

PROMOTION OF INTERNATIONAL COMMERCIAL ARBITRATION AND OTHER ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES IN TEN SOUTHERN MEDITERRANEAN COUNTRIES

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I. BACKGROUND

As the strategic economic partner of the Southern Mediterranean (MEDA) region, the European Union (EU) seeks to promote effective mechanisms of development through increased industrial cooperation in order to create a Euro-Mediterranean area of shared prosperity.¹ The first Euro-Mediterranean Conference of Ministries of Industry, held in June of 1996 in Brussels, listed among its priority objectives 1) the formation of a fair judicial and administrative framework for investment; and 2) the establishment and support of Small and Medium Enterprises (SMEs) through the development of regional networks. However, recent reports on world trade and investment describe the MEDA region as an area with low attractiveness for international investment.²

One of the obstacles preventing enhanced trade and investment in the MEDA countries, particularly for SMEs, originates from the lack of an efficient, effective, and reliable infrastructure to manage trade and investment disputes.³ Inadequately drafted contracts, insufficient or incompetent legal advice, and defective functioning of judicial systems evidence the unsatisfactory protec-

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¹ Trade with the 10 MEDA countries represents 7.79% of total EU imports and 9.23% of total EU exports. In 2002, 0.47% of EU (EU15) inflows came from MED10, while 2.5% of the EU outflows went to MED10 (source: Dg Trade). The MEDA region is 3.81% of the total world area and 3.98% of the world population, yet its GDP was 583 billion Euro in 2002, which represents only 1.68% of the world total (source: Dg Trade).

² World Investment Report 2003. FDI Policy for Development: National and International Perspectives, UNCTAD, United Nations, New York and Geneva 2003.

³ The toll paid by the region in this respect is significant. EU-based businesses may prefer to conduct comparable transactions with countries that are less convenient logistically, but that do provide at least one internationally accepted forum to deal with commercial disputes.

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tion provided to EU-MEDA transactions. SMEs are likely to suffer the most since their access to domestic tribunals is severely limited. In addition, they are largely unfamiliar with alternative systems to prevent and manage commercial disputes.

A. Benefits of Arbitration and Alternative Dispute Resolution

A country benefits from the confidence of international investors if its delivery of justice is perceived as generally fair and reliable, relatively quick and inexpensive, and involving procedural formalities that are not onerous. Arbitration and Alternative Dispute Resolution (ADR) are recognized as having advantages in dealing with commercial disputes, including reduced expense, procedural flexibility, efficiency, confidentiality, and finality. Further, arbitration awards may be enforced in most countries under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in 1958 (hereinafter “New York Convention”).

As a result of their benefits, arbitration and ADR have been steadily becoming more popular worldwide.⁴ These techniques are particularly useful in the context of international business as a way of bypassing the judicial barriers that impede trade and development. There is no doubt that the availability of functioning commercial arbitration and mediation systems in the MEDA countries would help them to attract foreign trade and investment. Therefore, with the overall aim of contributing to enhanced business environment conditions, particularly for SMEs, the European Commission decided, in 2001, to launch a pilot project promoting international commercial arbitration and ADR in the MEDA countries.

The project will be carried out mainly in ten MEDA countries: Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia, Turkey, and the West Bank and Gaza. In some countries, private institutions administering arbitration and ADR procedures will be targeted, while in others, public organizations will assume the lead-

⁴ The U.S. has adopted the use of these tools on the largest scale. There, the use of arbitration and ADR has become so accepted that commentators argue that actual court trials are becoming all but irrelevant to the disposition of disputes. Given the reputation of the U.S. as the world's most litigious nation, this argument is evidence of a remarkable shift, and one which offers great promise for the development of arbitration and ADR in the MEDA countries. See MARC GALANTER, *THE VANISHING TRIAL: AN EXAMINATION OF TRIALS AND RELATED MATTERS IN FEDERAL AND STATE COURTS* (2003).

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ing role. In each country, the intermediary organizations that provide advice and services to SMEs, such as chambers of commerce, federations of industries, and trade promotion agencies must be equally involved.

B. Current Regulatory Framework and Attitudes toward Arbitration and ADR

The existing regulatory framework of the MEDA target countries in the field of arbitration is suitable for international commercial arbitration. The only exceptions are Morocco and Syria, both of which are in the process of drafting and adopting new arbitration legislation in the area. The laws of each country clearly distinguish between domestic and international arbitration procedures. While the latter are usually subject to more liberal legal provisions to protect international business relations, however, “arbitration-unfriendly” provisions are present in some laws. Arbitration is also hindered by governmental and judicial attitudes, which vary from uncooperative in some countries to intrusive in others.⁵ In addition, although all MEDA countries have ratified and acceded to the New York Convention, recognition and enforcement in accordance with this agreement are not yet a matter of routine practice in the region. The basic prerequisites for an efficient application of arbitration and ADR in the MEDA countries include enhanced knowledge of these techniques, increased number and qualification of arbitrators and mediators, improved attitudes of the judiciaries, governments, and lawyers, and reinforcement of the role and number of intermediary institutions that provide mediation/conciliation.

II. PROJECT OBJECTIVES

The overall objective of the project will be to facilitate international trade and foreign investment in the MEDA countries through increased business and investor confidence generated by enhanced commercial dispute resolution methods. Specifically, the project will focus on promoting awareness, acceptance, and appli-

⁵ For instance, although the law in Lebanon expressly allows the government and other public entities to submit disputes to arbitration, the government often either tries to lodge procedures before the *Conseil d'Etat* or refuses to voluntarily enforce arbitration awards.

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cation of arbitration and ADR. The project activities are expected to foster capacity building within lawyers' and magistrates' associations, local arbitration and ADR institutions, and intermediary organizations that provide advice and services to SMEs.

The project activities should also produce increased awareness of the existence and usefulness of arbitration and ADR among business people, lawyers, and judges. MEDA business people responsible for SMEs will be educated concerning the importance of legal assistance and provisions for an adequate contractual dispute resolution mechanism, such as an arbitration, especially when negotiating and drafting contracts with international counterparts. The aim of activities targeting lawyers and judges is the recognition of private arbitration and ADR as complementing the national public justice system by enhancing its efficiency, rather than the creation of a contraposition between these dispute resolution methods.

A. Assumptions and Risks

The main assumption underlying the project is the commitment of concerned local organizations in a sufficient number of countries to support the project and to ensure its sustainability. The project also assumes collaboration among and mobilization of organizations such as lawyers' and magistrates' associations, local arbitration and ADR centers, and intermediary organizations. The project activities additionally rely on the capability of raising the interest and participation of business people and jurists. Finally, it is anticipated that efforts to engage highly regarded members of the business community, judiciary, and government agencies will lead the MEDA countries toward routine recognition and enforcement of foreign arbitral awards according to the New York Convention. Risks to implementation and sustainability, while mainly related to the commitment of the local organizations, also include the possibility of rivalries between intermediary organizations in the MEDA countries.

B. Project Consortium

The Project Consortium is led by the ADR Center s.r.l (hereinafter "ADR Center"), Italy's first and largest private provider of

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negotiation, conflict management, and alternative dispute resolution services, with an emphasis on business and commercial matters. The other specialized arbitration and ADR group, the Centre de Médiation et d'Arbitrage de Paris (CMAP), is highly regarded not only as one of the leading providers of arbitration and ADR services in France, but also as the premier training institution. The third consortium member, IBF International Consulting (IBF), is an independent management consulting company that provides advice on technical assistance projects to both developing and transitional economies. Confartigianato, the fourth member, is a non-political, autonomous organization that is open to all components of the Italian handicrafts industry. With its long history of working in and with the MEDA countries, it is in an excellent position to help convince SMEs in the MEDA countries of the importance and validity of this project.

III. PROJECT ACTIVITIES

The project activities are split into four main components (Axes): 1) diffusion of information on dispute settlement techniques; 2) training of specialists; 3) technical assistance to MEDA intermediary institutions; and 4) normalization and dissemination of contractual instruments. Each of these activities must focus not only on specific rules, but also on promoting arbitration and ADR as instrumental techniques for resolving commercial disputes. Indeed, without a broad perspective of the roles of these procedures in the MEDA countries, the prospective users (business people), their principal advisers (lawyers), and those called upon to enforce either arbitration awards or mediated settlements (judges) are unlikely to cooperate in promoting a modern culture and practice of dispute resolution.

A. Axis 1

Diffusion of information on dispute settlement techniques to business people and jurists will be achieved through workshops on international contracts and business dispute settlement coupled with a computer-assisted education e-learning system. Each of these workshops will target both the business and legal communities to increase awareness of the importance of arbitration and

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ADR in lowering judicial obstacles to develop trade and investment. This Axis will seek to involve universities, particularly to provide lecturers.

To guarantee the widest outreach for spreading information and knowledge in local business circles, this activity will target prominent business people with technical seminars. These seminars will examine how individuals and organizations typically prevent and respond to conflicts, focus on how they can manage conflicts more effectively, and demonstrate how business people can motivate their counterparts to use a conflict management system without being perceived as weak. Speakers and lecturers will include not only specialists in dispute management, but also local and EU business people with experience in dispute resolution.

Discussion panels that will target lawyers and judges will parallel the technical seminars for business people. These panels will focus on the main ADR techniques with an emphasis on mediation and negotiation, as judges are often already familiar with arbitration. Specifically, they will address the key points to consider when negotiating and drafting an international contract, including the importance of providing in advance for the later use of arbitration and/or ADR techniques. To confront any misgivings that MEDA lawyers and judges might have regarding contractual dispute settlement mechanisms, speakers selected from EU arbitrators' associations and business people with direct experience in dispute management will highlight the advantages and usefulness of alternative dispute settlement.

E-learning to complement the technical seminars and discussion panels will be effective for reaching a wide number of business people and jurists, even those located in remote areas. Due to the innovative and attractive nature of multimedia technology, it will also capture the interest of these beneficiaries. The e-learning scheme will elaborate on the features of international deal-making, with specific reference to the most prevalent structure and provisions of common contractual instruments of trade, such as those for sale, distribution, and licensing. It will also provide an overview of the technical aspects of international contracts and dispute settlement to professionals who may not be specialized in legal matters. To the extent that web-based lectures are essential, EU and academic specialists will be used sparingly; as much of the material as possible should be presented by MEDA jurists and business people to ensure maximum credibility to the target audience. These e-

learning tools will be developed for distribution to the beneficiaries through the Internet and by CD-Rom.

A multilingual website will be created in English, French and Arabic for both information dissemination and networking purposes. While the Arabic version will be the most difficult to create because of both linguistic and conceptual differences, it will be advantageous for gaining acknowledgement by SMEs whose personnel are not fluent in either English or French. The website will include a database of arbitration and ADR regulations, possibly through links with existing sites, and will offer the e-learning tools described above in a restricted section. The website will be promoted through both online advertisement (i.e., banners placed in related websites) and print media (i.e., press releases published in special interest magazines).

B. Axis 2

The second component of the project, the training of specialists, addresses the problem of the limited number and poor qualifications of arbitrators and mediators in the MEDA countries. Accordingly, the activities of this Axis will aim to create a group of highly specialized arbitrators and mediators who will be in a position to ensure the sustainability of the training program. Selection of the right candidates is fundamental because many of the skills required of an arbitrator or mediator develop from performing related work on a daily basis, typically over many years. MEDA jurists and bar officials, as well as trade associations and chambers of commerce, will be canvassed to identify prospective arbitrators and mediators. Interviews will also be conducted to build a culturally-sensitive picture of the level of intervention that each MEDA country desires in a mediator. Since demonstrated professional competence will be essential to convince the judiciary, the bar, and SMEs in each of the MEDA countries that the candidates chosen are both capable and trustworthy, the qualifications and suitability of candidates will be investigated and their skills evaluated by rigorous performance-based testing.

Candidates who are invited to participate will complete a course in either arbitration or mediation. ADR Center will provide additional training to selected MEDA arbitrators and mediators through its annual month-long intensive course in Rome, Italy, which includes 70 hours of arbitration and mediation

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instruction over 20 days and a two-day international conference on dispute resolution. This Axis will also seek to foster networking by assisting MEDA arbitrators and mediators in joining training programs held at EU universities, arbitration centers, and other specialized institutions.

This project will avoid formal accreditation of arbitrators and mediators because the exclusive nature of accreditation may frustrate the development of arbitration and ADR in the targeted MEDA countries. Instead, certificates of completion will be issued for each arbitration or mediation course. The high selectivity of participation in the courses and the favorable publicity generated by collaboration with local groups is expected to lend the holders of these certificates significant credibility, making it less likely that the arbitration awards and mediated settlements issued by them will be unnecessarily trampled upon by the judiciary.

C. Axis 3

The third component of project activities, provision of technical assistance to MEDA intermediary institutions, recognizes that institutions such as chambers of commerce and entrepreneurial associations customarily help local and foreign business people to amicably settle disputes. It is essential that these organizations structure the service in a way that ensures equal treatment of all users and transparency and effectiveness of the procedure. Standard guidelines on “informal” mediation/conciliation, designed especially for intermediary institutions, must be established to achieve this structure.

MEDA business people, jurists, and trainee arbitrators and mediators will be consulted during the first year of the project about developing a preliminary draft of informal regulations. A working committee composed of business people, jurists, and embassy and chamber of commerce personnel will then be established to analyze the comments and propose a final draft. While technical support will be provided by the Consortium, all actual members of this working committee, including the Chair, will be MEDA nationals.

Bearing in mind that this project is intended to integrate local initiatives without creating assistance-dependent services, the most promising overall approach to technical assistance is the networking of EU arbitration and ADR centers with existing MEDA coun-

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terpart institutions. The establishment of cooperation agreements, also known as twinning agreements, between institutions in the EU and the MEDA centers to be created or reinforced can generate development initiatives and institution building.⁶ To assist the establishment of these twinning agreements, information regarding the EU and MEDA centers, such as regulations, lists of arbitrators/mediators, fees, issues encountered, and case solutions, will be available on the website. Networking efforts will emphasize compatibility due to a common legal history, cultural past, or linguistic background. The success of these efforts will largely depend on the voluntary cooperation of the centers.

D. Axis 4

The final component of the project concerns the normalization and dissemination of contractual instruments. The existence of pro-forma contracts sponsored by the European Commission was widely voiced by stakeholders as a way to facilitate agreements between firms and reduce the occurrence of disputes. Both large multinational corporations and SMEs seek to avoid being trapped into clauses that are legally unfavorable. The additional time and expense of asking for legal advice every time a new contract must be signed is equally undesirable to them. Further, MEDA business people would feel more confident if a standard contract were available as a guideline for the finalization of a business transaction, but their lawyers are reluctant to have them rely on standard forms that may not reflect the latest developments in contract drafting. To address this issue, a meeting organized during the second year of the project will seek to adopt several pro-forma contracts. This meeting will examine the best international practices for various types of agreements, including those for sale, agency, distributorship, franchising, subcontracting, joint manufacturing, and joint venture.

⁶ In the framework of a twinning relationship, a mutual exchange of experience and information takes place through the organization of joint seminars and the carrying out of cross-apprenticeship periods involving the staff of the twinned organizations. These twinning agreements, as it is customary in the field, will provide for provisions relating to sharing of arbitrator and mediator rosters, compensation schemes in case of referral from one organization to the other, and cooperation in provision of services, such as in the case of co-mediation.

IV. PROJECT IMPLEMENTATION

The project will be implemented in three phases: 1) inception; 2) preparation and pre-implementation; and 3) full implementation. The inception phase entails missions to assess the needs of each country. It also involves identification of judges, officials, personnel of chambers of commerce, SMEs, and trade associations, and prospective arbitrators and mediators to be invited to participate in the project. The project activities will commence during the second phase of the project and will continue in the third phase of full implementation.

Inception missions conducted during the first six months of the project included meetings with business people, lawyers, government officials, and academics in each MEDA country. Prominent arbitration specialists were also interviewed at length, providing candid and invaluable insight into the status of arbitration and ADR in the MEDA countries. The findings of these inception missions, outlined below, provide information that will be useful to consider in the inception phase of the project.

In Algeria, arbitration is hardly used except within the oil industry. However, the creation of local arbitral institutions has stimulated members of the legal community to seek out information on arbitration through seminars and conferences. As Algerian judges have generally not received sufficient specialized training to address the issues that arise in commercial cases, government authorities have decided to support the development of arbitration as a method to entice foreign investment. With regard to mediation, Algeria follows the pattern of the other MEDA countries: both lawyers and business people are extremely interested, but are unfamiliar with the process and its benefits.

The interest of Egypt in arbitration, like that of Algeria, is evident from the attendance of scholars and practitioners at seminars and conferences. Although Egypt was a pioneer in the development of arbitration in the Middle East with the creation of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) over 25 years ago, the country has not attained its anticipated leadership role in international arbitration. This situation, along with the overloaded commercial court dockets, demonstrates that better information about ADR and a more efficient arbitration administrator are particularly important.

In Israel, arbitration enjoys default procedure status and heightened public awareness, while the mediation field is more vi-

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brant in terms of marketing efforts and professional training. The institutional structure for arbitration and mediation is favorable to the objectives of the project, with the court system itself acting as an organizational provider of ADR in certain cases. Project activities in Israel should focus on further developing both arbitration and mediation; arbitration regulations dating back to 1965 need updating and the potential to expand the use of mediation is great.

Although few arbitrations actually occur in Jordan, likely because its society is more civil-service oriented than business-minded, the inception mission revealed an interest in arbitration and ADR techniques. An institutional framework of arbitration is nonexistent, so it will be necessary during the project to explain and differentiate the role of arbitration centers from the activities of law firms. Since the judiciary currently challenges the prospect of arbitration development by reviewing awards in direct contradiction with the text of the New York Convention, judicial understanding of the arbitration process is essential to the development of arbitration and ADR in the country. Removal of judicial obstacles to the efficient resolution of commercial disputes also contributes to the objectives of the Agadir Treaty,⁷ to which Jordan is a signatory.

In Lebanon, the role of the courts in resolving commercial conflicts is negatively perceived because of the length of proceedings and the lack of judicial skill in handling commercial disputes. Arbitration and ADR must be promoted especially to the local business community, which approaches these techniques with caution. The capability of Lebanon to become a leader in the development of arbitration and ADR in the region is exceptional due to its two post-graduate arbitration programs.

Business people in Morocco, particularly those responsible for SMEs, are hesitant to introduce claims before the local courts which they view as costly, slow, and corrupt. Nevertheless, the domestic arbitration offered by several institutions remains virtually unused. International investors seem to have a strong preference for arbitration outside the country even if enforcement of the award will require intervention by the local courts. In order for arbitration to develop in Morocco, institutional development, an

⁷ The Agadir Treaty created a Free Trade Area among Egypt, Jordan, Morocco and Tunisia, and encouraged initiatives likely to promote South-South integration preparing economies for complete trade liberalization throughout the region. Jordanian officials involved in the Agadir Agreement Secretariat will be made familiar with arbitration, mediation, and other ADR techniques of commercial dispute resolution that will facilitate trade relations.

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appropriate regulatory framework, and awareness of and confidence in arbitration by business people must be simultaneous.

In Syria, although contracts often incorporate arbitration as a dispute resolution mechanism, particularly in the private commercial sector, judges and arbitrators are not properly trained. Implementation of the project in Syria will consequently have to involve endorsement by government authorities to secure participation of the judiciary alongside the other actors of commercial dispute settlement. Further, government approval will be imperative to enable participation in a project that includes Israel.

Arbitration is well-known and favored by business people and lawyers in Tunisia. However, its actual use is extremely limited, due to an unfamiliarity with potential arbitrators and a lack of confidence in their skills. Therefore, a listing of experienced arbitrators, along with arbitration and ADR marketing efforts, will likely further the development of arbitration in Tunisia.

Project activities are of keen interest to Turkish counterparts, who are enthusiastic for Turkey to harmonize its commercial dispute settlement procedures with those of the EU. Project implementation must assess the discrepancies between the existing domestic arbitration regulations and international practice to determine whether use of international standards would present an incentive for foreign investors. It will also be useful to evaluate whether international arbitration would be better served if there was a single institution tasked with its administration.

Due to the complex nature of the political situation in the West Bank and Gaza, a number of individuals indicated that the objectives of the project were "absurd in the Palestinian context." Specifically, it was expressed that to promote trade is premature when even business people cannot move freely between the West Bank and Gaza. Further, resources simply do not exist to sustain initiatives beyond the duration of projects. Other individuals, however, expressed more enthusiasm for an independent, professional, and credible provider of arbitration and mediation services. A major obstacle to implementation, however, is that both the Palestinian Bar Association and the Palestinian Businessmen's Association announced their unanimous objection to participation in a that also involves Israel.

V. CONCLUSION

It may take some time before arbitration and ADR methods are accepted into the mainstream of dispute processing in any country. While ADR methods are often seen as “alternatives,” that is, as processes that are mutually exclusive in relation to the traditional civil trial, legal scholars refer increasingly to ADR as an acronym for “Appropriate Dispute Resolution.” This term illustrates that the dispute resolution process should ideally adjust to the dispute, not vice-versa. Consistent with this observation, state courts may also provide arbitration and mediation services. Indeed, the impact and sustainability of the project implementation will increase substantially if arbitration and ADR are promoted both as purely private and as possibly court-annexed methods of dispute resolution.

VI. POST SCRIPTUM

Efforts by the international donor community to improve commercial dispute resolution in the MEDA countries must necessarily be viewed in light of the outbreaks of violence that characterized the summer of 2006 in that region. Some may argue that commercial arbitration and mediation are premature or simply out of place under these conditions. On the contrary, the principles and techniques underlying any ADR discourse, especially negotiation and mediation, are the same ones the international community to in its search for a solution for the Middle East. Therefore, international efforts to support the knowledge and practice of effective dispute resolution process, in the business context and beyond, should continue in the long term.

