

# Leaping the Bar: Overcoming Legal Opposition To ADR in the Developing World

By Christine Cervenak, David Fairman and Elizabeth McClintock

Just as alternative dispute resolution has not been enthusiastically embraced by the entire U.S. legal community, ADR programs the world over experience varying degrees of support from local legal communities.

This cross-current likely will not stem the rising tide of ADR programs across the globe. But it is becoming increasingly clear that the success of such programs will depend upon assessing and addressing the legal community's attitude toward ADR in each country, as well as the attitudes of ADR users toward the formal legal establishment.

A few of the many critical issues facing any community deciding whether and how to implement an ADR program are: (1) Why and to what degree will the lawyers and judges oppose or fail to support ADR? (2) How should this opposition or lack of support be addressed? (3) How do potential users of ADR view the judiciary and the rest of the legal establishment? and (4) How should the ADR project deal with their views?

This article, based on extensive research by the Conflict Management Group for the United States Agency for International Development, describes some of the ways ADR programs in developing and transition countries have addressed these questions.<sup>1</sup>

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## Resistance to ADR

To be sure, there are plenty of valid reasons for opposing ADR programs with inappropriate goals or improper design. ADR cannot replace formal judicial systems necessary to further the rule of law, redress fundamental social injustice, provide governmental sanction, or provide a "court of last resort" for disputes that cannot be resolved by voluntary, informal systems. Also, it is hard for ADR to deal well with extreme power imbalances between disputants.

However, even well-designed ADR programs with appropriate goals still draw opposition from legal communities in the developing world. As in developed countries like the United States, the reasons range from the philosophical to the mundane. Debates over the role of the state in dispute resolution and the importance

norms and practices, or that trenches on their turf.

It is important to understand this dynamic in designing an ADR program, just as it is important to understand the potential users' attitude toward legal structures and personnel. If the public mistrusts the judiciary, the public is unlikely to patronize an ADR system managed by it. Users fear that corruption, bias, high costs, delays, and other faults in the judicial system will be imported into the ADR system immediately or eventually. Even if the system is well-designed to minimize these "contagion risks," the public's expectation that these faults will be replicated in the ADR system may undermine ADR's ability to draw users. In India, for example, a community-based mediation program, *lok adalat*, was widely accepted while operating independently, but fell into

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of rejecting "second-class justice" are at one end of the spectrum; fears relating to negative effects on the legal profession's pocketbooks, power and prestige are at the other. Legal culture – whether arising out of civil law, common law, indigenous traditions or a hybrid of these – may also predispose lawyers and judges to oppose ADR that is inconsistent with the legal system's

low regard after being taken over by the government (at the urging of the legal establishment); the public's mistrust of the judiciary was simply transferred to the program.<sup>2</sup>

Community distrust of the formal court system has important implications for the linkage between ADR and the legal system. Well-designed ADR projects assess the relevant public

attitudes and craft appropriate links to formal legal structures or devise methods for surviving without such linkage.

Not surprisingly, our study shows that outreach, education and good program design can help overcome, neutralize or at least reduce skepticism and opposition by the legal community. Basically, ADR program designers have to decide whether to rely on high-level supporters to “bulldoze” opposition, “bypass” the opposition by establishing a program that

application of legal principles by appropriate authorities. At the same time, the commercial sector did not view the court system as able to adequately handle disputes.

The ADR project designers understood these dynamics, and so implemented the project through private business offices and the Ministry of Labor, since many of the disputes anticipated were between employers and workers. The judiciary, as well as the Ministry of Justice, were thereby circumvented in the designers’ strategy

While there is no judicial enforcement of resulting mediated agreements, informal community enforcement has worked well. In fact, large numbers of villagers typically attend mediations, effectively witnessing agreements and guaranteeing compliance. Ironically, legal education and supervision for community mediators have made the ADR system a better forum for enforcing women’s rights than the courts.

Local bar associations and district judges participate in mediation trainings aimed at broadening understanding of mediation and its potential. However, ADR providers at the village level do not want to formalize links with the legal establishment. Now that the reformed village mediation system is successful, there is a desire on the part of the government to replace this ADR system with a network of local courts.

Non-governmental organizations (NGOs) and private donors believe such a move would undermine the success of village mediation by exposing it to the same corruption and barriers to utilization that eroded confidence in the formal justice system, just as occurred in India’s *lok adalat* system.



*A Mediation Session in Bangladesh: ADR was designed to build upon Bangladesh’s indigenous mediation system — and to be kept independent from the courts — after research revealed the public’s overwhelming view of the formal court system as corrupt, inaccessible and biased, particularly against women.*

functions independently of the legal system, use symbolic gestures or financial incentives to “buy off” the opposition, “bring in” the legal community with incentives to participate in ADR’s design and operation, or some combination of these. Country-specific strategies for addressing opposition within the legal community are instructive, and a handful of cases are described below.

### **Uruguay: ‘Bulldozing,’ Then ‘Bringing Judges In’**

In Uruguay, commercial-sector ADR has improved the legal and regulatory climate for investment by providing an alternative to the courts for resolving business disputes. By and large, judges were skeptical about and resistant to introducing ADR practices into the court system, in part because judicial training leads judges to believe that disputes are zero-sum equations, and that proper procedure requires

to get ADR into the hands of non-judges.

This strategy, along with strong political and popular support for ADR in Uruguay, saved the ADR system despite judicial opposition. At the same time, outreach and ADR training for judges was built into the project to “bring them in,” and may affect judicial attitudes in the longer term.<sup>3</sup>

### **Bangladesh: ‘Bypassing’ the Legal Community Altogether**

In 1995 in Bangladesh, U.S.A.I.D. undertook an extensive assessment of attitudes toward ADR and the court system, revealing the public’s overwhelming view of the formal court system as corrupt, inaccessible and biased, particularly against women. As a result, U.S.A.I.D. supported an ADR project that builds on the indigenous mediation system and remains independent of the legal system.

### **Sri Lanka: ‘Buying Them Off,’ Then ‘Bringing Them In’**

Sri Lanka’s government-supported community mediation program is an example of a successful ADR program well-supported by the legal community.

The previous system of Conciliation Boards failed because the officials involved were vulnerable to local elites and corruption. The current mediation board system was established by high-level officials and is run as part of the judicial system, overseen by a Mediation Commission comprised of former Supreme Court and Appeals Court justices. Mediators are volunteers, and sometimes are also lawyers. Stakeholders, like judges and police chiefs, participate in trainings and one-day “awareness raising” programs. Educational outreach on ADR also extends to local bars and law schools. In practice, however, the

mediation boards operate largely independently of the legal system.

Recently, there have been rumblings against ADR within the legal profession to the effect that the mediation boards are "a step to deny access to courts of law." (It is true that a certificate of non-settlement is required to take many cases to court).

Acknowledging the problem that mediators and parties may not have a clear understanding of the laws relevant to their case, as well as the importance of continued support from the legal community, the mediation program is attempting to bring legal professionals into the system so that their advice can be more constructively integrated into the system. To this end, mediation trainers have organized workshops for students at the Sri Lanka Law College and sessions for local bar associations.

### **Ukraine: 'Bringing in' the Legal Community Through Outreach**

The Ukraine Mediation Group ("UMG"), a network of mediation organizations, offers mediation for any type of civil case, although it is focusing on commercial, labor and privatization disputes. UMG faces a number of vestiges of Soviet control, such as out-dated laws unfavorable to ADR, cultural barriers to sharing information necessary to successful mediation, as well as rigidity in some older judges who believe that there is no legal basis for mediation in Ukraine.

One of UMG's targets for outreach is the legal community. Lectures and seminars on ADR are given at law schools, and judges are encouraged to participate in ADR training. UMG has found that the younger generation of justices is enthusiastic about mediation and court referral for civil suits. UMG's strategy is to have "enlightened" judges (who have been exposed to ADR through UMG outreach) refer cases to its centers, continue to build interest in the legal community, while promoting other necessary reforms.

### **South Africa: From 'Bypass' To a Successful 'Buy-In'**

One result of South Africa's

political transition in the early 1990s was a shift of the ADR system from outside the apartheid-era legal structures to a prominent role within the new government.

Until the new government was elected in 1994, interest in and provision of ADR services were almost entirely limited to the NGO sector. ADR was an alternative to the state systems, which were viewed as unwilling and unable to meet the needs of the majority of the population. There were virtually no linkages during this period.

The new government, however, is interested in developing ADR mechanisms within a variety of state systems, including the formal legal system. A number of top government officials have come out of the NGO sector, are familiar with ADR and have encouraged the government to embrace ADR systems.

One NGO in particular – the Independent Mediation Services of South Africa (IMSSA) – has been able to navigate well the changes in governmental attitudes toward ADR and the public's attitudes toward the formal legal system. IMSSA has been extremely successful in handling disputes in the organized labor sector, and remained independent of the formal legal system during apartheid. After 1994, the new governmental structure for addressing labor disputes – the Commission for Conciliation, Mediation and Arbitration ("CCMA") – was modeled on IMSSA, and until recently was headed by one of IMSSA's founders and former directors. Legal professionals who deal with labor/management disputes are now learning how to assist clients within the framework of the CCMA.

In a sense, IMSSA has enjoyed the best of both worlds, remaining independent of a system widely perceived as ineffective and illegitimate, yet able to provide a foundation for changing that system. The impressive record of IMSSA and other NGOs in the ADR field has increasingly convinced lawyers of the value of ADR, and lawyers serve as paid IMSSA panelists.

### **Lessons Drawn from the Developing World**

Our review of ADR experience in the developing world highlights the following lessons:

- Where the legal profession opposes ADR, but political support for ADR is strong, it may be possible to bulldoze opposition;

- Where the legal profession opposes ADR and other support for it is weak, it may be wise to "bypass" or "buy off" the bar; and

- Where the legal profession supports ADR, it may be appropriate to "bring-in" the bar to assist in the design and operation of the ADR system as long as the "risk of contagion" from corrupt and/or cumbersome legal systems can be minimized.

Mixing these strategies may also be appropriate, especially as changes in attitudes of and toward the legal community occur over the life of the ADR project in any given developing nation. In this regard, while these lessons are drawn from experience abroad, future ADR researchers and system designers may find they also shed some light on the implementation and usage of ADR here in the United States and in other developed nations.

### **Endnotes**

<sup>1</sup>. This article is based on Conflict Management Group's recent comprehensive study for the U.S. Agency for International Development on whether and how ADR can promote certain rule of law and other developmental objectives in developing and transitional countries. The results have been published by U.S.A.I.D. in Scott Brown, Christine Cervenak and David Fairman, *ALTERNATIVE DISPUTE RESOLUTION: A GUIDE FOR U.S.A.I.D.* (1998).

<sup>2</sup>. See Sarah Leah Whitson, 'Neither Fish, Nor Flesh, Nor Good Red Herring' *Lok Adalats: An Experiment in Informal Dispute Resolution in India*, 15 *Hastings Int'l & Comp. L. Rev.*, 391-445 (1992).

<sup>3</sup>. See Harry Blair, Mary Staples Said, Joseph Thome and Christopher Sabatini, *A Strategic Assessment of Legal Systems Development in Uruguay and Argentina* (Center for Development Information and Evaluation, U.S.A.I.D. Working Paper No. 192, 1994).