



Geneva

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### **Managing Out-of-Court Business Dispute Resolution Services**

Settling business disputes in court can be expensive, lengthy and embarrassingly public. Even though arbitration and mediation centres can offer firms a faster, confidential solution, these centres have their own problems, particularly in developing economies.

In a first for arbitration and mediation centres, the International Trade Centre (ITC) brought together more than 60 directors of centres from 50 developing and developed countries at a symposium on how to strengthen their services, in Chamonix, France (2 to 3 September 2004). In addition to many new centres some of the world's foremost institutions in the field were present, including the International Chamber of Commerce; the International Federation of Commercial Arbitration Institutions; and the UN Commission on International Trade Law, whose model law on arbitration forms the basis of national legislation in more than 40 countries.

#### **A learning opportunity**

The meeting allowed new centres, especially in the developing economies, to benefit from the experience of well-established centres in the efficient management of commercial disputes. Yet even experienced arbitration and mediation centres can suffer from isolation, noted Myriam Bacqué of the *Centre de Médiation et d'Arbitrage de Paris*. "Learning about new centres can call into question our established practices," she said.

For ITC, settling business disputes rapidly and efficiently is an essential link in the chain tying suppliers and buyers together. "Mediation and arbitration centres of developing and emerging economies have a unique role to play to help their countries join in the world economy," said ITC's Executive Director, J. Denis Bélisle. "Not only do they provide methods for solving the disputes that arise inevitably from trade," he continued, "but they can promote ways to prevent commercial disputes and provide direct support to the business community at the operational level."

The meeting looked particularly at the managerial and operational challenges of running a centre.

#### **High and rising demand for services**

The sheer volume of cases in an era of increased trade is one important factor. Moreover, some centres from the South have gained a greater practical experience than those of the North due to the huge demand for dispute resolution services. South Africa's Commission for Conciliation, Mediation and Arbitration, for example, has settled some 340,000 cases since January 2000. The centre handles 500 cases on a daily basis. This means that case managers need excellent organizational skills, on a par with their knowledge of arbitration.

### **Few trained staff**

Among newly-created centres, the lack of a skilled staff for the secretariat, not to mention for the pool of arbitrators, was a pressing concern. “Informal systems for alternative dispute resolution are deeply rooted in the community, but there is a lack of specifically-trained senior and junior professional staff,” said Lubnah Katbeh of the Tahkeem Center for Settlement of Commercial Disputes, which serves Palestinian businesses. To survive, centres must engage in training themselves – they can’t rely just on providing arbitration or mediation services.

Training and education are important activities for many centres, accounting for around two-thirds of their income. Creating an association for young lawyers, especially women, has helped Germany’s arbitration institution boost numbers of trained arbitrators.

### **Changing mindsets**

What also became clear during the meeting is the diplomatic and awareness-building skills required of the head of an arbitration or mediation centre. “The manager is the face of the centre,” said Marcela Filloy of the centre for conciliation and arbitration of Costa Rica’s chamber of commerce. “It’s crucial to appoint someone who has the ability to handle relations with staff and the judiciary, and not just legal skills.” Frequently, he or she has to overcome skepticism or downright hostility from the rest of the legal profession, as well as to raise the profile of arbitration and mediation services with the business sector. “We had to convince the judiciary and lawyers that we weren’t competing with them, but on the contrary, that magistrates can also be arbitrators,” said Babacar Diouf of the five-year-old arbitration and mediation centre of Dakar, Senegal.

To help ingrain arbitration and mediation in the national legal culture, centres “have to network with legislators, link up with courts and propose their services to the judiciary,” suggested Mark Appel of the American Arbitration Association. Participants learned that similar efforts have paid off in the United Kingdom, where the Centre for Effective Dispute Resolution now receives referrals through the court system, which encourages claimants to negotiate a settlement through mediation rather than get involved in long-drawn-out and costly court cases.

### **Drawing in clients**

Arbitration and mediation may not be well known or understood among the business community either. Various centres explained how they are working to implant these services in the local business culture – some on their own, but most often working through the national chamber of commerce.

In Madagascar’s duty-free zones (“*zones franches*”), it is a legal obligation to settle disputes by arbitration, said Raphael Jakoba of the national centre for arbitration and mediation. He also suggested using foreign arbitrators to build credibility when starting up a centre. In Burkina Faso, the Ouagadougou arbitration, mediation and conciliation centre, linked to the chamber of commerce, provides free services to small firms that cannot afford the costs of a trial. “It helps build recognition,” said the head of the legal service, Boly Bintou. “Be versatile,” suggested Dharmasinh Popat of the Indian Council of Arbitration. “Organize activities such as conferences, which build visibility and confidence.”

Specializing in solving the disputes of particular sectors or industries is a very effective way to build a solid client base. Mathieu Reeb of the Lausanne-based Court of Arbitration for Sport, explained how the sports industry now generates hundreds of arbitration cases. Consumer disputes -- even over funeral services – generate a heavy caseload, according to Gregory Hunt of the Chartered Institute of Arbitrators in London. Meanwhile, in Cambodia, the textile industry – a major economic force employing more than 260,000 workers – was becoming paralysed due to frequent strikes. An arbitration centre set up to resolve labour disputes in the sector has helped reduce the number of strikes almost by half.

In everything they do, dispute resolution centres need to keep in mind the sensitive nature of their work. “As the service is essentially based on trust, it may take at least six years to build confidence with the business community and only six months to bungle it,” cautioned Giorgio Schiavoni of the Chamber of National and International Arbitration of Milan.

### **From competition to collaboration**

Another recurring challenge is competing for business with a multitude of other centres in one country, creating confusion in the minds of users. In Latvia, for instance, over a hundred centres offer dispute resolution services. Participants proposed two solutions to this problem. Centres can merge, as happened with the two in neighbouring Lithuania. Another approach, adopted by the 25 new centres in Argentina and six in Switzerland, is harmonization. Agreeing to use the same procedural rules and undertaking a collective “branding” effort helped raise the profile of all their centres, nationally and internationally. “The quality of services improves too, as arbitrators in each centre acquire access to the expertise of specialists from other centres in the network,” commented Daniela Jobin-Chabudini of Geneva’s chamber of commerce and industry, a leading member of the Swiss network.

Linking up centres on a regional and international basis makes sense too. Giving support to client companies where their business activities take them is clearly a growing trend, reflected by the large numbers of cooperative agreements that the larger arbitration centres have reached with counterparts around the world. “We believe that creating or reinforcing our ties with the arbitration centres of the 14 member states of the Southern Africa Development Community is important because South African companies are conducting business and investing in these countries,” said Danie van Wyk of the Arbitration Foundation of South Africa.

### **Part of the changing business landscape**

Out-of-court dispute resolution services have brought new and innovative concepts – from partners to processes, techniques and attitudes – into the legal and business landscape. For instance, the percentage of women managing arbitration and mediation centres came as an eye-opener to many at the meeting.

It is no longer in question that providing such services contributes to a competitive business environment. “If you want to do business in Mauritius, you know that you will be subjected to international arbitration rules,” said Barnen Pillay of the Permanent Arbitration Court of the Mauritius Chamber of Commerce and Industry. An efficient dispute resolution system is a factor that will attract investors and business people to a country, in the same manner as its transport systems, macro-economic and fiscal policies.

### **Next steps**

ITC is interested in aiding young centres to become operational and effective in their support of developing country exporters. As a result of this meeting, ITC is helping centres establish an open network for technical assistance between them, flowing South-South, and North-South in both directions.

Another result of the meeting has been that several arbitration centres have decided to investigate setting up conciliation and mediation services, along with their existing arbitration services.

“The Chamonix meeting of arbitration and mediation centre managers is set to become a regular feature in the calendar of events for dispute resolution services,” said Jean-François Bourque, ITC’s Senior Legal Adviser and the organizer of the symposium. It should take place every 18 months. “The next meeting will probably focus more on setting up mediation and conciliation services for the business community. At a time when our society has become so adversarial, many are realising that the adversarial approach to solving disputes may not in fact

serve their best interests. Less conflictual solutions, emanating particularly from the South, are the way forward.”

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**About ITC**

The International Trade Centre is the technical cooperation agency of the United Nations Conference on Trade and Development (UNCTAD) and the World Trade Organization (WTO) for operational and enterprise- oriented aspects of international trade development. As the United Nations focal point for technical cooperation in trade promotion, ITC works with developing countries and economies in transition to set up effective trade promotion programmes to expand their exports and improve their import operations.

