, indicating that the mediation has been successfully completed, is signed by the parties and the mediator. If a resolution is not reached, a document is submitted to the court asserting that mediation had been attempted but that no resolution was reached. At that point, parties may choose to litigate the case in court.

Mediated resolutions are not enforced by judges<sup>114</sup>. Once signed by both parties, the settlement functions as a contract. In the rare occurrence that parties do not comply with the rules of the agreement, litigants are permitted to return to court, however this happens very infrequently<sup>115</sup>. The reason for this infrequency is that mediation is voluntary, as is the achieved resolution. He concluded that the quality of the mediator is more crucial to the success of the mediation than the enforceability of the settlement.

In Italy, mediators include attorneys, notaries, and psychologists; a legal degree is not required. However, 80% of mediators are lawyers; Mr. Azzali speculated that this could be due in part to the common perception within Italian society that lawyers are necessary actors in dispute resolution.

## 3. Institutional Framework

Though the passage of Law LD 5/2003 (in 2003) allows for public, private, or Chamber of Commerce "qualified bodies" (of which a list is maintained at the Ministry of Justice, comprised of individuals who have met stringent training criteria) to mediate corporate disputes, the Chamber of Commerce remains the primary mediation service provider in Italy. This is expected to change in coming years, however<sup>116</sup>.

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<sup>114</sup> Only mediated settlements for corporate disputes, which fall under Corporate Law (Law LD 5/2003), can be enforced in court.

<sup>115</sup> Mr. Azzali cited that within ten years at the Milan Chamber of Commerce, there had been only one instance referred to the State Court Judge in which a mediation agreement was not complied with by the parties.

<sup>116</sup> Bill 2463 supports judicial referral of cases to mediation through a private provider or a Chamber of Commerce and determines a cohesive framework for mediation (setting the parameters, procedure, and providers).

The cost of mediation is determined based on the amount in dispute. Parties pay a minimum of €40 for disputes not exceeding €1,000, after which the fee increases by incremental steps. In addition, any incidental fees accumulated in the course of mediation are borne by the parties.

#### 4. Coordination & Oversight

Chamber of Commerce mediation, as a non-court annexed program, is completely overseen by the Chamber of Commerce itself. Disputing parties directly solicit the services of mediators at the Chambers of Commerce through the Secretariat of the Mediation Service. The Secretariat serves to coordinate the correspondence between parties and organize the mediation meeting. Parties may either jointly or separately submit forms to the Chambers, which outline the facts and legal issues of the dispute and request mediation. If jointly submitted, the Secretariat assigns a mediator<sup>117</sup> from a list of approved Chamber mediators<sup>118</sup>, and parties are notified of their session date<sup>119</sup>. When the request is filed by only one party, the “receiving” party is presented with the request and may choose whether or not to participate. (Participation in mediation is entirely voluntary. If the “receiving” party chooses not to participate, the “requesting” party may file the dispute in court.)

Mediation training was standardized with the passage of law LD 5/2003 stipulating that corporate disputes could only be handled by mediators registered with the Ministry of Justice national database. ADR providers were required to register themselves and train their mediators based on standard procedures. Mr. Azzali stated that within the last three years most ADR providers have begun to follow the Chambers of Commerce training model. Training requirements include: a 24-hr training program, evaluation of newly trained mediators through mediation observation, and mediation training updates every two years<sup>120</sup>. Chamber of Commerce training also includes adherence to ethical standards of conduct for mediators; mediators are bound by contract to follow the rules and ethical standards of the institution under which they practice. Mr. Azzali emphasized that beyond training and knowledge of mediation techniques, personal aspects of the mediator such as positive attitude, communication skills and accessibility are fundamental to a good mediator.

Mr. Azzali stressed the importance of strict standards for training in order to maintain enthusiasm for mediation. He mentioned some Chambers of Commerce where the number of mediators had reached several hundred, sometimes with

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<sup>117</sup> Specific mediators are able to refuse assignment to a certain case.

<sup>118</sup> Mr. Azzali noted the difference between “ad hoc mediation”, in which the parties choose their mediator and “institutional mediation”, in which a mediator is assigned by an ADR provider or Chamber of Commerce.

<sup>119</sup> In particularly complex cases the Secretariat may assign an “assistant to the mediator”, a specialist who assists the mediator with technical questions pertaining to the field of the case.

<sup>120</sup> Bill 2463 regulates training (for judicially referred cases) such that private mediators are required to complete a 40-hr training program and mediators belonging to a public facility (such as the Chambers of Commerce) are required to complete a 30-hr training.

University courses offering to train mediators in one week. With such a large quantity of trainees, new mediators are not able to gain practical experience. Without quality control, parties can become distrustful of mediation and cease utilizing it as a viable alternative to trial.

#### 5. Implementation Strategies

Mr. Azzali addressed several questions about reluctance to undertake mediation by the bar. He stated that it had taken time for layers to become comfortable with the idea of mediation and begin to seek it out as a technique for dispute resolution (this often began at the wishes of the parties, desiring expedient settlement). He also commented that while resistance to mediation is still a factor, the progression of a legal framework for ADR in Italy has helped the program to advance, along with an educational campaign in order to disseminate information to universities, lawyers and the public in general.

#### 6. Successes & Limitations

Mr. Azzali cited a 93% settlement rate for mediation with the Milan Chamber of Commerce over the last ten years. The Milan Chamber of Commerce currently utilizes a total of 36 mediators. Over the ten-year period, Mr. Azzali stated that 2500 cases had been assigned to mediation, however 47% had not reached the stage of mediation.

## **Case 4: ADR in the Netherlands—Private and Court-Annexed Mediation**

*By Judge Dory Reiling*<sup>121</sup>

#### 1. History & Development

Judge Reiling began her presentation with a description of the legal system in the Netherlands. The Dutch legal system consists of 25 courts, with one Supreme Court, 5 courts of appeal, and 19 district courts, containing 2200 judges (serving 16 million inhabitants). In 2003, there were 1.7 million cases, half of which were family and civil cases. The duration of the average case extended between 13-400 days.

While Judge Reiling stated that the general attitude toward judicial settlements in the Netherlands is positive, she also explained that, in recent years, only 73% of the cases that eventually go to trial achieved their goal, while the litigants in 22% of the cases felt the judicial sentence did not resolve the problem. For this reason,

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<sup>121</sup> Paper presented on the conference organized by (ISDLS) Institute for the Study and Development of Legal Systems (2005). [Report on the Turkish Civil Justice Conference:ADR Learning Program.](#)

court-annexed and private mediation programs developed as a means of resolving disputes in a fashion more responsive to the needs of the litigants than traditional trial methods. Mediation provides a more cost efficient, expedient means of settlement, especially for parties that would like to continue an ongoing relationship.

The Netherlands mediation project has been in operation for five years. It began as a pilot project in one court, then expanded to seven courts of first instance and one court of appeal, and has eventually moved to every branch of jurisdiction.

## 2. Mechanism

Mediation in the Netherlands is facilitative, voluntary and confidential<sup>122</sup>. No special legislation was introduced for its establishment<sup>123</sup>. Mediators meet with both parties and counsel to hear an overview of the case, then convene with each party individually. During private caucusing, mediators go back and forth between parties gathering information to facilitate settlement. If parties reach a settlement, that settlement becomes a contract. If the case has been filed in court, the settlement can be certified by the court and will then be enforceable as a judicial decision.

According to an evaluation of the court-annexed mediation pilot<sup>124</sup> in the Netherlands, mediation can be successfully utilized at any point in the life of the case; there is no point in time when referral seems to yield significantly higher settlement rates. Similarly, the study reported that no single case or group of cases settled more easily than others through mediation and the study could not determine one criterion for case selection that was linked to settlement; mediation is now used in all types of cases including administrative and tax cases. Judge Reiling specified that the only condition that significantly assists success in mediation is the parties' willingness to cooperate and seek out settlement options. However, she also noted the importance of selective case referral and limitations on the complexity of the case as important factors in increasing settlement rates.

Mediators are paid by an hourly rate. During the introduction period of court-annexed mediation, the first two and a half hours are free of charge<sup>125</sup>. Several questions revolved around the necessity and payment of legal counsel. Ms Reiling replied that counsel is required in the Netherlands for disputes exceeding €5000 and property disputes. Parties are required to pay for legal counsel; however legal aid is subsidized on a limited basis.

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<sup>122</sup> To a question concerning which type of mediation the Netherlands preferred, evaluative or facilitative, Judge Reiling replied that the type of mediation is inconsequential as long as it is voluntary and successful.

<sup>123</sup> Provisions for settlement exist in the Dutch Code of Civil Procedure so that mediated settlements are seen as contracts.

<sup>124</sup> Combrink-Kuiters, L., Niemeijer, E., Voert, M. Ter, *Ruimte voor Mediation (Space for Mediation)*, Justice Research and Documentation Center (Attachment C).

<sup>125</sup> In this case, the Ministry of Justice actually pays the mediator (at the specified rate) for this initial period of mediation.

Judge Reiling also noted the value of information technology, such as chat rooms, calculation programs, and assessment forms that facilitate the ease of mediation. IT allows parties who are physically distant to communicate and negotiate from their separate locations. However, one drawback might be that technology detracts from the personal atmosphere of mediation, which is commonly one of its positive attributes.

### 3. Institutional Framework

The Netherlands has both private and court-annexed mediation programs. According to Judge Reiling, little difference exists between the two except that court-annexed mediators are required to obtain more legal and procedural training in more sophisticated mediation techniques

### 4. Coordination & Oversight

In court-annexed mediation in the Netherlands, mediation sessions are coordinated by a non-judge coordinator. Parties choose a mediator from the court's register and mediations proceed at a specified date. As mediation in the Netherlands is entirely voluntary, judges do not refer cases to mediation, however they are able to explain to parties the extent of their options and the advantages of pursuing ADR.

Court-annexed mediators are deemed qualified when they meet the requirements for mediation as described by the European norm for certification, EN 45013. This practice requires mediators to complete an online examination that tests general mediation knowledge and techniques and to conduct a minimum of 4 mediations per year. All certified mediators who have met the requirements for court-annex mediations are registered at the court.

Judge Reiling also mentioned the Netherlands Mediation Institute, which maintains a register of certified mediators, a listing of standard rules for mediators, and information on mediation models and processes. Mediators are overseen in part by the use of a complaint procedure by which parties can file complaints against ineffective mediators. Judge Reiling also described a proposal for a European mediation directive that could standardize common rules for confidentiality, referral and limitations of mediation.

### 5. Implementation Strategies

The Netherlands mediation project evolved on a pilot basis, slowly expanding to incorporate a larger number of courts. As mediation first developed, courts offered mediation free of charge during "Mediation Weeks".

Judge Reiling addressed the question of resistance by the bar. She explained that while there was initial resistance by lawyers who believed mediation would decrease their business, as mediation became popular most attorneys found that mediation actually increased business (for attorney mediators), and support was forthcoming.

## 6. Successes & Limitations

Judge Reiling cited a 61% settlement rate for court-annexed mediation. She stated that almost 1000 cases had been referred to mediation, of which 89% had completed the terms of the mediated settlement within three months. According to Judge Reiling, a typical case required an average of 6.3 hours of mediation over a period of 95 days. She also suggested that 50% of civil cases could be settled via mediation, reducing case backlog and increasing the settlement capacity of judges.

## Case 5: ADR in Egypt: Court-Annexed Judicial Settlement

*By Counselor El Bisbry El Shorbagy, Assistant to the Minister of Justice*<sup>126</sup>

### 1. History & Development

In 1999, at the apex of a lengthy cooperative effort with ISDLS and integrative study of the California court system, Egypt passed a mandatory civil ADR law. This law required that all civil cases brought against the Gov. of Egypt (GOE) be sent to mandatory ADR within 60 days of the answer to the filing, and before the first court appearance.

### 2. Mechanism

Under the mandatory ADR program, disputing parties are required to attend an ADR session with a pensioned, retired Supreme Court Justice<sup>127</sup>. These justices are selected from among 319 mediation committees spread throughout the country. There are currently 667 retired justices serving as settlement officers in Egypt<sup>128</sup>.

During mediation proceedings, the settlement officer attempts to facilitate an out-of-court resolution of the case by any legal means necessary. He may creatively utilize mediation, neutral evaluation, arbitration or any variation of these mechanisms. Procedural rules of evidence are relaxed in order to facilitate early resolution. The settlement conferences are held in a governmental administrative office, which is specifically reserved for the settlement of such disputes.

<sup>126</sup> Paper presented on the conference organized by (ISDLS) Institute for the Study and Development of Legal Systems (2005). [Report on the Turkish Civil Justice Conference: ADR Learning Program.](#)

<sup>127</sup> Egypt has approximately 750 retired justices.

<sup>128</sup> The number of mediation committees is substantial, as it exceeds the number of courts of first instance.

Each party has the right to retain legal counsel during mediation but attorneys are not required. If a settlement is reached within the course of mediation, both parties and the mediator sign a settlement document. The mediated settlement must be approved by a high-ranking government official, at which point it receives the legal status of a court sentence.

Complex cases, which require more than the 60 days allotted for mediation, are not generally amenable to Egypt's system of judicial settlement. However, mandatory mediation still provides a valuable service to litigants by requiring an early evaluation of the case by parties and counsel.

### 3. Institutional Framework

Civil ADR is practiced solely by these court-annexed mediation committees. Due to the extensive network of court-annexed programs and their successful disposal of cases, a private mediation facility has not developed within Egypt.

Mediators are paid a fixed sum in addition to the pension they receive as retired Justices<sup>129</sup>. As mediation is mandatory within court proceedings, parties participate free of charge.

### 4. Coordination & Oversight

The Assistant to the Minister of Justice, Counselor El Bishry Shorbagy, serves as the ADR coordinator and heads a department within the Ministry of Justice responsible for the administration and oversight of the civil ADR programs. Counselor El Bishry Shorbagy employs a Secretariat of 38 Justices to assist him in the supervision of the project and receives reports from local ADR coordinators and mediation committee presidents of each region.

Mediator training in Egypt is designed to take into account the substantial judicial experience of new mediators. It includes review of the law providing for mediation, explanatory notes describing the greater legal context, and studies exploring the nature of mediation as opposed to adjudication. New mediators confer with more experienced mediators in order to coordinate mediation sessions and improve techniques. Senior mediators are also expected to continue to develop their mediation skills by perusing authoritative papers issued by the Ministry of Justice and participating in roundtable discussions concerning the issues and expected advancements of the mediation programs.

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<sup>129</sup> Mediator compensation is similar in amount to the salary of a Justice before retirement.

## 5. Successes & Limitations

Using the court-annexed judicial settlement model, approximately 40% of the cases brought against the government are resolved out of court. Rates of settlement vary from 35%-100, depending on the region.

## Case 6: ADR in Germany: Court Annexed ADR

By Dr. Siegfried H. Elsing<sup>130</sup>

### 1. History & Development

Germany's ADR system was initiated in response to a sizeable increase in civil litigation in the late nineteen-eighties and early nineties. Between 1980 and 1995, the number of civil cases filed nearly doubled from 1.3 million to 2.2 million, increasing the duration of civil state-court proceedings to more than ten months.

In order to relieve the strain this overload placed on court resources, the German Legislature passed a law allowing for mediation to be used prior to and during court proceedings<sup>131</sup>. This legislation enabled the development of a number of court-annexed and private institutions dedicated to mediation and the mandatory stipulation to mediation of a number of different case types.

Dr. Elsing touched on the fact that though Germany was experiencing delays in the court system, there was not the same incentive for parties and attorneys to adopt mediation as in the United States because trial is less costly in Germany (court and attorney fees are lower) and there is not a great deal of pre-trial discovery. However, he noted that ADR had been more widely used in recent years, due to the development of ADR institutions and the growing number of companies that require ADR, rather than the traditional trial system, to resolve disputes<sup>132</sup>.

### 2. Mechanism

Mediation in Germany's ADR system falls under three categories: (1) mandatory, binding mediation prior to the initiation of court proceedings, (2) mandatory, binding court-administered mediation during court proceedings, and (3) voluntary, non-binding private mediation. All three types of mediation are strictly confidential, relatively inexpensive procedure. The statute of limitations as provided for in the German Civil Code is suspended for the duration of the mediation proceedings for all types of mediation<sup>133</sup>.

<sup>130</sup> Paper presented on the conference organized by (ISDLS) Institute for the Study and Development of Legal Systems (2005). *Report on the Turkish Civil Justice Conference: ADR Learning Program*.

<sup>131</sup> Section 15a of the German Introductory Code to the Code of Civil Procedure (*EGZPO*) and Section 278 of the German Code of Civil Procedure (*ZPO*), respectively.

<sup>132</sup> Companies require mediation through the use of mediation clauses in company contracts.

<sup>133</sup> Under Section 204 of the German Civil Code (*BGB*).

Under Section 15a EGZPO, eight of the sixteen German Federal States have adopted court-annexed mediation programs prior to court proceedings for certain case types. These case types include: monetary claims (small claims not exceeding €750.00), some neighbor disputes, and libel claims (that have not been published). Dr. Elsing also mentioned the use of mandatory mediation for tax consultants. Within the Federal States that have initiated court-annexed mediation, parties seeking to litigate cases of these three types must attempt mediation before the case can be filed; complaints filed prior to mediation are rejected as inadmissible.

Section 278 ZPO requires a mandatory conciliation hearing prior to the regular oral hearing, in which parties are encouraged to settle before extensive litigation and judgment. The minutes of this hearing are recorded within the court record. This hearing is not required if an earlier attempt at ADR has failed. If both parties fail to appear at the hearing, the judge may declare a stay of proceedings. If the conciliation hearing is unsuccessful the oral hearing may follow immediately afterward<sup>134</sup>.

Private mediation is commonly used in commercial disputes in which a contract between companies includes a provision for mediation. Unlike court-annexed mediation, private mediation is not regulated under the German Code of Civil Procedure (ZPO); there is no generally accepted set of rules for mediation. Therefore, parties and mediators are able to design mediation proceedings to fit their specific needs<sup>135</sup>. The mediation design is recorded in a number of agreements, and usually includes: a mechanism for the appointment of a mediator, a description of the role and function of the mediator, the procedure the mediation will follow, an agreement of confidentiality, and the fee and liability of the mediator<sup>136</sup>. Though there are no standard rules for private mediation, a number of well-respected institutions that provide mediation services within Germany have developed rules, which are often adopted even for mediations outside the specific institution<sup>137</sup>.

Mediated settlements can be certified and made enforceable in a variety of ways, such as by: notary deed, attorney's settlement, conciliatory center settlement, court-recorded settlement, or an arbitration award. A deed drawn up by a German notary is deemed an enforceable title, under the condition that the debtor has agreed to immediate execution of the agreement<sup>138</sup>. However, this type of enforcement can produce hefty fees due to the fact that the cost of notarization is based on the

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<sup>134</sup> This type of mediation has not proven particularly successful. This may be due to the fact that mediation is offered too early in the litigation process, before parties are able to review the opposing party's position and determine whether settlement would be beneficial. Another possibility is that parties have already attempted mediation and failed.

<sup>135</sup> In some cases, arbitration rules are applied to mediation sessions where applicable. Mediation sessions also fall under general German contract law.

<sup>136</sup> The agreement can also include a reference to the institution's rules of mediation if the mediator is affiliated with a mediation institution.

<sup>137</sup> One such institution, the German Institution for Arbitration (DIS), maintains standard rules that are widely applied to mediation.

<sup>138</sup> Under EU Directive No. 44/2001 Art. 57.

amount in dispute. Attorney's settlements can be a more cost-efficient way to document a settlement, as they are finalized by legal counsel with the full authority of the parties they represent. In addition to following the conditions of a notary deed, they must also be recorded in the appropriate local court, and signed and dated by attorneys of both parties. Settlements can also be recorded before a state-approved conciliatory center; however this option is not widely utilized. This may be because rules are not consistent between states and this procedure does not automatically make the settlement enforceable. If court proceedings are pending (as in most court-annexed mediation), the settlement can be recorded in court and will be enforceable within the European Union<sup>139</sup>. Lastly, parties can appoint the mediator to arbitrate the case and dictate an arbitration award based on the terms of the agreed upon settlement.

Standards for mediator training and certification are determined within each state. Some private mediation institutions and bar associations provide up to 200 hours of training. In two of the eight states to implement court-annexed mediation, mediators at state-approved mediation institutions must be either notaries or attorneys; in the other six states mediators are not required to be lawyers<sup>140</sup>.

### 3. Institutional Framework

Germany utilizes both court-annexed and private mediation. While court-annexed mediation is stipulated and regulated by the German Code of Civil Procedure, private mediation functions outside the court system. Parties may enter into a private agreement to attempt mediation as a means of dispute resolution (described in detail above).

Rules for mediation fees are determined on a state-by-state basis for court-annexed mediation, and in the agreement between parties and mediators for private mediation. Fees are generally included within the settlement agreement; if a settlement is not reached, fees are instead allocated within the costs of the court proceedings<sup>141</sup>. Dr. Elsing noted that at this point there was no waiver of court costs for parties engaging in court-annexed mediation.

### 4. Coordination & Oversight

In Germany, a number of individuals are responsible for the coordination and oversight of ADR programs. Dr. Elsing stated that court-annexed mediation is organ-

<sup>139</sup> Under EU Directive No. 44/2001 Art. 58.

<sup>140</sup> The two Federal States are Bavaria and Baden-Wuerttemberg.

<sup>141</sup> Limited legal aid for out-of-court dispute resolution is available if the parties meet specified qualifications (under the German Act on Legal Aid and Section 15a of the German Introductory Act to the German Code of Civil Procedure). Parties receive a voucher with which they can retain legal counsel for €10, the State covers the rest of the legal fees (for small claims, however, legal counsel is not required for litigation). While legal aid is available, there is currently no existing aid to pay for mediators.

ized by a clerk, who files the mediation agreements; the judge does not play a role in the administration of the mediation proceedings. Institutional mediation is coordinated through a mediation Secretariat affiliated with a particular institution, similar to the Mediation Service Secretariat of the Chambers of Commerce in Italy. The Secretariat receives the applications for mediation (which are also forwarded from the party requesting mediation to the opposing party in the dispute), notes the initiation and termination of mediation proceedings, receives mediation fees from parties, and upon request can make suggestions for the appointment of a mediator.

Oversight is largely provided by the court for court-annexed mediation and by the affiliated mediation institutions and actual parties in dispute for private mediation. Mediators are liable based on contract law and the law of torts, for a period of three years following the mediation (unless otherwise stated in the agreement to mediate).

## 5. Implementation Strategies

Dr. Elsing felt that there was still some prejudice in Germany against mediation, and a doubt as to whether it is a time- and cost-efficient alternative to court. In answer to a question about whether the government might institute incentives to encourage the proliferation of mediation and a culture of compromise, such as tax deductions, Dr. Elsing responded in the negative. However, he expressed his confidence that the application of mediation to cases in which it is appropriate and can render positive results will ultimately encourage its acceptance and success in Germany.

Dr. Elsing mentioned that part of ADR implementation in Germany required the lifting of a ban on advertisement for lawyers in order to spread awareness about mediation and give the public access to information that would assist consumer welfare. He suggested a similar strategy could be used in Turkey to promote mediation and encourage lawyers to become mediators. Dr. Elsing also stated that this process had the added benefit of increasing healthy competition between lawyers that would lead to better services for clients.

## 6. Successes & Limitations

Dr. Elsing cited a 17% settlement rate for mediation within the German District Courts (of first instance), as determined by the German Bar Association.

Dr. Elsing also discussed the EC Mediation Directive. The Directive was proposed in October 2004, in order to coordinate the mediation initiatives of the member states, cement the relationship between civil proceedings and mediation, and provide greater access to justice through these programs. The Directive will provide

a universal definition for mediation including civil and commercial mediation, court-annexed mediation by private mediators or in-house judges, and purely domestic mediation. Also covered in the Directive are the suspension of the statute of limitations, admissibility of evidence in civil judicial proceedings, agreement of confidentiality, support of appropriate court, and enforcement of settlements. The Directive will not incorporate judicial settlement attempts, rules for the conduct of and professional requirements for mediators, and provisions for the enforcement of agreements to mediate. Dr. Elsing commented that he was not certain when the Directive would be adopted, but that it had been well received by the legal community.

## Case 6: ADR in the United States: Private and Court-Annexed ADR

*Presented by Judge Charles Breyer<sup>142</sup>*

### 1. History & Development

Judge Breyer began with an explanation of the history of ADR development in the United States. Though by no means the first nation to develop ADR (cultural dispute resolution mechanisms have existed around the world for generations), the United States has the widest range of formalized ADR mechanisms, which are administered through developed ADR systems. Due to the great diversity of ADR models and the high rate of settlement in the U.S. courts, the United States has served to inspire some countries in the development of their ADR models.

ADR was introduced in U.S. courts in the early 1980s in an effort to rapidly resolve the large numbers of backlogged cases pending before the courts and to address the considerable expense associated with trial. Multiple court appearances, extensive evidentiary discovery and lengthy trials were a considerable monetary burden on courts, attorneys and litigants. The Federal Courts ruled broadly that courts should develop means of alternative dispute resolution, but allowed states and courts to develop these means independently. Individual courts exercised great creativity and developed ADR mechanisms, procedures, and institutions that were most appropriate for their local contexts. The four most prominent ADR mechanisms utilized in the United States are described below.

### 2. Mechanism

Judge Breyer explained that ADR in the United States is comprised of two components: (1) early judicial case management and (2) an “ADR mechanism,” such as mediation, arbitration, judicial settlement or early neutral evaluation (ENE).

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<sup>142</sup> Paper presented on the conference organized by (ISDLS) Institute for the Study and Development of Legal Systems (2005). Report on the Turkish Civil Justice Conference: ADR Learning Program.

Judges play an important role in expediting the resolution of civil cases through judicial *case management*. First, they monitor the progression of a case through the court system with regular status conferences. These conferences obligate opposing attorneys to begin work on the case early, and ensure continual advancement. Judges also require attorneys to identify the legal and factual claims in dispute prior to the early status conferences, which focus and limit the scope of the case<sup>143</sup>. By requiring parties to share this information, each side is able to pinpoint the strengths of their case and get a sense of the strengths of the case made by the opposing side, paving the way for early settlement<sup>144</sup>. Judges also encourage parties to attempt out of court settlement before trial by providing a stipulation to ADR after the initial case management conference. Judge Breyer noted the importance of case management before the initiation of ADR proceedings; he felt that the judicial encouragement and supervision of the case's advancement helped parties to be more amenable to the ADR process. Finally, judges set firm deadlines that ensure the timely movement of the case to trial<sup>145</sup>. Judge Breyer emphasized that the role of the judicial officer in case management is to promote the progression of the case rather than to evaluate the legal merits of the case.

Judge Breyer next explained that the most frequently employed ADR mechanism in the United States is *mediation*. Mediation is a voluntary and confidential process, in which a neutral mediator assists parties to reach a mutually agreeable settlement. Parties, rather than the mediator, drive the mediation process. Mediation is an incentive based process; the mediator facilitates an exchange of information between parties by focusing on the interests of both parties, rather than evaluating the legal merits of each claim and passing judgment.

Several questions focused on the voluntary nature of mediation. Judge Breyer explained that many courts require parties to *attempt* settlement through ADR, but cannot require parties to settle. He clarified that though non-binding throughout the mediation process, a mediated settlement is binding once signed by both parties. If parties successfully reach a settlement, they typically outline the terms and conditions in a signed, binding contract and dismiss the pending claims. (In some other countries, and in rare cases in the United States, litigants may return to court to enter their agreement formally into court record and receive a ruling / dismissal directly from a judge.) Though such instances are rare, if a party to a dispute fails to honor the terms of the agreement, the opposing may seek enforcement by the courts. (This is rare because parties generally reach mutually agreeable resolutions,

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<sup>143</sup> This information is recorded in a case management form.

<sup>144</sup> Mr. Mayo gave the example of Jordan, in which the introduction of a preliminary case management hearing (even without an ADR mechanism) reduced the duration of the case by 60%.

<sup>145</sup> Judge Breyer explained that within his court he requires case management conferences 30, 60 and 90 days after the case is filed. After 150 days, the parties must select which type of ADR they will pursue, if they cannot agree, the court will assign an ADR process for them.

so there is usually no reason for one party to violate the terms of the agreement.) If parties fail to reach a settlement, they continue upon their original litigation track. They return to court and their case is ultimately tried by an entirely independent trial judge. All information introduced during the settlement attempt is privileged and may not be used as evidence in court.

*Judicial settlement* is similar to mediation with the condition that a judge will serve as mediator. However, judicial settlement is also more evaluative than American mediation; after promoting communication among the parties and holding one-on-one sessions with each side, the settlement judge will offer an objective assessment of the case and suggests various settlement options (unlike facilitative mediation in which the mediator refrains from providing an appraisal of the case). Judicial settlement is similar in process to early neutral evaluation (ENE).

*Early neutral evaluation (ENE)* is a process conducted by a senior lawyer with expertise and experience in a particular subject matter. In this process, the parties convene in the office of the early neutral evaluator (the “neutral”), who evaluates each side of the case. Following a joint session and private caucuses, the neutral prepares an outline of the issues and an informed evaluation of the potential outcome of the case, which is then related to the parties either jointly or (more frequently) separately. This process results in the parties gaining a better understanding of their respective positions and the likely outcome if they proceed with litigation.

*Arbitration* is less commonly used in the United States. An arbitrator “hears” both sides of a civil dispute and hands down an award, which may be accepted or rejected by the parties. If the resolution is accepted, it becomes legally binding; if rejected, parties return to the court process.

Following the explanation of the ADR mechanisms, Judge Breyer served as a mediator in role-play mediation (see Attachment B). Mr. Stephen Mayo and Ms. Dilek Barlas served as the attorneys for Allied Industries and CAS, respectively. Judge Breyer presented a hypothetical civil dispute:

Allied Industries hired Computer Application System to design and install a computer system, and contracted to pay CAS for the services incrementally over two years. After an initial payment, Allied withheld later payments because, it claimed, the CAS program did not work as expected. CAS sued Allied, demanding full payment for the design and installation of the product; Allied countersued, claiming damages as a result of the unanticipated delays associated with the product’s failure to work properly.

As mediator between Allied and CAS, Judge Breyer met first with both parties to verify the factual and legal claims in dispute (which had been previously provided, in writing, to the mediator) and to inquire what each hoped to gain from the other.

Thereafter he met individually with the senior executives of each company and their attorneys, in confidential, private caucuses. He asked the executives and attorneys to identify the companies' most pressing interests and concerns. It became clear that Allied wanted to continue to use the CAS product and to gain compensation for damages caused by the system's initial failures. CAS wanted to receive full payment promised in the contract. Ultimately the parties agreed that CAS would hire an outside party to train Allied's employees to use the system properly, and would pay half of the damages requested by Allied. After the computer system was fully operational, Allied would reenter the payment schedule within 30-40 days.

### 3. Institutional Framework

The United States utilizes court annexed and private ADR programs. Parties can seek settlement either via a neutral retained by the court (through a court-annexed program) or via a private neutral (usually employed by a for-profit mediation center)

Through court-annexed ADR programs, litigants in the United States are able to attempt to resolve disputes through a wide range of mechanisms. (Programs which offer the option to select between multiple ADR options are called "Multi-Option Programs.") Court-annexed or in house ADR programs generally provide a mediation session free of charge and only require payment by the parties once the mediation has exceeded a certain time limit.

Many parties considering litigation elect to entirely bypass the court system and instead attempt settlement through private ADR offices. (This is particularly true in complex commercial disputes.) One example of a prominent private mediation body is Judicially Arbitrated Mediation Services (JAMS).

JAMS was founded in 1979 as one of the United States' first private (i.e. not court affiliated) ADR centers. With offices throughout the United States, JAMS continues to serve the legal community by providing highly competent and specialized neutrals to act as mediators, arbitrators and early neutral evaluators in civil cases. These neutrals are frequently retired judges, who have chosen to enter the workforce as mediators and arbitrators after their retirement from the court, or highly skilled attorneys. JAMS is a for-profit institution that is privately owned by the neutrals that it employs.

Litigants who choose to hire private JAMS neutrals are required to pay market rates for their services<sup>146</sup>. While some private ADR centers are highly specialized by

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<sup>146</sup> Some parties prefer to engage private, paid settlement officer for the following reasons: 1. Parties that choose private ADR may select the settlement officer of their choice (whereas some court-annexed programs assign settlement officers without consulting the parties.) 2. Some litigants believe that parties will be more dedicated to reaching a settlement if they are paying for services. 3. Some parties believe that the quality of settlement services in private ADR programs is superior to that of court-annexed programs. (This is not always the case, however, as court programs have stringent training requirements and oversight procedures to ensure the quality of their program officers).

type or size of case (e.g. family mediation centers or centers that only accept large commercial disputes), JAMS employs settlement officers with a wide range of experiences, and accepts all types of cases.

#### 4. Coordination & Oversight

Typically, court-annexed ADR programs are administered by ADR Coordinators, who specialize in pairing litigants with appropriate settlement officers. Coordinators require litigants to submit surveys indicating their ADR preferences and their synopses of the facts and laws at issue in the case. Based upon this survey, Coordinators either assign a settlement officer to a case or refer the litigants to a court-approved body of settlement officers (and litigants will jointly choose a settlement officer.) Once referred, the litigants usually contact their settlement officer directly and the court's official involvement is suspended.

ADR Coordinators also provide oversight in court-annexed ADR programs. They are responsible for recruiting mediators to the court maintained body of neutrals, upholding strict training and certification procedures, and monitoring actual mediation sessions. Mediators are also evaluated through use of questionnaires submitted by attorneys and parties after the mediation is complete.

Judge Breyer explained that most mediators in the United States are attorneys or retired judges, who have been certified as mediators. There are no nationally standardized training requirements for mediators, but most court programs have stringent local training requirements<sup>147</sup>. Private (non-court) mediators gain their business through their reputations as successful mediators; therefore those that are insufficiently trained are less able to resolve disputes, and therefore have a harder time gaining business. Mediators must be neutral and must ensure confidentiality of the process. Those that are creative and flexible are most likely to assist settlement effectively.

All court-annexed ADR programs in the United States are governed by local rules<sup>148</sup>, which are developed by the judges of the court. Local rules establish quality control standards (e.g. establish statutory-minimum training requirements for all settlement officers involved in the program), define key concepts, determine payment schemes for settlement officers, and generally seek to ensure standardization in the treatment of cases.

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<sup>147</sup> Mr. Mayo cited the common requirement that a mediator must have practiced law for at least seven years and undergo a 40-hr training program.

<sup>148</sup> U.S. legislation (which applies to all states and all courts) broadly requires courts to provide citizens with rapid access to justice and allows individual states to develop the mechanisms necessary to do so. While state legislations differ, all states allow, and many states require, courts to utilize ADR to rapidly resolve civil cases. Many states, such as California, allow local courts (county courts) to develop local rules governing their ADR processes.

## 5. Implementation Strategies

Judge Breyer emphasized the importance of flexibility to the development of ADR in the United States. ADR in United States is governed by broad legislation, which allowed courts throughout the country to develop unique ADR programs. As pilot projects developed, committees were formed to make adjustments and provide oversight, incorporating members of both the bar and the judiciary. The inclusion of attorneys in the formation and advancement of ADR programs assisted in overcoming some initial bar resistance to ADR. One such significant program advancement was the development of data collection models. Data collection enabled program officers to substantiate the programs' settlement rates, which provided a basis for program amendments. ADR education for the general public was court based, providing information to litigants and counsel within the context of their case.

Mr. Mayo went into some detail about the development of ADR as specific to California. Within California's 58 counties, ADR models emerged in response to a California Supreme Court decision requiring that civil cases proceed through the system within one year. Under this mandate, individual counties developed ADR processes to deal with the particular problems (backlog, expense of court and attorney fees, lengthy trial duration) and unique circumstances (low vs. high volume, limited vs. extensive resources, geographic location) of each court. The central criterion determining the success of a mechanism was agreed to be its utility in achieving settlements. This system allowed for the evolution of the plethora of ADR mechanisms that are in use today.

## 6. Successes & Limitations

ADR programs and mechanisms have been monitored, critically evaluated, and refined in the thirty years since their introduction. Today, over 98% of civil cases filed in the United States are resolved through private or court-annexed ADR. ADR has helped diminish the substantial backlog of cases, and ensured timely access to justice by guaranteeing the expeditious movement of cases through the system within one year.

Though statistics vary, most court ADR programs report that between 60-80% of cases referred to the program are successfully resolved through ADR. ADR programs at the appellate level tend to report even higher settlement rates due to the discretion with which cases are referred.

## Case 7: Bangladesh: NGO-supported Community Mediation<sup>149</sup>

### Description:

Bangladesh's court system is unresponsive to the needs of the poor, and its traditional village dispute resolution institutions are biased against the interests of women. Based on a 1995 national customer needs survey, USAID-Bangladesh defined local participation and increased access to justice (especially for women) as a strategic objective, and improved ADR as an intermediate result (IR).

The case profiles a community mediation program developed to meet USAID's ADR IR. The program is managed by the Maduripur Legal Aid Association (MLAA), a Bangladeshi NGO. The MLAA community mediation program uses a multi-tier structure of village mediation committees supported by MLAA field workers to deliver ADR services. Local mediators are selected, trained and supervised by MLAA field workers in consultation with local officials, religious, and social leaders. The local committees meet twice a month to mediate village disputes, free of charge. Most disputes involve property or marital problems. Agreements are voluntary and are not enforceable in court. The MLAA program currently mediates roughly 5000 disputes annually and resolves roughly two-thirds of them. Satisfaction with the program is high. Most users prefer the program both to the traditional village dispute resolution system and to the courts.

### Goals:

Reform of the court system is considered politically and institutionally unattainable for the foreseeable future. The ADR program seeks to improve access to justice by providing a substitute for the courts and for traditional dispute resolution systems which are biased against women. Program goals and design were driven by a needs survey that focused directly on potential user groups.

### Design:

The program design builds on the traditional (*shalish*) system of community dispute resolution, which has much greater legitimacy than the court system. The MLAA program reduces the *shalish* system's cultural bias against women through legal education for local mediators and disputants, and through the selection of women as mediators.

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<sup>149</sup> Summary of the case prepared for USAID in USAID (1998). Alternative Dispute Resolution Practitioners Guide. Washington, DC, USAID. For more information on the Bangladesh project see Appendix B in the publication.

**Operation:**

To ensure the quality of dispute resolution services, the program provides training and ongoing oversight for mediators and field workers. To minimize costs, the program uses a word-of-mouth outreach strategy, volunteer mediators, and simple procedures with a minimum of written documentation. Although it is highly cost-effective compared to the courts, the program is not financially self-sustaining. To ensure sustainability, it must continue to secure grants, begin charging user fees, or both.

**Impact:**

MLAA's community mediation program has demonstrated the potential for community mediation to increase access to justice for disadvantaged rural groups, especially women. Its impact is limited primarily by the small scale of the program relative to national needs. Scaling up to the national level would require substantial additional financial and human resources.

## **Case 8: Bolivia: Private Arbitration and “Conciliation” of Commercial Disputes<sup>150</sup>**

**Description:**

Since the 1980s, USAID/Bolivia has pursued reform of the justice system to support both anti-narcotics and democratization objectives. In 1990, USAID began to support the use of ADR, especially commercial arbitration and conciliation, as a way to reduce the backlog of cases in the court system. By reducing the backlog, ADR could support both anti-narcotics and broader judicial reform objectives.

This case study profiles the development and operation of the commercial arbitration and conciliation program. USAID's implementing partners, the Inter-American Bar Foundation (IABF) and the Bolivian Chamber of Commerce, established Conciliation and Arbitration Centers within the chambers of commerce in Bolivia's three major cities. Starting in 1994, the centers recruited and trained conciliators and arbitrators from the business community, provided education and outreach to potential users of their services, and helped draft a new Arbitration and Conciliation Law to make conciliation agreements and arbitration decisions enforceable by the courts. The centers provide both conciliation (an opportunity for disputants to reach a voluntary agreement with the help of a neutral party, the equivalent to mediation in the U.S.), and arbitration (a binding decision by a panel of three arbitrators with expertise on the disputed issues). Users pay a fee based on the monetary value of the dispute; the fees are supposed to cover operating costs. The demand for their services is still small: the La Paz Center, the largest of the three

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<sup>150</sup> Summary of the case taken from *Ibid.* For more information on the Bolivian project see Appendix B of the publication.

centers, has conciliated 10–25 cases annually since 1994, and arbitrated 1–8 cases a year, with a high resolution rate and high levels of compliance and user satisfaction. The major obstacle to increased use of commercial ADR seems to be the business community's low level of awareness and understanding of ADR.

**Goals:**

The program's primary goal—reducing court backlogs—was set by USAID in the context of its anti-narcotics and democratization objectives. In practice, the program has contributed only very indirectly to this goal, though it has the potential to meet business sector goals by reducing the cost and time to resolve commercial disputes.

**Design:**

Though the program's designers recognized the need to make conciliation agreements and arbitration decisions legally enforceable, they did not accomplish this goal until three years after the program began operation. Potential users' uncertainty about the enforceability of ADR may have constrained the demand for the centers' services. In addition, the design did not establish any clear links between the program and the courts. It might have been possible to use the courts to provide information about ADR services to commercial litigants.

**Operations:**

Despite the lack of legal sanction for their work, the centers have been able to attract enough paying clients to cover their direct operating costs. USAID support has covered their outreach and training costs. In the fall of 1997, USAID decided to discontinue its funding for the centers; the centers therefore may need to increase demand and/or fees to make the centers financially self sustaining.

## **Case 9: South Africa: NGO Mediation and Arbitration of Labor Disputes<sup>151</sup>**

**Description:**

This case profiles the ADR work of an NGO, the Independent Mediation Services of South Africa (IMSSA), in the mediation and arbitration of labor disputes. The program works to resolve union-management disputes, primarily in the organized labor sector. Participation in the ADR processes is voluntary, and arbitration agreements are legally enforceable. Mediated agreements are not enforceable, but are reported to enjoy a high compliance rate. Panelists are well-trained, and they may collect fees

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<sup>151</sup> Summary of the case taken from *Ibid.* For more information on the South African project see Appendix B of the publication.

for their work. IMSSA finances its ADR work through a mix of fee-for-service (about 20 percent) and donor funding. Its caseload has grown from 44 cases in 1984 to almost 1500 in 1996. Cases can be handled within a few days. There is no systematic follow-up or monitoring, although satisfaction appears to be high.

**Goals:**

IMSSA's program began in the 1980s to address tensions and poor relations between management and labor. It was established to overcome the ineffectiveness (costly, time-consuming with low user satisfaction) of the government-run labor dispute resolution system. With the political transition in South Africa, IMSSA's ADR program has served as a model for the new governmental structure for addressing labor disputes—the Commission for Conciliation, Mediation, and Arbitration (CCMA).

**Design:**

IMSSA's program uses Western ADR models, which fit well with the institutional and cultural norms within the industrial relations sector. IMSSA's organizational and institutional creativity has been instrumental in its continuing success, as these qualities have helped it to adapt its program to meet challenges to its financial resources and to its mandate posed by the recent political transition and accompanying changes.

**Operation:**

Other factors important to IMSSA's success include: the large number and good training of the panelists; the high unmet demand for dispute resolution services in this sector; and the consequent support for the program from labor and management, its key constituents. Its relationship to legal structures has been clarified and strengthened with a 1995 law; IMSSA's clear independence from an ineffective and illegitimate legal system and government structure was critical to its success at the time of IMSSA's origins and until the transition to the new government, though it is now working closely with the new CCMA.

**Impact:**

In terms of providing cheaper, quicker, more satisfactory resolution of labor disputes, IMSSA cites its ever-increasing caseload as evidence, although there is no systematic evaluation of its work. IMSSA's impact in the ADR field is established by the proliferation of ADR programs and particularly by the creation of CCMA. IMSSA can also take credit for developing leadership at the grassroots level. One of its former founders and director is now the head of the CCMA. IMSSA faces new challenges

in the face of the new government ADR system, and plans to complement and supplement CCMA work, and branch out into more specialized services. Modifications of the funding sources to rely more on fee-for-service work are also planned.

## **Case 10: Sri Lanka: Government-supported Community Mediation<sup>152</sup>**

### **Description:**

This case profiles Sri Lanka's community mediation program, which dates to 1990. The Sri Lankan program operates in all but the Northern and Eastern provinces, which are affected by civil war. It includes 218 mediation boards, with 5,400 trained mediators, and has handled about half a million cases since 1990. The program is based on a comprehensive Mediation Boards Act of 1988 (amended in 1997), and operates within a clear legal framework. The mediation boards are appointed and operate at the community level, with immediate oversight by commissioners and general oversight by the National Mediation Boards Commission.

Cases appropriate for mediation include civil disputes and minor criminal offenses; certain kinds of cases in fact need certificates of non-settlement from the mediation boards before they may be heard in court. Mediations are free to users; program costs are covered by the Sri Lankan government, with some funding from foundations. The mediation boards meet about once a week for approximately four to eight hours, using public buildings. Each mediation board is comprised of a chair and 12-30 mediators; individual panels for cases have three mediators. Satisfaction with the program is high.

### **Goals:**

The boards were established by the ministry of justice for a number of reasons: increase access to justice by reducing court backlog; increase access to the economically disadvantaged; replace the failed conciliation boards with a better ADR program.

### **Design:**

The program attempts to improve on the failed conciliation boards by incorporating lessons learned from that experiment, especially problems of politicization of personnel. Mediation is accepted by the population, and builds on indigenous conflict resolution systems.

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<sup>152</sup> Summary of the case taken from *Ibid.* For more information on the Sri Lanka project see Appendix B of the publication.

**Operation:**

To ensure the quality of dispute resolution services, the program provides training and ongoing oversight for mediators. The program relies heavily on volunteer staff, and so is extremely cost-effective. However, stipends provided to staff should be increased to ensure their costs are covered. Trainers are critical to operations but also overburdened, and so additional training staff should be hired. High literacy facilitates outreach and education, as well as the operation of the boards themselves.

**Impact:**

Satisfaction by the mediation board users is very high; related compliance rates are also high. Court delays have been reduced. The government needs to ensure long-term financing as external funding becomes uncertain. Confidentiality of the mediation process needs to be improved. A lurking problem to continued success is the developing backlog of cases to be mediated.

**Case 11: Ukraine: NGO Mediation of Civil and Commercial Disputes**<sup>153</sup>

**Description:**

As Ukraine emerges from the Soviet system and attempts to privatize, build civil society, and move to reform its justice system, a well-functioning ADR system may help further these goals. USAID is supporting an NGO, the Ukraine Mediation Group (UMG), in its work mediating commercial disputes as well as a broad range of civil disputes, consistent with strategic objectives aimed at legal and economic reform and increased democratic participation. USAID recently began to support the UMG, which had previously secured funding through grants from other foundations and organizations.

This case profiles the UMG's mediation program, which is essentially a network of mediation organizations now in four cities: Donetsk (the first), Lugansk, Odessa, and a new office in Kiev. UMG trains mediators, offers a clearinghouse for those seeking mediation (matching mediators with clients), and consults with enterprises. Although commercial and labor disputes, as well as disputes related to privatization, will eventually be the target of UMG efforts, UMG will take any type of civil case. Mediators in the network are trained and certified by the UMG. The program is still relatively small: from January 1996 to March 1997, the three active offices accepted a total of 61 applications for mediation, and 26 were actually mediated.

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<sup>153</sup> Summary of the case taken from *Ibid.* For more information on the Ukrainian project see Appendix B of the publication.

**Goals:**

UMG's stated goal is "creating conditions for peaceful work and the stable development of national industries, the essential factors in building a healthy economy." This goal is consistent with a number of USAID's SOs, with the hope that the UMG's programs will help expedite the process of privatization and help move other economic restructuring projects forward more effectively. Potential users are the businessmen and others involved in commercial disputes who are loath to use the court system, which is plagued by delays and high costs.

**Design:**

The mediation program follows developed country mediation models. Outreach is through UMG's collateral activities, such as university-based seminars on ADR. The greatest design challenges include developing monitoring and evaluation in a society fearful of providing the necessary information, as well as financial sustainability.

**Operation:**

The program provides extensive training of mediators, although quality control is difficult due to the problems in monitoring mentioned above. Current laws severely limiting permissible sources of NGO funding have spawned insufficient and unsustainable funding strategies, and laws must be changed to permit fee for service charges. The relationship between ADR and the court system must also be clarified through legislation.

**Impact:**

UMG's mediation program has great potential to impact the commercial sector, as well as developing civil society, particularly as interest and enthusiasm for it grows. It must first overcome significant legal obstacles in securing sustainable funding, as well as cultural obstacles to open sharing of information and effective monitoring of mediations

# Appendix B: Selected ADR Procedures<sup>154</sup>

## Arbitration

Arbitration is a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments. Arbitration is different from mediation because the neutral arbitrator has the authority to make a decision about the dispute. The arbitration process is similar to a trial in that the parties make opening statements and present evidence to the arbitrator. Compared to traditional trials, arbitration can usually be completed more quickly and is less formal. For example, often the parties do not have to follow state or federal rules of evidence and, in some cases, the arbitrator is not required to apply the governing law.

After the hearing, the arbitrator issues an award. Some awards simply announce the decision (a “bare bones” award), and others give reasons (a “reasoned award”). The arbitration process may be either binding or non-binding. When arbitration is binding, the decision is final, can be enforced by a court, and can only be appealed on very narrow grounds. When arbitration is non-binding, the arbitrator’s award is advisory and can be final only if accepted by the parties.

In **court-annexed arbitration**, one or more arbitrators, usually lawyers, issue a non-binding judgment on the merits after an expedited, adversarial hearing. The arbitrator’s decision addresses only the disputed legal issues and applies legal standards. Either party may reject the non-binding ruling and proceed to trial; sometimes, cost sanctions may be imposed in the event the appellant does not improve his/her position in court. This process may be mandatory or voluntary.

Examples: USA—used in federal and state courts, mainly in small and moderate-sized tort and contract cases, where the costs of litigation are often much greater

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<sup>154</sup> Descriptions of procedures are adapted from the dictionary of American Bar Association, CPR (2001). *ADR Suitability Guide (Featuring Mediation Analysis Guide)*. New York, CPR Institute for Dispute Resolution.; Niemic, R. J., Donna Stienstra, et al. (2001). *Guide to Judicial Management of Cases in ADR*, Federal Judicial Center.; Arnold, T. (1995). “A Vocabulary of Alternative Dispute Resolution.” and other publication in the bibliography.

than the amounts at stake; Japan—appellate ADR (Iwai 1991); Bolivia Case Study—pilot project.

**Private (v. court-annexed) arbitration** may be “administered” or managed by private organizations, or non-administered” and managed by the parties. The decisions of arbitrators in private arbitration may be *non-binding* or *binding*. **Binding arbitration** decisions typically are enforceable by courts and not subject to appellate review, except in the cases of fraud or other defect in the process. Often binding arbitration arises from contract clauses providing for final and binding arbitration as the method for resolving disputes. Examples: South Africa Case Study-IMSSA; Thailand-commercial arbitration (Worawattanamateekul 1996); Bolivia case study-Chambers of Commerce centers.

## Early Neutral Evaluation

Early neutral evaluation is a process that may take place soon after a case has been filed in court. The case is referred to an expert, usually an attorney, who is asked to provide a balanced and unbiased evaluation of the dispute. The parties either submit written comments or meet in person with the expert. The expert identifies each side’s strengths and weaknesses and provides an evaluation of the likely outcome of a trial. This evaluation can assist the parties in assessing their case and may propel them towards a settlement.

## Mediation

Mediation is a private process where a neutral third person called a mediator helps the parties discuss and try to resolve the dispute. The parties have the opportunity to describe the issues, discuss their interests, understandings, and feelings, provide each other with information and explore ideas for the resolution of the dispute. While courts can mandate that certain cases go to mediation, the process remains voluntary’ in that parties are not required to come to agreement. The mediator does not have the power to make a decision for the parties, but can help the parties find a resolution that is mutually acceptable. The only people who can resolve the dispute in mediation are the parties themselves. There are a number of different ways that mediation can proceed. Most mediations start with the parties together in a joint session. The mediator will describe how the process works, will explain the mediator’s role and will help establish ground rules and an agenda for the session. Generally, parties then make opening statements. Some mediators conduct the entire process in a joint session. However, other mediators will move to separate sessions, shuttling back and forth between the parties. If the parties reach an agreement, the mediator can help reduce the agreement to a written contract, which may be enforceable in court.

**Conciliation** is a type of mediation whereby the parties to a dispute use a neutral third party (a conciliator), who meets with the parties separately in an attempt to resolve their differences. Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award. Conciliation differs from mediation in that the main goal is to conciliate, most of the time by seeking concessions. In mediation, the mediator tries to guide the discussion in a way that optimizes parties' needs, takes feelings into account and reframes representations. In conciliation the parties seldom, if ever, actually face each other across the table in the presence of the conciliator, instead a conciliator meets with the parties separately ("caucusing"). Such form of conciliation (mediation) that relies on exclusively on caucusing is called "shuttle diplomacy".

### Mini-Trial

A mini-trial is a private, consensual process where the attorneys for each party make a brief presentation of the case as if at a trial. The presentations are observed by a neutral advisor and by representatives (usually high-level business executives) from each side who have authority to settle the dispute. At the end of the presentations, the representatives attempt to settle the dispute. If the representatives fail to settle the dispute, the neutral advisor, at the request of the parties, may serve as a mediator or may issue a non-binding opinion as to the likely outcome in court.

### Negotiation

Negotiation is a voluntary and usually informal process in which parties identify issues of concern, explore options for the resolution of the issues, and search for a mutually acceptable agreement to resolve the issues raised. The disputing parties may be represented by attorneys in negotiation. Negotiation is different from mediation in that there is no neutral individual to assist the parties negotiate.

### Neutral Fact-Finding

Neutral fact-finding is a process where a neutral third party, selected either by the disputing parties or by the court, investigates an issue and reports or testifies in court. The neutral fact-finding process is particularly useful for resolving complex scientific and factual disputes.

### Ombuds

An ombuds is a third party selected by an institution – for example, a university, hospital or governmental agency – to investigate complaints by employees, clients or con-

stituents. The ombuds works within the institution to investigate the complaints independently and impartially. The process is voluntary, private and non-binding.

## Private Judging

Private judging is a process where the disputing parties agree to retain a neutral person as a private judge. The private judge, who is often a former judge with expertise in the area of the dispute, hears the case and makes a decision in a manner similar to a judge. Depending on court rules, the decision of the private judge may be appealable in the public courts.

## Settlement Conferences

A settlement conference is a meeting in which a judge or magistrate assigned to the case presides over the process. The purpose of the settlement conference is to try to settle a case before the hearing or trial. Settlement conferencing is similar to mediation in that a third party neutral assists the parties in exploring settlement options. Settlement conferences are different from mediation in that settlement conferences are usually shorter and typically have fewer roles for participation of the parties or for consideration of non – legal interests.

## Summary Jury Trial

In summary jury trials, attorneys for each party make abbreviated case presentations to a mock six-member jury (drawn from a pool of real jurors), the party representatives and a presiding judge or magistrate. The mock jury renders an advisory verdict. The verdict is frequently helpful in getting a settlement, particularly where one of the parties has an unrealistic assessment of their case.

## Settlement Week

In a typical settlement week, a court suspends normal trial activity and, aided by volunteer mediators, sends numerous trial-ready cases to mediation sessions held at the courthouse. The mediation sessions may last several hours, with additional sessions held as needed. Cases unresolved during settlement week return to the court's regular docket for further pretrial or trial proceedings as needed. If settlement weeks are held infrequently and are a court's only form of ADR, parties who want to use ADR may have to look outside the court or may incur additional litigation expenses while cases await referral to settlement week. This can be overcome by regularly offering at least one other form of ADR.

## Case Evaluation (“Michigan mediation”)

Case evaluation provides litigants in trial ready cases with a written, non-binding assessment of the case’s value. The assessment is made by a panel of three attorneys after a short hearing. If the panel’s assessment is accepted by all parties, the case is settled for that amount. If any party rejects the panel’s assessment, the case proceeds to trial. This arbitration-like process has been referred to as “Michigan mediation” because it was created by the Michigan state courts and subsequently used by the federal district courts in Michigan as well.<sup>91</sup> 324. *See, e.g.*, WI. Mich. Civ. R. 16.5. 134

**Med-Arb.**, or **Mediation-Arbitration:** An example of multi-step ADR, parties agree to mediate their dispute with the understanding that any issues not settled by mediation will be resolved by arbitration, using the same individual to act as both mediator and arbitrator. The parties may, however, be unwilling to speak candidly during the mediation when they know the neutral may ultimately become a decision maker. They might believe that the arbitrator will not be able to set aside unfavorable information learned during the previous mediation. Additional related methods have evolved to address this problem:

In **Co-Med-Arb**, different individuals serve as neutrals in the arbitration and mediation sessions, although they both may participate in the parties’ initial exchange of information. *In Arb-Med*, the neutral first acts as arbitrator, writing up an award and placing it in a sealed envelope. The neutral then proceeds to a mediation stage, and if the case is settled in mediation, the envelope is never opened.

**Fact-finding:** A process by which a third party renders binding or advisory opinions regarding facts relevant to a dispute. The third party neutral may be an expert on technical or legal questions may be representatives designated by the parties to work together, or may be appointed by the court.

**Judge-Hosted Settlement Conference:** In this court-based ADR process, the settlement judge (or magistrate) presides over a meeting of the parties in an effort to help them reach a settlement. Judges have played a variety of roles in such conferences, articulating opinions about the merits of the case, facilitating the trading of settlement offers, and sometimes acting as a mediator. Examples: USA—This is the most common form of ADR used in US federal and state courts; Japan-judge as neutral may implement three ADR procedures (Jardine 1996).

**Private Judging:** A private or court-connected process in which parties empower a private individual to hear and issue a binding, principled decision in their case. The process may be agreed upon by contract between the parties, or authorized by statute (in which case it is sometimes called **Rent-a-Judge**).

**Settlement Week:** Typically, a court suspends normal trial activity for the week and with the help of volunteer lawyers, mediates long-pending civil cases. Mediation sessions may last an hour or two. Unresolved cases go back on the court's docket. Examples: USA—used more widely in state than federal courts.

**Summary Jury Trial:** A flexible, voluntary or involuntary non-binding process used mainly to promote settlement in order to avoid protracted jury trials. After a short hearing in which the evidence is provided by counsel in abbreviated form (but usually following fixed procedural rules), the mock jury gives a non-binding verdict, which may then be used as a basis for subsequent settlement negotiations.

**Negotiated Rule-making, Regulatory Negotiation or “Reg-Neg”:** Used by governmental agencies as an alternative to the more traditional approach of issuing regulations after a lengthy notice and comment period. Instead, agency officials and affected private parties meet under the guidance of a neutral facilitator to engage in joint negotiation and drafting of the rule. The public is then asked to comment on the resulting, proposed rule. By encouraging participation by interested stakeholders, the process makes use of private parties' perspectives and expertise, and can help avoid subsequent litigation over the resulting rule.

# Appendix C: Sample Mediation/ADR Clauses and Corporate Pledges

## Sample Mediation/ADR Clauses

### CPR MODEL STAND-ALONE MEDIATION CLAUSE

*“The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation under the CPR Mediation Procedure [then currently in effect OR in effect on the date of this Agreement], before resorting to arbitration or litigation. Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.”*

### CPR MODEL MULTI-STEP DISPUTE RESOLUTION CLAUSE

#### Negotiation

##### *Negotiation Between Executives*

*“(A) The parties shall attempt (Boettger) to resolve any dispute arising out of or relating to this (Fisher R.) (Bazerman and Gillespie) promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this contract. Any person may give the other party written notice of any dispute not resolved in the normal course of business. Within (Ancona) days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of that party’s position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within (Albin) days after delivery of the initial notice, the executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. [All reasonable requests for information made by one party to the other will be honored.]”*

*All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.”*

## Mediation

*“(B) If the dispute has not been resolved by negotiation as provided herein within [45] days after delivery of the initial notice of negotiation, [or if the parties failed to meet within [30] days after delivery], the parties shall endeavor to settle the dispute by mediation under the CPR Mediation Procedure [then currently in effect OR in effect on the date of this Agreement], [provided, however, that if one party fails to participate in the negotiation as provided herein, the other party can initiate mediation prior to the expiration of the [45] days.] Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.”*

## Arbitration

*“(C) Any dispute arising out of or relating to this [Agreement] [Contract], including the breach, termination or validity thereof, which has not been resolved by mediation as provided herein [within [45] days after initiation of the mediation procedure] [within [30] days after appointment of a mediator], shall be finally resolved by arbitration in accordance with the CPR Rules for Non-Administered Arbitration [then currently in effect OR in effect on the date of this Agreement], by [a sole arbitrator] [three independent and impartial arbitrators, of whom each party shall designate one] [three arbitrators of whom each party shall appoint one in accordance with the ‘screened’ appointment procedure provided in Rule 5.4] [three independent and impartial arbitrators, none of whom shall be appointed by either party]; [provided, however, that if one party fails to participate in either the negotiation or mediation as agreed herein, the other party can commence arbitration prior to the expiration of the time periods set forth above.] The arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. §§1 et seq., and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be [city, state].”*

## American Arbitration Association (Mediation)

### Mediation clause 1

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by

the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

Mediation clause 2

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures [the clause may also provide for the qualifications of the mediator(s), the method for allocating fees and expenses, the locale of meetings, time limits, or any other item of concern to the parties]. An AAA administrator can assist the parties regarding selection of the mediator, scheduling, pre-mediation information exchange and attendance of appropriate parties at the mediation conference. It is prudent to include time limits on steps prior to arbitration. Under a broad arbitration clause, the question of whether a claim has been asserted within an applicable time limit is generally regarded as an arbitrable issue, suitable for resolution by the arbitrator.

## Sample Corporate Pledges

### The CPR International Institute for Conflict Prevention & Resolution Center for Public Pledge

#### ***For Corporations:***

“We recognize that for many disputes there is a less expensive, more effective method of resolution than the traditional lawsuit. Alternative dispute resolution (ADR) procedures involve collaborative techniques which can often spare businesses the high costs of litigation. In recognition of the foregoing, we subscribe to the following statements of principle on behalf of company and its domestic subsidiaries:

*In the event of a business dispute between our company and another company which has made or will then make a similar statement, we are prepared to explore with that other party resolution of the dispute through negotiation or ADR techniques before pursuing full-scale litigation. If either party believes that that dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation.”*

#### ***For Law Firms:***

“We recognize that for many disputes there may be methods more effective for resolution than traditional litigation. Alternative dispute resolution (ADR) procedures – used in conjunction with litigation or independently – can significantly reduce the costs and burdens of litigation and result in solutions not available in court.

In recognition of the foregoing, we subscribe to the following statements of policy on behalf of our firm. First, appropriate lawyers in our firm will be knowledgeable about ADR. Second, where appropriate, the responsible attorney will discuss with the client the availability of ADR procedures so the client can make an informed choice concerning resolution of the dispute.”

# Appendix D: Why American Companies Choose Mediation or Arbitration<sup>155</sup>

## Reasons for Using Mediation and Arbitration

(Base: Use Mediation or Arbitration)

The primary reasons for using mediation or arbitration include saving money and saving time.

	Mediation	Arbitration
Saves money	91%	71%
Saves time	84%	73%
Provides a more satisfactory process	83%	66%
Allows parties to resolve disputes themselves	81%	60%
Has limited discovery	68%	66%
Is court mandated	63%	45%
Uses expertise of mediators/arbitrators	61%	49%
Gives more satisfactory settlements	61%	41%
Preserves good relationships between disputing parties	56%	38%
Is required by contract	54%	87%
Is desired by senior management	48%	37%
Preserves confidentiality	47%	54%
Is a managerial or technically complex dispute	36%	37%
Avoids establishing legal precedents	36%	32%
Provides more durable resolution compared to litigation	31%	25%
Is an international dispute	16%	25%
Became standard practice in industry	14%	21%

Addressing the effectiveness of ADR procedures, a substantial majority of respondents said that they believed that both mediation and arbitration reduced the time needed to resolve disputes (see Figure 10) and lowered the costs of the dispute resolution process itself (i.e., it reduced all costs involved exclusive of judgment or award costs) (see Figure 11).

<sup>155</sup> Excerpt taken from AAA (2003). Dispute-Wise Business Management. New York, American Arbitration Association.

# Appendix E: Sample Memorandum of Understanding

## Background

As a part of the Alternative Dispute Resolution (ADR) program that has been launched in Bosnia and Herzegovina back in January 2003, IFC/SEED (International Finance Corporation/Southeast Europe Enterprise Development) has now decided to initiate the roll out of the 2nd Court-referred Mediation Pilot Project in Bosnia and Herzegovina. While the ongoing 1st Pilot Project revealed many challenges that need to be dealt with, it also demonstrated that overall court-referred mediation is an efficient and effective mean of resolving disputes and one that is likely to be widely acceptable to the public and judicial system alike.

IFC/SEED will enter into partnership with Sarajevo Municipal Court (*hereinafter* the Court) in staging a pilot project, in the continuum of assessing mediation's results in practice. The intention of this intervention is to continue monitoring effective disputes resolution through mediation, as an alternative to the formal court processes, and to foster support to end-users (primarily small and medium enterprises) in improving their access to justice. IFC/SEED will continue to carefully monitor to what extent would this approach trigger and result in improving the efficiency of the BiH courts focusing specifically on reducing average case load time, and therefore assisting courts to decrease the level of backlog.

IFC/SEED's partner on ADR program in Bosnia and Herzegovina is Association of Mediators in Bosnia and Herzegovina (AoM BiH). The principles of AoM is to provide a politically uncommitted forum in BiH which will serve for exchange of ideas and experiences amongst mediators and to educate the judiciary and general population about the mediation process. In addition, the AoM will follow the trends and achievements in the area of alternative dispute resolution in the developed countries, and work on modernization and promotion of these methods in Bosnia and Herzegovina. The AoM plans to introduce mediation as a mechanism to help reduce case load in courts all over Bosnia and Herzegovina and to offer citizens and legal entities more efficient and sustainable method for dispute resolution.

Duration of the Sarajevo Mediation Pilot Project (*hereinafter* Pilot project) is established by the financing allocated by both IFC/SEED and CIDA (Canadian International Development Agency), and this is until the end March, 2006. Decision on whether Sarajevo Mediation Pilot Project activities would cease or would be continued would primarily be based on indicators received from the field team (project dynamics, mediation response rate, settlement rate, etc.). IFC/SEED will consult the Court prior to making any kind of decision in due time.



This Memorandum of Understanding is established between Sarajevo Municipal Court and IFC/SEED on April 27, 2005, and will remain in effect until all activities that are subject to this MOU are completed, but much understanding that funding from IFC/SEED will cease at the latest in March, 2006. The parties hereby agree to the following:

1. IFC/SEED will recruit consultancy expertise in order to secure already developed mediation methodology implementation within on-the-site project. IFC/SEED will make sure that efforts put and know-how expertise gained through initial pilot testing is utilized to maximum possible extent.
2. IFC/SEED will establish the reporting structure between consultancy expertise recruited, the Court and the AoM. Recruited consultancy will be assign to report to IFC/SEED and will liaise with the Court and AoM in BiH, as local counterparts. Recruited expertise will lead the overall effort and will report to IFC/SEED and will liaise with the Court and AoM, respectively. In the absence, AoM will take over overseeing pilot project implementation (including providing mentoring to mediators).
3. IFC/SEED will deliver to the Court Pilot project description in writing, for both Court's review and Court's agreement to the proposed methodology, and that through this memorandum.
4. IFC/SEED will cover the costs of preparing Pilot project and costs of its implementation. These costs include: consultancy services, mediators' services, court administrator, advisory committee meetings, training, data analyst, printing/preparing promotional materials (print and video), printing and translating project related materials, mediation information disbursement to potential mediation clients.
5. The Court will suggest a staff to act as Court Administrator for the pilot project. IFC/SEED will contract Court Administrator for his/her Pilot project related duties. IFC/SEED will pay for the services provided by the Court Administrator

during the timeframe of the Pilot project. Court Administrator will be primarily based in the mediation center, but will be working closely with court staff in preparing of selected cases.

6. The Court will assign a team of judges, working primarily on Commercial cases, to assist the Pilot team, primarily in suggesting and directing the cases to mediation. Judges assigned to the Pilot team may act as pro bono mediators in accordance to the existing regulations and provided Court's President approval. Please note: For those judges who will be cooperating with IFC/SEED on this Pilot project, the Court will need to secure their enrollment and completion of mediation preparatory training delivered by AoM and IFC/SEED.
7. The Court will provide the IFC/SEED with information on the structure of the court, i.e. organization of departments, their level of effort, and assign responsible liaison staff to represent the Court at Advisory Committee meetings.
8. Court representative, Ms. Fatima Mrdovic, assigned to the Pilot project will cooperate closely with the Pilot team leader, an IFC/SEED expert, in order to exchange project-related information and will be reporting to IFC/SEED expert.
9. Pilot team leader, IFC/SEED expert will provide bi-weekly reporting to the President of the Court, i.e. his Deputy/representative on the Pilot project development status and respective project results. Moreover, IFC/SEED expert will be reporting directly to IFC/SEED on overall Pilot project implementation.
10. Should there be any disputes between IFC/SEED and the Court during and/or related to the implementation of this Project, they will be resolved by mutual understanding in due time.

Sarajevo Municipal Court

IFC/SEED

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Association of Mediators in Bosnia and Herzegovina

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# Appendix F: Training Case— World Bank ADR Project in Albania

## **Albania: Commercial Mediation & Arbitration Project Case—Part I**

In the year 2000, the World Bank approved a USD 9 million loan (“Legal and Judicial Reform Project”) to the Government of Albania, to help strengthen the weak institutional and governance capacity of the government, including its ability to enforce its laws and regulations. This project included a component aimed at the introduction of ADR in Albania, the “Albanian Commercial Mediation & Arbitration Project” with a budget of USD 750,000 to be implemented in a 5 year framework (June 2000 to September 2005). One of the goals defined within the project scope was the introduction of mediation and arbitration as alternative means to resolve commercial disputes outside the formal justice system.

The reason for including the introduction of ADR in Albania through a WB loan project was not arbitrary. Three facts encouraged the introduction of ADR in the country, therefore making sense (at the time) to include ADR as a component of a broader Legal and Judicial Reform project:

1. Legal and Judicial Reform is a must for countries aspiring to join the European Union (EU);
2. Albania needed to enforce the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), that had signed in June 27, 2001.
3. Different diagnostics from WB and IFC suggested that there was a considerable need for reform in this area. A Study on Administrative Barriers to Investment from the IFC’s Foreign Investment Advisory Service (FIAS) identified the absence of credible legal commercial dispute resolution mechanisms amongst the most important administrative barriers to attracting investments into Albania. Additionally, results of a WB study indicated the numerous transaction costs

and inefficiencies for businesses caused by the Albanian weak Court system.<sup>156</sup> The study also showed that the cost of contract enforcement in Albania is considerably higher than the regional average (cost of the formal court process in Albania is 140% of the total case value including court fees and attorney fees). Finally, the study showed that the biggest problem of the Albanian judicial system is not a notorious backlog, like in other neighboring countries, but governance issues in the judicial system.

The implementation activities of the ADR component started at the beginning of 2002 with a bidding process for a contract with Albania's Ministry of Justice to introduce ADR in Albania by creating a legal framework, to train mediators and arbitrators and to set up a commercial ADR Centre in Albania. The contract was awarded to the Canadian company Gowlings.

The first activity implemented by Gowlings and the project implementation team led by the WB task manager of ADR component was the creation in December 2002 of the *Albanian Arbitration and Mediation Center (MEDART)*. MEDART was established as an independent, private and non profit organization with the primary function of: maintaining a roster of mediators & arbitrators; administering rules and procedures; providing case management; promoting the use of mediation and arbitration for resolving commercial disputes; increasing awareness, and; training mediators & arbitrators. MEDART had no competition in Albania, it was the only institution offering commercial mediation services.

In a different front, Gowlings participated with the Albanian Ministry of Justice in the preparation of the Mediation Law. The draft law was harmonized with UNCITRAL's Model Law and then submitted to Parliament. The *new "Law on Mediation"* was enacted in June 2003.

At that same time, MEDART center officially open, with one full time staff on board, his Executive Director, Fatbardh Ademi. The Center was going to be fully financed by the WB funds until they reached financial sustainability in the medium term.

Within its project scope, Gowlings also started providing training to the legal community on the new ADR system. They trained 10 arbitrators and 4 mediators, mainly experienced lawyers who have been subsequently certified by the Ministry of Justice.

Finally, around October 2003, MEDART with the assistance from Gowlings and the project implementation team started the *public awareness campaign*. The Center's outreach and education strategy focused on overcoming resistance by dif-

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<sup>156</sup> See Building Market Institutions in South Eastern Europe, WB and EBRD, 2003.

ferent stakeholders by clearly communicating – through a variety of means like media – the message that ADR is results oriented, cost effective, and typically faster than litigation in the courts.

***All of these activities resulted in 0 cases being referred to mediation by Courts.***

The main reasons for the lack of success were the following:

- No support from the legal community to help introduce mediation: (i) courts non responding to the requests for cooperation; (ii) lawyers (trained mediators and arbitrators) do little efforts in promoting ADR by direct contact with business clients.
- Lack of trust among private sector (business) for ADR mechanisms which are not promoted by the courts or lawyers.
- Ministry of Justice implementing the WB's project but with no real instructional authority over the Courts, i.e. Courts completely independent in making decisions regarding the support for ADR.

In November 2003, looking for solutions to obtain more positive results, the WB team contacted the Southeast Europe Enterprise Development IFC Facility (SEED), what is now PEP SE, looking for cooperation and support in this initiative. A Business Development Officer (BDO) from the Albania SEED Office was asked by SEED management to work with our colleagues in the WB and consider the possibility of supporting this initiative and proposing a way forward. The BDO, an Albanian, who knows the local context and stakeholders extremely well believes that SEED can make this project successful and decides to inform her boss in Albania positively about the continuation of the WB Mediation project. This is the context in which the BDO will have to work to make mediation successful in Albania.

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The participants can be divided into 5 groups (around 5 people per group). Each of the groups will design a strategy of how they would proceed if they were part of the SEED team in Albania. Each group will have to work on the way forward in the specific area described below:

GROUP 1: What would you do to obtain the support and collaboration of the legal community to introduce ADR?

GROUP 2: What are the incentives that you would offer the private sector to convince them that ADR is an alternative solution to corruption and court malfunctioning in dealing with commercial disputes?

GROUP 3: What solutions would you offer in order to overcome the problem of the courts not responding to the project implementation unit and the Ministry of Justice request to refer cases to mediation?

GROUP 4: How would you deal with the Ministry of Justice to resolve the issue of the courts not reporting to them and to have more commitment from the Ministry regarding the implementation of the project?

GROUP 5: How would you use MEDART in the next phases of the project? What would you change about MEDART, if anything?

## **Albania: Commercial Mediation & Arbitration Project Case—Part II**

### ***Results of the Project since SEED's Involvement***

In March 2004 IFC/SEED and MEDART sign a Partnership Agreement to work together on raising public acceptance on mediation and to increase the capacities of the MEDART center to better serve the market and attract businesses to use mediation and arbitration as efficient alternatives to the formal court system. The main goal of the partnership was to create better opportunities for access to justice for SMEs through building an operational, effective and sustainable Commercial ADR Service Center and by raising awareness of ADR as a faster, cheaper and more efficient mechanism within the business community. Project activities included:

- Organization of National ADR conference with international presence;
- 6 half-day presentations to a total of 350 businesses;
- Promotion of ADR through a number of media programs and promotional materials;
- Two 1-day introductory mediation trainings delivered by MEDART to an audience of 44 judges;

At the same time MEDART center continued working with Gowlings under the scope of the project approved by the project implementation team and the WB. At the end of 2004, a pilot project for case referral from the courts was designed as the vehicle to achieve success in this project. The aim of the pilot was to facilitate cases referral from the 1<sup>st</sup> instance Court in Tirana to the MEDART Center. In an effort to fully support the use of mediation, the Board of Directors of the MEDART Center allowed for fully subsidized mediations. The mediators and arbitrators were to be paid by the Center through the funds made available by the WB/PIU for the entire project.

In a meeting attended by the Albanian Chief Justice, the MEDART team and the judges from the selected partner court, the judges expressed full support to the project, but indicated their concern over proper procedures being respected and parties being mandated to mediate. IFC/SEED assisted this initiative by providing introductory trainings to the commercial department judges. The pilot was developed in two phases.

*Phase I:* Introduction of the pilot initiative. Three months after the pilot project was started only 10 cases had been referred to mediation and the success rate of cases resolved remained zero, as none of the mediations took place due to lack of consent from both parties in conflict to participate.

*Phase II:* After the failure of phase I, MEDART's Board of Directors designed the strategy for the Phase 2 of the pilot project. The strategy recommended that the parties should be informed of the possibility to mediate at the first Court hearing. Unfortunately, this proposal was rejected by the court. Instead, the Court agreed to allow MEDART to have access to the claims filled in Court, assess if the case was suitable for mediation and contact the parties directly. Two people were hired to assist in this activity – one to select cases suitable for mediation and the other to provide information on ADR to parties in the court.

Phase two lasted for an additional three months. A total of 30 cases were selected for mediation. Of these cases, 20% of them could not be held due to difficulties in contacting the two parties (wrong addresses, no responses), and in 35% of the cases only one party accepted mediation. The rest of the cases were held with little success in terms of success rate and funds released due to the solution of the cases. Phase II was analyzed in some detail and the following conclusions were made:

- The number of suitable cases was rather low (only 30);
- Parties not being accessible and not being willing to mediate was one of the major obstacles to the success of the project;
- Courts failed to provide full support to the project, i.e. the judges remained idle in the efforts to promote ADR between the parties in conflict;
- Lawyers' opposition to mediation as an alternative to formal court process.

### ***SEED's Exit Strategy***

After a series of consultations with the management team, the General Manager of IFC/SEED considered dropping their support in the project. SEED's project team asked to approach the Ministry of Justice and seek their more active involvement in the project, primarily in terms of fostering judges' support to introduction of mediation in Tirana's 1st Instance Court.

A letter to the Ministry was sent asking for support in this matter. The Ministry expressed their full support for the project but stated that unfortunately, they have no formal authority over courts and cannot instruct them to participate fully in the pilot project.

This was a clear signal for IFC/SEED's General Manager to instruct dropping the project and wait until the Ministry and other relevant institutions (School of Magistrates and High Judicial Council)<sup>157</sup> could reconsider their involvement and provide more substantive support to the introduction of mediation.

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Compare the real results of the project with the proposals from the participants and discuss what were the key issues that hampered the project implementation to be more successful.

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<sup>157</sup> The School of Magistrates is the institution in charge for the continuous education of judges. The High Judicial Council is an Independent institution in charge of overall monitoring of the courts' work.

# Appendix G: Samples of Mediation Procedures

## **CENTER FOR EFFECTIVE DISPUTE RESOLUTION (CEDR) MEDIATION RULES.**

### **MODEL MEDIATION PROCEDURE AND AGREEMENT (ninth edition)**

#### **Summary of changes**

The following ninth edition of the Model Mediation Procedure and Agreement has been updated from the previous edition. Summarised below are the main changes.

#### **Procedure**

##### ***Paragraph 2***

The following wording in bullet point 4 “assist the Parties in drawing up any written settlement agreement” has been replaced by “facilitate the drawing up of any settlement agreement”.

This change is to clarify the mediator’s role in relation to drawing up the settlement agreement.

##### ***Paragraph 6***

The following has been deleted from Paragraph 6 of the previous edition as it is merely a repetition of the wording in paragraph 4 of the agreement

“The person signing the Mediation Agreement on behalf of each Party will be deemed to be agreeing, on behalf of both the Party he/she represents and all persons present on that Party’s behalf at the Mediation, to be bound by the provisions of this Model Procedure.”

##### ***Paragraph 14***

To be consistent with CEDR’s mediator code of conduct, withdrawal by the mediator, at their discretion has been added as terminating the mediation.

***Paragraph 18***

Includes specific reference to mediator's duty of confidentiality when in private session/caucus. This was previously only mentioned in the guidance notes.

***Paragraph 19***

This paragraph now sets out more exceptions to confidentiality to take into account legal obligations under The Proceeds of Crime Act 2002 and similar legislation.

**Guidance notes*****Paragraph 14***

The guidance notes now give more specific examples of situations where a mediator may withdraw but these are not intended to be restrictive.

***Paragraph 18***

Explanatory note for the changes to paragraph 18 of the procedure.

**Model Mediation Procedure and Agreement*****Mediation Agreement***

1. The parties ("the Parties") to the dispute in question ("the Dispute"), the Mediator and the Centre for Effective Dispute Resolution ("CEDR Solve") will enter into an agreement ("the Mediation Agreement") based on the CEDR Model Mediation Agreement in relation to the conduct of the Mediation. This procedure ("the Model Procedure") will be incorporated into, form part of, and may be varied by, the Mediation Agreement.

***The Mediator***

2. CEDR Solve will, subject to the agreement of the Parties or any court order, nominate an independent third party(ies) ("the Mediator"). The Mediator, after consultation with the Parties where appropriate, will:
  - attend any meetings with any or all of the Parties preceding the mediation, if requested or if the Mediator decides this is appropriate and the Parties agree;
  - read before the Mediation each Case Summary and all the Documents sent to him/her (see paragraph 7 below);

- chair, and determine the procedure for, the Mediation;
  - facilitate the drawing up of any settlement agreement; and
  - abide by the terms of the Model Procedure and the Mediation Agreement.
3. The Mediator (and any member of the Mediator's firm or company) will not act for any of the Parties individually in connection with the Dispute in any capacity either during the currency of this agreement or at any time thereafter. The Parties accept that in relation to the Dispute neither the Mediator nor CEDR Solve is an agent of, or acting in any capacity for, any of the Parties. The Parties and the Mediator accept that the Mediator (unless an employee of CEDR Solve) is acting as an independent contractor and not as an agent or employee of CEDR Solve.

***Optional / additional wording***

4. CEDR Solve, in conjunction with the Mediator, will make the necessary arrangements for the Mediation including, as necessary:
- nominating, and obtaining the agreement of the Parties to, the Mediator;
  - drawing up the Mediation Agreement;
  - organising a suitable venue and dates;
  - organising exchange of the Case Summaries and Documents;
  - meeting with any or all of the Parties (and the Mediator if appointed), either together or separately, to discuss any matters or concerns relating to the Mediation; and
  - general administration in relation to the Mediation.
5. If there is any issue about the conduct of the Mediation (including as to the nomination of the Mediator) upon which the Parties cannot agree within a reasonable time, CEDR Solve will, at the request of any Party, decide the issue for the Parties, having consulted with them.

***Participants***

6. The Lead Negotiators must be sufficiently senior and have the full authority of their respective Parties to settle the Dispute, without having to refer to anybody else. If there is any restriction on that authority, this should be discussed with CEDR Solve and/or the Mediator before the Mediation. Parties should inform CEDR Solve prior to the date of Mediation of all persons attending the mediation on behalf of each Party.

***Exchange of information***

7. Each Party will prepare for the other Party(ies), the Mediator and Assistant Mediator sufficient copies of:
  - a concise summary (“the Case Summary”) of its case in the Dispute; and
  - all the documents to which the Summary refers and any others to which it may want to refer in the Mediation (“the Documents”).

The Parties will exchange the Case Summary and Documents with each other at least two weeks before the Mediation, or such other date as may be agreed between the Parties and CEDR Solve, and send copies directly to the Mediator and Assistant Mediator on the same date. Each Party will send a copy of the Case Summary to CEDR Solve.

In addition, each Party may send to the Mediator (through CEDR Solve) and/or bring to the Mediation further documentation which it wishes to disclose in confidence to the Mediator but not to any other Party, clearly stating in writing that such documentation is confidential to the Mediator and CEDR Solve.

8. The Parties should try to agree:
  - the maximum number of pages of each Case Summary; and
  - a joint set of Documents or the maximum length of each set of Documents.

***The Mediation***

9. The Mediation will take place at the arranged place and time stated in the Mediation Agreement.
10. The Mediator will chair, and determine the procedure at, the Mediation.
11. No recording or transcript of the Mediation will be made.
12. If the Parties are unable to reach a settlement in the negotiations at the Mediation, and only if all the

Parties so request and the Mediator agrees, the Mediator will produce for the Parties a non-binding recommendation on terms of settlement. This will not attempt to anticipate what a court might order but will set out what the Mediator suggests are appropriate settlement terms in all of the circumstances.

***Settlement agreement***

13. Any settlement reached in the Mediation will not be legally binding until it has been reduced to writing and signed by, or on behalf of, the Parties.

***Termination***

14. Any of the Parties may withdraw from the Mediation at any time and shall immediately inform the Mediator and the other representatives in writing. The Mediation will terminate when:

- a Party withdraws from the Mediation; or
- the Mediator, at his/her discretion, withdraws from the mediation; or
- a written settlement agreement is concluded.

The mediator may also adjourn the mediation in order to allow parties to consider specific proposals, get further information or for any other reason, which the mediator considers helpful in furthering the mediation process. The mediation will then reconvene with the agreement of the parties.

***Stay of proceedings***

15. Any litigation or arbitration in relation to the Dispute may be commenced or continued notwithstanding the Mediation unless the Parties agree otherwise or a court so orders.

***Confidentiality etc.***

16. Every person involved in the Mediation will keep confidential and not use for any collateral or ulterior purpose all information (whether given orally, in writing or otherwise) arising out of, or in connection with, the Mediation, including the fact of any settlement and its terms, save for the fact that the mediation is to take place or has taken place.

17. All information (whether oral, in writing or otherwise) arising out of, or in connection with, the Mediation will be without prejudice, privileged and not admissible as evidence or disclosable in any current or subsequent litigation or other proceedings whatsoever. This does not apply to any information, which would in any event have been admissible or disclosable in any such proceedings.

18. The Mediator will not disclose to any other Party any information given to him by a Party in confidence without the express consent of that Party.

19. Paragraphs 16 -18 shall not apply if, and to the extent that:

- all Parties consent to the disclosure; or
- the Mediator is required under the general law to make disclosure; or

- the Mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed; or
  - the Mediator reasonably considers that there is a serious risk of his/her being subject to criminal proceedings unless the information in question is disclosed.
20. None of the Parties to the Mediation Agreement will call the Mediator or CEDR Solve (or any employee, consultant, officer or representative of CEDR Solve) as a witness, consultant, arbitrator or expert in any litigation or other proceedings whatsoever arising from, or in connection with, the matters in issue in the Mediation. The Mediator and CEDR Solve will not voluntarily act in any such capacity without the written agreement of all the Parties.

### ***Fees, expenses and costs***

21. CEDR Solve's fees (which include the Mediator's fees) and the other expenses of the Mediation will be borne equally by the Parties. Payment of these fees and expenses will be made to CEDR Solve in accordance with its fee schedule and terms and conditions of business.
22. Each Party will bear its own costs and expenses of its participation in the Mediation.

### ***Exclusion of liability***

23. Neither the Mediator nor CEDR Solve shall be liable to the Parties for any act or omission in connection with the services provided by them in, or in relation to, the Mediation, unless the act or omission is shown to have been in bad faith.

## **Guidance notes**

The paragraph numbers and headings in these notes refer to the paragraphs and headings in the Model Procedure.

The same terms ("the Parties" etc.) are used in the Model Procedure and the Model Agreement.

### ***Introduction***

The essence of mediation is that it:

- involves a neutral third party to facilitate negotiations;
- is quick and inexpensive, without prejudice and confidential;

- enables the Parties to devise solutions which are not possible in an adjudicative process, such as litigation or arbitration, and which may be to the benefit of both/all Parties, particularly if there is a continuing business relationship;
- involves representatives of the Parties who have sufficient authority to settle. In some cases, there may be an advantage in the representatives being individuals who have not been directly involved in the events leading up to the dispute and in the dispute itself.

The procedure for the mediation is flexible and this Model Procedure can be adapted (with or without the assistance of CEDR Solve) to suit the Parties.

A mediation can be used:

- in both domestic and international disputes;
- whether or not litigation or arbitration has been commenced; and
- in two-party and multi-party disputes.

Rules or rigid procedures in the context of a consensual and adaptable process, which is the essence of ADR, are generally inappropriate. The Model Procedure and the Model Agreement and this Guidance note should be sufficient to enable parties to conduct a mediation.

In some cases the agreement to conduct a mediation will be as a result of an “ADR clause” (such as one of the CEDR Model Contract Clauses) to that effect in a commercial agreement between the Parties, or a court order. Where that is the case the Model Procedure and Mediation Agreement may need to be adapted accordingly.

The Model Agreement, which has been kept short and simple, incorporates the Model Procedure (see paragraph 1).

The Mediation Agreement can vary the Model Procedure; the variations can be set out in the body of the Mediation Agreement, or the Mediation Agreement can state that variations made in manuscript (or otherwise) on the Model Procedure are to be incorporated.

### ***Mediation Agreement – paragraph 1***

If CEDR Solve is asked to do so by a Party wishing to initiate a mediation, it will approach the other Party(ies) to a Dispute to seek to persuade it/them to participate.

Alternatively, the Party who has taken the initiative in proposing the mediation may wish to send a draft agreement based on the Model Agreement to the other Party(ies).

Representatives of the Parties (and the Mediator if he/she has been nominated) and CEDR Solve may meet to discuss and finalise the terms of the Mediation Agreement.

### ***The Mediator – paragraphs 2-3***

The success of the Mediation will, to a considerable extent, depend on the skill of the Mediator. CEDR Solve believes it is very important for the Mediator to have had specific training and experience. CEDR Solve will propose mediators suitable for the particular matter.

In some cases it may be useful to have more than one Mediator, or to have an independent expert who can advise the Mediator on technical issues. All should sign the Mediation Agreement, which should be amended as appropriate.

It is CEDR Solve's practice, as part of its mediator development programme, to have an assistant mediator ("the Assistant Mediator") attend most mediations. The Assistant Mediator signs the Mediation Agreement and falls within the definition "the Mediator" in the Model Procedure and the Model Agreement.

It is advisable, but not essential, to involve the Mediator in any preliminary meeting between the Parties.

### ***CEDR Solve – paragraphs 4-5***

The Model Procedure envisages the involvement of CEDR Solve because in most cases this is likely to benefit the Parties and the Mediator and generally to facilitate the setting up and conduct of the Mediation. The Model Procedure, however, can be amended if CEDR Solve is not to be involved.

### ***Participants – paragraph 6***

The lead role in the mediation is usually taken by the Lead Negotiators, because the commercial or other interests of the Parties will often take the negotiations beyond strict legal issues.

The Lead Negotiator must have full authority to settle the Dispute, as detailed in the text of paragraph 6.

Full authority means they are able to negotiate freely without restriction or limits on their authority and that the representative does not need to refer to anyone outside the mediation when negotiating and agreeing a settlement. If negotiating authority is less than full, this fact should be disclosed to the other Party and to the Mediator at least two weeks before the Mediation.

The Lead Negotiator should be at the Mediation throughout the whole day. It is easy to forget that the mediation sessions often go well into the evening.

In certain cases, for example claims involving public bodies and class actions, the Lead Negotiator may only have the power to make a recommendation. In these circumstances the following clause should be substituted:

*“the Lead Negotiator(s) [for Party] will have full authority to make recommendations on terms of settlement on behalf of its Party”.*

Professional advisers, particularly lawyers, can, and usually do, attend the Mediation. The advisers play an important role in the exchange of information, in supporting their clients (particularly individuals) in the negotiations, advising their clients on the legal implications of a settlement and in drawing up the settlement agreement.

### ***Exchange of information - paragraphs 7-8***

Documentation which a Party wants the Mediator to keep confidential from the other Party(ies) (e.g. a counsel’s opinion, an expert report not yet exchanged) must be clearly marked as such. It can be disclosed confidentially to the Mediator by the Party before or during the Mediation. It will not be disclosed by the Mediator or CEDR Solve without the express consent of the Party.

One of the advantages of ADR is that it can avoid the excessive disclosure process (including witness statements) which often blights litigation and arbitration. The Documents should be kept to the minimum necessary to understand the Party’s case and to give the Mediator a good grasp of the issues. The Summaries should be similarly brief.

Should the Parties require CEDR Solve to conduct a simultaneous exchange of Case Summaries and Documents, the following wording is suggested:

*“Each party will send to CEDR Solve at least two weeks before the Mediation, or such other date as may be agreed between the Parties and CEDR Solve, sufficient copies of:*

- *a concise summary (“the Case Summary”) of its case in the Dispute; and*
- *all documents to which the Summary refers and any others to which it may want to refer in the Mediation (“the Documents”), which CEDR Solve will send simultaneously to the other Party(ies), the Mediator and Assistant Mediator.”*

### ***The Mediation - paragraphs 9-12***

The intention of paragraph 12 is that the Mediator will cease to play an entirely facilitative role only if the negotiations in the Mediation are deadlocked. Giving a settlement recommendation may be perceived by a Party as undermining the Mediator’s neutrality and for this reason the Mediator may not agree to this course

of action. Any recommendation will be without prejudice and will not be binding unless the Parties agree otherwise.

### ***Settlement agreement - paragraph 13***

If no agreement is reached, it is nonetheless open to the Parties to adjourn the Mediation to another time and place. Experience shows that even where no agreement is reached during the Mediation itself, the Parties will often reach a settlement shortly after, as a result of the progress made during that Mediation.

### ***Termination - paragraph 14***

A mediator may withdraw from the mediation at any time if, in their view, there is not a reasonable likelihood of the parties achieving a workable settlement ; or if in their discretion there is any other reason that it would be inappropriate to continue with the mediation.

### ***Stay of proceedings - paragraph 15***

Although a stay may engender a better climate for settlement, it is not essential that any proceedings relating to the Dispute be stayed. If they are stayed, it is the responsibility of the Parties and their legal advisers to consider and, if necessary, deal with the effect of any stay on limitation periods. Suggested wording for a stay, which can be incorporated into the Mediation Agreement, is:

*“No litigation or arbitration in relation to the Dispute is to be commenced [Any existing litigation or arbitration in relation to the Dispute is to be stayed] from the date of this agreement until the termination of the Mediation.”*

### ***Confidentiality - paragraphs 16-20***

Documents which would in any event be disclosable will not become privileged by reason of having been referred to in the Mediation and will therefore still be disclosable. The position on this may depend on the relevant jurisdiction and it is the responsibility of the Parties and their legal advisers to consider and, if necessary, deal with this.

If either Party wishes to keep confidential the fact the Mediation is taking place or has taken place, paragraph 16 can be amended by replacing the wording “*save for the fact that the Mediation is to take place or has taken place*” with the wording “*including the fact that the Mediation is to take place or has taken place*”.

*[Paragraph 18 provides an exception to the general requirement for confidentiality where all Parties consent to disclosure or where the Mediator reasonably considers*

*that there are public interest or similar reasons that would require disclosure to be made; this would include any circumstances arising under the Proceeds of Crime Act 2002 or any similar legislation.]*

***Fees, expenses and costs - paragraphs 21-22***

The usual arrangement is for the Parties to share equally the fees and expenses of the procedure, but other arrangements are possible. A Party to a Dispute, which is reluctant to participate in mediation, may be persuaded to participate if the other Party(ies) agree to bear that Party's expenses. Parties may also amend the agreement to identify that the costs of mediation may be taken into account in any court orders if there is no settlement at the Mediation.

***International disputes - language and governing law/jurisdiction***

The Model Agreement can be easily adapted for international cross-border disputes by the addition in the Mediation Agreement of wording along the following lines:

***Language***

*The language of the Mediation will be [English]...Any Party producing documents or participating in the Mediation in any other language will provide the necessary translations and interpretation facilities.*

***Governing law and jurisdiction***

*The Mediation Agreement shall be governed by, construed and take effect in accordance with, [English] law.*

*The courts of [England] shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of, or in connection with, the Mediation."*

Where the law is not English or the jurisdiction not England, the Mediation Agreement may need to be amended to ensure the structure, rights and obligations necessary for a mediation are applicable.

## Model Mediation Agreement

### *Parties*

\_\_\_\_\_ (“Party A”)

\_\_\_\_\_ (“Party B”)

\_\_\_\_\_ (“Party C”)

etc.]

(jointly “the Parties”) *Add full names and addresses*

\_\_\_\_\_ (“the Mediator”)

(“the Mediator”)

Centre for Effective Dispute Resolution Limited, 70 Fleet Street, London EC4Y 1EU  
 (“CEDR Solve”)

### *Dispute (“the Dispute”)*

*Add brief description of the Dispute.*

### *Participation in the Mediation*

1. The Parties will attempt to settle the Dispute by mediation (“the Mediation”). The CEDR Model Mediation Procedure (“the Model Procedure”) [as varied by this agreement] will determine the conduct of the Mediation and is incorporated into, and forms part of, this agreement. The definitions in the Model Procedure are used in this agreement.

### *The Mediator*

2. The Mediator[s] will be \_\_\_\_\_  
 If an Assistant Mediator is appointed by CEDR Solve, he/she will be bound by the terms of this agreement. The Mediator and Assistant Mediator will be referred to individually and jointly as “the Mediator”.

### *Participants*

3. At least one attendee on behalf of each Party at the Mediation will have full authority to settle at the Mediation as set out in paragraph 6 of the Model Procedure (“the Lead Negotiator”).

4. Each representative in signing this agreement is deemed to be agreeing to the provisions of this agreement on behalf of the Party he/she represents and all other persons present on that Party's behalf at the Mediation.

***Place and time***

5. The Mediation will take place on \_\_\_\_\_

***Confidentiality***

6. Each Party to the Mediation and all persons attending the Mediation will be bound by the confidentiality provisions of the Model Procedure (paragraphs 16-20).

***Mediation fee***

7. The person signing this agreement on behalf of the Party he/she represents is agreeing on behalf of that Party, to proceed on the basis of CEDR Solve's standard terms and conditions including the mediation fee as previously agreed by the Parties and CEDR Solve.

***Law and jurisdiction***

8. This agreement shall be governed by, construed and take effect in accordance with, English law. The courts of England shall have exclusive jurisdiction to settle any claim, dispute or matter of difference which may arise out of, or in connection with, the Mediation.

***Human Rights***

9. The referral of the Dispute to mediation does not affect any rights that may exist under Article 6 of the European Convention on Human Rights. If the Dispute is not settled by the Mediation, the Parties' rights to a fair trial remain unaffected.

***Model Procedure amendments***

10. *Set out amendments (if any) to the Model Procedure - see introduction to Model Procedure guidance notes.*

*If any litigation or arbitration is to be stayed, paragraph 15 of the Model Procedure should be excluded/deleted and wording along the following lines should be added*

*in the agreement: “No litigation or arbitration in relation to the Dispute is to be commenced [Any existing litigation or arbitration in relation to the Dispute is to be stayed] from the date of this agreement until the termination of the Mediation”.*

**Signed**

On behalf of Party A \_\_\_\_\_ Date \_\_\_\_\_

On behalf of Party B \_\_\_\_\_ Date \_\_\_\_\_

On behalf of Party C \_\_\_\_\_ Date \_\_\_\_\_

On behalf of the Mediator \_\_\_\_\_ Date \_\_\_\_\_

On behalf of CEDR Solve \_\_\_\_\_ Date \_\_\_\_\_

**CPR MEDIATION PROCEDURE**

(Revised and effective as of April 1, 1998)

1. Agreement to Mediate
2. Selecting the Mediator
3. Ground Rules of Proceeding
4. Exchange of Information
5. Presentation to the Mediator
6. Negotiations
7. Settlement
8. Failure to Agree
9. Confidentiality
10. Form 1: Model Agreement for Parties and Mediator

**1. Agreement to Mediate**

The CPR Mediation Procedure (the “Procedure”) may be adopted by agreement of the parties, with or without modification, before or after a dispute has arisen. The following provisions are suggested:

**A. Pre-dispute Clause**

*The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by confidential mediation under the [then current] CPR Mediation Procedure [in effect on the date of this Agreement], before resorting to arbitration or litigation.*

**B. Existing Dispute Submission Agreement**

*We hereby agree to submit to confidential mediation under the CPR Mediation Procedure the following controversy:*

(Describe briefly)

**2. Selecting the Mediator**

Unless the parties agree otherwise, the mediator shall be selected from the CPR Panels of Neutrals. If the parties cannot agree promptly on a mediator, they will notify CPR of their need for assistance in selecting a mediator, informing CPR of any preferences as to matters such as candidates' mediation style, subject matter expertise and geographic location. CPR will submit to the parties the names of not less than three candidates, with their resumes and hourly rates. If the parties are unable to agree on a candidate from the list within seven days following receipt of the list, each party will, within 15 days following receipt of the list, send to CPR the list of candidates ranked in descending order of preference. The candidate with the lowest combined score will be appointed as the mediator by CPR. CPR will break any tie.

Before proposing any mediator candidate, CPR will request the candidate to disclose any circumstances known to him or her that would cause reasonable doubt regarding the candidate's impartiality. If a clear conflict is disclosed, the individual will not be proposed. Other circumstances a candidate discloses to CPR will be disclosed to the parties. A party may challenge a mediator candidate if it knows of any circumstances giving rise to reasonable doubt regarding the candidate's impartiality.

The mediator's rate of compensation will be determined before appointment. Such compensation, and any other costs of the process, will be shared equally by the parties unless they otherwise agree. If a party withdraws from a multiparty mediation but the procedure continues, the withdrawing party will not be responsible for any costs incurred after it has notified the mediator and the other parties of its withdrawal.

Before appointment, the mediator will assure the parties of his or her availability to conduct the proceeding expeditiously. It is strongly advised that the parties and the mediator enter into a retention agreement. A model agreement is attached hereto as a Form.

### 3. Ground Rules of Proceeding

The following ground rules will apply, subject to any changes on which the parties and the mediator agree.

- a. The process is non-binding.
- b. Each party may withdraw at any time after attending the first session, and before execution of a written settlement agreement, by written notice to the mediator and the other party or parties.
- c. The mediator shall be neutral and impartial.
- d. The mediator shall control the procedural aspects of the mediation. The parties will cooperate fully with the mediator.
  - i. The mediator is free to meet and communicate separately with each party.
  - ii. The mediator will decide when to hold joint meetings with the parties and when to hold separate meetings. The mediator will fix the time and place of each session and its agenda in consultation with the parties. There will be no stenographic record of any meeting. Formal rules of evidence or procedure will not apply.
- e. Each party will be represented at each mediation conference by a business executive or other person authorized to negotiate a resolution of the dispute, unless excused by the mediator as to a particular conference. Each party may be represented by more than one person, e.g. a business executive and an attorney. The mediator may limit the number of persons representing each party.
- f. Each party will be represented by counsel to advise it in the mediation, whether or not such counsel is present at mediation conferences.
- g. The process will be conducted expeditiously. Each representative will make every effort to be available for meetings.
- h. The mediator will not transmit information received in confidence from any party to any other party or any third party unless authorized to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.
- i. Unless the parties agree otherwise, they will refrain from pursuing litigation or any administrative or judicial remedies during the mediation process or for a set period of time, insofar as they can do so without prejudicing their legal rights.

- j. Unless all parties and the mediator otherwise agree in writing, the mediator and any persons assisting the mediator will be disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the mediation (including any investigation, action or proceeding which involves persons not party to this mediation).
- k. If the dispute goes into arbitration, the mediator shall not serve as an arbitrator, unless the parties and the mediator otherwise agree in writing.
- l. The mediator may obtain assistance and independent expert advice, with the prior agreement of and at the expense of the parties. Any person proposed as an independent expert also will be required to disclose any circumstances known to him or her that would cause reasonable doubt regarding the candidate's impartiality.
- m. Neither CPR nor the mediator shall be liable for any act or omission in connection with the mediation, except for its/his/her own willful misconduct.
- n. The mediator may withdraw at any time by written notice to the parties (i) for serious personal reasons, (ii) if the mediator believes that a party is not acting in good faith, or (iii) if the mediator concludes that further mediation efforts would not be useful. If the mediator withdraws pursuant to (i) or (ii), he or she need not state the reason for withdrawal.

#### **4. Exchange of Information**

If any party has a substantial need for documents or other material in the possession of another party, or for other discovery that may facilitate a settlement, the parties shall attempt to agree thereon. Should they fail to agree, either party may request a joint consultation with the mediator who shall assist the parties in reaching agreement.

The parties shall exchange with each other, with a copy to the mediator, the names and job titles of all individuals who will attend the joint mediation session.

At the conclusion of the mediation process, upon the request of a party which provided documents or other material to one or more other parties, the recipients shall return the same to the originating party without retaining copies.

#### **5. Presentation to the Mediator**

Before dealing with the substance of the dispute, the parties and the mediator will discuss preliminary matters, such as possible modification of the procedure, place and time of meetings, and each party's need for documents or other information in the possession of the other.

At least 10 business days before the first substantive mediation conference, unless otherwise agreed, each party will submit to the mediator a written statement summarizing the background and present status of the dispute, including any settlement efforts that have occurred, and such other material and information as the mediator requests or the party deems helpful to familiarize the mediator with the dispute. It is desirable for the submission to include an analysis of the party's real interests and needs and of its litigation risks. The parties may agree to submit jointly certain records and other materials. The mediator may request any party to provide clarification and additional information.

The parties are encouraged to discuss the exchange of all or certain materials they submit to the mediator to further each party's understanding of the other party's viewpoints. The mediator may request the parties to submit a joint statement of facts. Except as the parties otherwise agree, the mediator shall keep confidential any written materials or information that are submitted to him or her. The parties and their representatives are not entitled to receive or review any materials or information submitted to the mediator by another party or representative without the concurrence of the latter. At the conclusion of the mediation process, upon request of a party, the mediator will return to that party all written materials and information which that party had provided to the mediator without retaining copies thereof or certify as to the destruction of such materials.

At the first substantive mediation conference each party will make an opening statement.

## **6. Negotiations**

The mediator may facilitate settlement in any manner the mediator believes is appropriate. The mediator will help the parties focus on their underlying interests and concerns, explore resolution alternatives and develop settlement options. The mediator will decide when to hold joint meetings, and when to confer separately with each party.

The parties are expected to initiate and convey to the mediator proposals for settlement. Each party shall provide a rationale for any settlement terms proposed.

Finally, if the parties fail to develop mutually acceptable settlement terms, before terminating the procedure, and only with the consent of the parties, (a) the mediator may submit to the parties a final settlement proposal; and (b) if the mediator believes he/she is qualified to do so, the mediator may give the parties an evaluation (which if all parties choose, and the mediator agrees, may be in writing) of the likely outcome of the case if it were tried to final judgment, subject to any limitations under any applicable mediation statutes/rules, court rules or ethical codes.

Thereupon, the mediator may suggest further discussions to explore whether the mediator's evaluation or proposal may lead to a resolution.

Efforts to reach a settlement will continue until (a) a written settlement is reached, or (b) the mediator concludes and informs the parties that further efforts would not be useful, or (c) one of the parties or the mediator withdraws from the process. However, if there are more than two parties, the remaining parties may elect to continue following the withdrawal of a party.

## 7. Settlement

If a settlement is reached, a preliminary memorandum of understanding or term sheet normally will be prepared and signed or initialed before the parties separate. Thereafter, unless the mediator undertakes to do so, representatives of the parties will promptly draft a written settlement document incorporating all settlement terms. This draft will be circulated, amended as necessary, and formally executed. If litigation is pending, the settlement may provide that the parties will request dismissal of the case. The parties also may request the court to enter the settlement agreement as a consent judgment.

## 8. Failure to Agree

If a resolution is not reached, the mediator will discuss with the parties the possibility of their agreeing on advisory or binding arbitration, "last offer" arbitration or another form of ADR. If the parties agree in principle, the mediator may offer to assist them in structuring a procedure designed to result in a prompt, economical process. The mediator will not serve as arbitrator, unless all parties agree.

## 9. Confidentiality

The entire mediation process is confidential. Unless agreed among all the parties or required to do so by law, the parties and the mediator shall not disclose to any person who is not associated with participants in the process, including any judicial officer, any information regarding the process (including pre-process exchanges and agreements), contents (including written and oral information), settlement terms or outcome of the proceeding. If litigation is pending, the participants may, however, advise the court of the schedule and overall status of the mediation for purposes of litigation management. Any written settlement agreement resulting from the mediation may be disclosed for purposes of enforcement.

Under this procedure, the entire process is a compromise negotiation subject to Federal Rule of Evidence 408 and all state counterparts, together with any applica-

ble statute protecting the confidentiality of mediation. All offers, promises, conduct and statements, whether oral or written, made in the course of the proceeding by any of the parties, their agents, employees, experts and attorneys, and by the mediator are confidential. Such offers, promises, conduct and statements are privileged under any applicable mediation privilege and are inadmissible and not discoverable for any purpose, including impeachment, in litigation between the parties. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable solely as a result of its presentation or use during the mediation.

The exchange of any tangible material shall be without prejudice to any claim that such material is privileged or protected as work-product within the meaning of Federal Rule of Civil Procedure 26 and all state and local counterparts.

The mediator and any documents and information in the mediator’s possession will not be subpoenaed in any such investigation, action or proceeding, and all parties will oppose any effort to have the mediator or documents subpoenaed. The mediator will promptly advise the parties of any attempt to compel him/her to divulge information received in mediation.

Form

**CPR Model Agreement for Parties and Mediator**

Agreement made (date) \_\_\_\_\_, \_\_\_\_\_  
 between \_\_\_\_\_  
 represented by \_\_\_\_\_  
 and \_\_\_\_\_  
 represented by \_\_\_\_\_  
 and (the Mediator) \_\_\_\_\_

A dispute has arisen between the parties (the “Dispute”). The parties have agreed to participate in a mediation proceeding (the “Proceeding”) under the CPR Mediation Procedure [, as modified by mutual agreement] (the “Procedure”). The parties have chosen the Mediator for the Proceeding. The parties and the Mediator agree as follows:

**A. Duties and Obligations**

1. The Mediator and each of the parties agree to be bound by and to comply faithfully with the Procedure, including without limitation the provisions regarding confidentiality.

2. The Mediator has no previous commitments that may significantly delay the expeditious conduct of the proceeding and will not make any such commitments.
3. The Mediator, the International Institute for Conflict Prevention & Resolution (CPR) and their employees, agents and partners shall not be liable for any act or omission in connection with the Proceeding, other than as a result of its/his/her own willful misconduct.

## **B. Disclosure of Prior Relationships**

1. The Mediator has made a reasonable effort to learn and has disclosed to the parties in writing (a) all business or professional relationships the Mediator and/or the Mediator's firm have had with the parties or their law firms within the past five years, including all instances in which the Mediator or the Mediator's firm served as an attorney for any party or adverse to any party; (b) any financial interest the Mediator has in any party; (c) any significant social, business or professional relationship the Mediator has had with an officer or employee of a party or with an individual representing a party in the Proceeding; and (d) any other circumstances that may create doubt regarding the Mediator's impartiality in the Proceeding.
2. Each party and its law firm has made a reasonable effort to learn and has disclosed to every other party and the Mediator in writing any relationships of a nature described in paragraph B.1. not previously identified and disclosed by the Mediator.
3. The parties and the Mediator are satisfied that any relationships disclosed pursuant to paragraphs B.1. and B.2. will not affect the Mediator's independence or impartiality. Notwithstanding such relationships or others the Mediator and the parties did not discover despite good faith efforts, the parties wish the Mediator to serve in the Proceeding, waiving any claim based on said relationships, and the Mediator agrees to so serve.
4. The disclosure obligations in paragraphs B.1. and B.2. are continuing until the Proceeding is concluded. The ability of the Mediator to continue serving in this capacity shall be explored with each such disclosure.

## **C. Future Relationships**

1. Neither the Mediator nor the Mediator's firm shall undertake any work for or against a party regarding the Dispute.

2. Neither the Mediator nor any person assisting the Mediator with this Proceeding shall personally work on any matter for or against a party, regardless of specific subject matter, prior to six months following cessation of the Mediator's services in the Proceeding.
3. The Mediator's firm may work on matters for or against a party during the pendency of the Proceeding if such matters are unrelated to the Dispute. The Mediator shall establish appropriate safeguards to insure that other members and employees of the firm working on such matters unrelated to the Dispute do not have access to any confidential information obtained by the Mediator during the course of the Proceeding.

### D. Compensation

1. The Mediator shall be compensated for time expended in connection with the Proceeding at the rate of \$\_\_\_\_\_, plus reasonable travel and other out-of-pocket expenses. The Mediator's fee shall be shared equally by the parties. No part of such fee shall accrue to CPR.
2. The Mediator may utilize members and employees of the firm to assist in connection with the Proceeding and may bill the parties for the time expended by any such persons, to the extent and at a rate agreed upon in advance by the parties.

\_\_\_\_\_  
Party

by \_\_\_\_\_

Party's Attorney

\_\_\_\_\_  
Mediator

\_\_\_\_\_  
Party

by \_\_\_\_\_

Party's Attorney

# Appendix H: Model Codes of Ethics for Mediators

## **MODEL CODE OF ETHICS, CONFLICT RESOLUTION NETWORK CANADA**

### ***Introduction***

This Model Code of Ethics is from Conflict Resolution Network Canada. The initiative originally came from three professional groups: the American Arbitration Association, the American Bar Association (Section of Dispute Resolution), and the Society of Professionals in Dispute Resolution.

The standards set out in this Model Code of Ethics for Mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards are intended to apply to all types of mediation. It is recognized, however, that in some cases their application may be affected by laws or contractual agreements.

### **I. Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principle of Self-Determination by the Parties.**

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

### ***Comments:***

The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute.

Parties shall be given the opportunity to consider all proposed options. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

## **II. Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner.**

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

### ***Comments:***

A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.

When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartially. A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

## **III. Conflicts of Interest: A Mediator Shall Disclose all Actual and Potential Conflicts of Interest Reasonably Known to the Mediator.**

After Disclosure, the Mediator shall decline to mediate unless all parties choose to retain the Mediator. The need to protect against Conflicts of Interest also governs conduct that occurs during and after the Mediation.

A conflict of interest is a dealing or relationship that might create an impression of possible bias.

The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

***Comments:***

A mediator shall avoid conflicts of interest in recommending the services of other professionals. A mediator may make reference to professional referral services or associations which maintain rosters of qualified professionals.

Potential conflicts of interest may arise between the administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressures from outside of the mediation process should never influence the mediator to coerce parties to settle.

**IV. Competence: A Mediator Shall Mediate only When the Mediator Has the Necessary Qualifications to Satisfy the Reasonable Expectations of the Parties.**

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

***Comments:***

Mediators should have available for the parties information relevant to training, education and experience.

The requirements for appearing on a list of mediators must be made public and available to interested persons.

When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

## **V. Confidentiality: A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.**

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

### ***Comments:***

The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties. If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.

In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation. Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.

Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation, of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.

## **VI. Quality of the Process: A Mediator Shall Conduct the Mediation Fairly, Diligently, and in a Manner Consistent with the Principle of Self-Determination by the Parties.**

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

***Comments:***

A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.

Mediators should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.

The presence or absence of persons at a mediation depends on the agreement of the parties and mediator. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial. A mediator shall withdraw from the mediation or postpone a session if the mediation is being used to further illegal conduct or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity. Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

## **VII. Advertising and Solicitation: A Mediator Shall Be Truthful in Advertising and Solicitation for Mediation.**

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

***Comments:***

It is imperative that communication with the public educate and instill confidence in the process. In an advertisement or other communication to the public, a mediator may make reference to meeting state, national, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

## **VIII. Fees: A Mediator Shall Fully Disclose and Explain the Basis of Compensation, Fees, and Charges to the Parties.**

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable, considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

### ***Comments:***

A mediator who withdraws from a mediation should return any unearned fee to the parties. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement. Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees. A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

## **IX. Obligations to the Mediation Process: Mediators have a duty to improve the practice of mediation.**

### ***Comments***

Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.

## EUROPEAN CODE OF CONDUCT FOR MEDIATORS

*This code of conduct sets out a number of principles to which individual mediators can voluntarily decide to commit, under their own responsibility. It is intended to be applicable to all kinds of mediation in civil and commercial matters.*

*Organisations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organisation to respect the code.*

*Organisations have the opportunity to make available information on the measures they are taking to support the respect of the code by individual mediators through, for example, training, evaluation and monitoring.*

*For the purposes of the code mediation is defined as any process where two or more parties agree to the appointment of a third-party – hereinafter “the mediator” – to help the parties to solve a dispute by reaching an agreement without adjudication and regardless of how that process may be called or commonly referred to in each Member State.*

*Adherence to the code is without prejudice to national legislation or rules regulating individual professions.*

*Organisations providing mediation services may wish to develop more detailed codes adapted to their specific context or the types of mediation services they offer, as well as with regard to specific areas such as family mediation or consumer mediation.*

### 1. Competence and Appointment of Mediators

#### ***1.1 Competence***

Mediators shall be competent and knowledgeable in the process of mediation.

Relevant factors shall include proper training and continuous updating of their education and practice in mediation skills, having regard to any relevant standards or accreditation schemes.

#### ***1.2 Appointment***

The mediator will confer with the parties regarding suitable dates on which the mediation may take place. The mediator shall satisfy him/herself as to his/her background and competence to conduct the mediation before accepting the appointment and, upon request, disclose information concerning his/her background and experience to the parties.

### ***1.3 Advertising/promotion of the mediator's services***

Mediators may promote their practice, in a professional, truthful and dignified way.

## **2. Independence and Impartiality**

### ***2.1 Independence and neutrality***

The mediator must not act, or, having started to do so, continue to act, before having disclosed any circumstances that may, or may be seen to, affect his or her independence or conflict of interests. The duty to disclose is a continuing obligation throughout the process.

Such circumstances shall include

- any personal or business relationship with one of the parties,
- any financial or other interest, direct or indirect, in the outcome of the mediation, or
- the mediator, or a member of his or her firm, having acted in any capacity other than mediator for one of the parties.

In such cases the mediator may only accept or continue the mediation provided that he/she is certain of being able to carry out the mediation with full independence and neutrality in order to guarantee full impartiality and that the parties explicitly consent.

### ***2.2 Impartiality***

The mediator shall at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation.

## **3. The Mediation Agreement, Process, Settlement and Fees**

### ***3.1 Procedure***

The mediator shall satisfy himself/herself that the parties to the mediation understand the characteristics of the mediation process and the role of the mediator and the parties in it.

The mediator shall in particular ensure that prior to commencement of the mediation the parties have understood and expressly agreed the terms and conditions of

the mediation agreement including in particular any applicable provisions relating to obligations of confidentiality on the mediator and on the parties.

The mediation agreement shall, upon request of the parties, be drawn up in writing.

The mediator shall conduct the proceedings in an appropriate manner, taking into account the circumstances of the case, including possible power imbalances and the rule of law, any wishes the parties may express and the need for a prompt settlement of the dispute. The parties shall be free to agree with the mediator, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

The mediator, if he/she deems it useful, may hear the parties separately.

### ***3.2 Fairness of the process***

The mediator shall ensure that all parties have adequate opportunities to be involved in the process.

The mediator if appropriate shall inform the parties, and may terminate the mediation, if:

- a settlement is being reached that for the mediator appears unenforceable or illegal, having regard to the circumstances of the case and the competence of the mediator for making such an assessment, or
- the mediator considers that continuing the mediation is unlikely to result in a settlement.

### ***3.3 The end of the process***

The mediator shall take all appropriate measures to ensure that any understanding is reached by all parties through knowing and informed consent, and that all parties understand the terms of the agreement.

The parties may withdraw from the mediation at any time without giving any justification.

The mediator may, upon request of the parties and within the limits of his or her competence, inform the parties as to how they may formalise the agreement and as to the possibilities for making the agreement enforceable.

### ***3.4 Fees***

Where not already provided, the mediator must always supply the parties with complete information on the mode of remuneration which he intends to apply. He/she

shall not accept a mediation before the principles of his/her remuneration have been accepted by all parties concerned.

#### **4. Confidentiality**

The mediator shall keep confidential all information, arising out of or in connection with the mediation, including the fact that the mediation is to take place or has taken place, unless compelled by law or public policy grounds. Any information disclosed in confidence to mediators by one of the parties shall not be disclosed to the other parties without permission or unless compelled by law.

# Appendix I: Selected ADR and Mediation WEB Resources

- ADR resources and links <http://adrr.com/>
- ADRWold.com <http://www.adrworld.com/>
- Agree Inc <http://agreeinc.com/agree/agree.htm>
- American Arbitration Association, Dispute Resolution Section <http://www.adr.org/>
- American Bar Association <http://www.abanet.org/dispute/home.html>
- Canadian Institute for Conflict Resolution [http://www.cicr-icrc.ca/english/index\\_e.htm](http://www.cicr-icrc.ca/english/index_e.htm)
- Centre for Effective Dispute Resolution (CEDR) <http://www.cedr.co.uk/>
- Canadian Bar Association ADR section <http://www.cba.org/CBA/Sections/Adre/>
- CDR Associates <http://www.mediate.org/start.htm>
- Center for Online Dispute Resolution <http://www.odr.info/>
- Conflict Research Consortium of the University of Colorado <http://www.colorado.edu/conflict>
- ConflictNet <http://www.igc.org/igc/conflictnet/>
- Cornell Law School <http://www.law.cornell.edu/wex/index.php/ADR>
- Court Mediation Program (DC) <http://www.cadc.uscourts.gov/internet/internet.nsf/Content/Mediation+Program>
- CPR Institute for Dispute Resolution <http://www.cpradr.org/>
- Department of Justice, Canada - Project on Dispute Resolution [http://canada.justice.gc.ca/Orientations/Methodes/index\\_en.html](http://canada.justice.gc.ca/Orientations/Methodes/index_en.html)

- Dispute Resolution Journal (ABA)  
<http://www.abanet.org/dispute/drjournal.html>
- Federal Mediation and Conciliation Service <http://www.fmcs.gov/internet/>
- International Center for Conflict Prevention and Resolution (CPR)  
<http://www.cpradr.org/cpr2.asp>
- International Chamber of Commerce (ICC) <http://www.iccwbo.org/>
- Mediation Information and Resource Center <http://www.mediate.com/>
- National Alternative Dispute Resolution Advisory Council (Australia)  
<http://www.ag.gov.au/agd/www/Disputeresolutionhome.nsf/page/home>
- Negotiation Journal  
<http://www.blackwellpublishing.com/journal.asp?ref=0748-4526&site=1>
- Ohio State Journal on Dispute Resolution  
<http://moritzlaw.osu.edu/jdr/index.html>
- Program on Negotiation at Harvard Law School  
<http://www.pon.harvard.edu/index.php>
- Recent Developments in Dispute Resolution <http://www.willamette.edu/dis-res/>
- RAND Institute for Civil Justice <http://www.rand.org/icj/research/adr.html>
- Society of Professionals in Dispute Resolution <http://www.spidr.org/>
- Udruzenje medijatora u BiH [http://www.umbih.co.ba/eng/index2\\_eng.htm](http://www.umbih.co.ba/eng/index2_eng.htm)
- United Nations Commission on International Trade Law (UNCITRAL)  
[www.uncitral.org](http://www.uncitral.org)
- University of Colorado Conflict Research Consortium  
<http://conflict.colorado.edu/>
- University of Victoria - Institute for Dispute Resolution <http://dispute.resolution.uvic.ca/>

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