

# The Cost of Disputes in Companies and the use of ADR Methods

Lessons from Nine Latin American Countries



## FOREWORD

This study was developed within the framework of the "Partners for Innovation" Program a pilot initiative established in 2004 of the Multilateral Investment Fund (MIF) of the Inter-American Development Bank (IDB). The purpose of the Program is to mobilize Latin American and Caribbean organizations to share information and experiences in order to develop a stronger private sector in the region. Within this context, Alternative Dispute Resolution (ADR) Network was established, comprising with Arbitration and Conciliation Centers from different Latin American countries.

The mission of the ADR Network is "to contribute towards the improvement of the business climate and relationships by increasing the use of alternative dispute resolution methods by businessmen and the community in general". In developing this mission, the ADR Network considered that it was relevant to have a tool, i.e, a detailed study of commercial disputes, that could identify the real cost of resolving them.

There is no doubt that the present study responds to this mission, and it is a joint effort of the members of the ADR Network, Consultant Alvaro Herrero who directed the research, and the MIF, who committed to providing support to carry out a broad analysis of disputes within companies in an effort to help the private sector improve its conflict management.

The Chamber of Commerce of Santiago (Chile), the Lead Institution of the Network in 2005, and the Chamber of Industry, Commerce, Services and Tourism of Santa Cruz de la Sierra, Bolivia, the current Lead Institution, wish to thank all the people who cooperated to produce this document. They very specially thank Winsome Leslie, Lorena Mejicanos, and Jorge de Vicente from the MIF, and the Directors and Members of the Arbitration Centers who participate in the ADR Network and who supported the outcome of this research.

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## PROLOGUE

When the MIF launched its first project in Alternative Dispute Resolution (ADR) in 1994, arbitration and mediation as methods for resolving commercial disputes were virtually non-existent in Latin America and the Caribbean. Since then, the MIF has not only co-financed over 18 projects that have established and strengthened arbitration and mediation centers throughout the entire region, but it has also established a Network so that the centers can share and promote their knowledge and devise innovative solutions to better satisfy the needs of the private sector.

This study, "The Cost of Disputes in Companies and the use of ADR Methods: Lessons from Nine Latin American Countries" is a great achievement of the ADR Network for 2005.

The report is innovative for several reasons: i) it is the first comparative study on the subject that has ever been conducted in the region, providing empirical information on the cost of disputes within companies; ii) it evaluates in a comparative way, the inadequacies in the legal environment for businesses and the private sector in general, as well as the relationship between companies and the judicial system; and iii) it targets the private sector, thus closing the traditional gap between the legal area and the business world.

Undoubtedly, the conclusions of this study and the subsequent debate will help to achieve improvements in the business climate in Latin America.

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# **Introduction**



## **I. Introduction**

This investigation began because the ADR Network was interested in a detailed study on commercial disputes. The ADR Network is comprised of mediation and arbitration centers that focus on commercial dispute resolution. Within that framework, the objective was to generate a new framework for discussion on a topic that to date had not really been explored, but which is nonetheless very important for those centers and for the private sector in general, namely disputes within companies and the cost of those disputes.

On the one hand, the purpose of the project was to identify and collect empirical information on commercial disputes. On the other, it was hoped that this information would allow a comparative analysis to be carried out on the topic at the regional level. Therefore, concrete action plans could be formulated to promote the increased use of Alternative Dispute Resolution (ADR) Methods, increasing the demand for the services of mediation and arbitration centers.

In this way, the study would have two positive impacts. First, it would fill the gap due to the lack of empirical information and comparative analyses on company disputes and the economic cost of conflicts. Second, it would help to design concrete strategies for the effective dissemination of ADR methods, thus aiming for subsequent improvements in the functioning of the mediation and arbitration centers.

This project represents a very ambitious effort to assess the needs of businessmen on the subject of disputes with solid empirical data. With this goal in mind, a survey of 675 businessmen in nine Latin American countries was carried out. This not only permitted an analysis of commercial disputes in different countries in the region, but also a comparative evaluation of the challenges for businesses in the legal system and the development of the private sector, the relations between companies and the Judicial Branch and, in general, the situation of arbitration and mediation.

The main activities of this study are:

- Identify the most frequent commercial disputes and how they are resolved;
- Analyze the level of conflicts in companies;
- Evaluate knowledge about and the use of ADR methods by companies;
- Propose new approaches to identify the cost of disputes;
- Prepare recommendations to consolidate the functioning of the arbitration centers and, especially, to improve the effectiveness of dissemination strategies for their services; and
- Formulate proposals for new areas of intervention for the MIF and international donors.





**Background**



## II. Background

### A. History of MIF Projects

One of MIF's most important mandates is improving the way in which markets work to promote private sector development. Within that framework, in the mid '90's a series of projects were developed focusing on providing businessmen with new tools for resolving commercial disputes.

The first arbitration and mediation project was developed in Peru in 1994. Although it sought to strengthen the Chamber of Commerce of Lima, whose main activity is arbitration, the core of the project was oriented towards promoting mediation. The second MIF arbitration and mediation operation was approved the following year. This time it was a project to strengthen ADR methods in Colombia. The program was carried out in coordination with the Chamber of Commerce of Bogota. There, project activities focused on both arbitration and mediation, including such areas as school and community mediation.

Based on the operations in Colombia and Peru, MIF's arbitration and mediation projects adopted a basic model that mainly consisted of the creation and/or strengthening of ADR centers that functioned in chambers of commerce. Activities financed included training arbitrators and mediators, modernizing the legal framework for ADR methods, strengthening management in the centers and carrying out intensive dissemination work. Although almost all of the programs were oriented towards resolving commercial disputes, there were some exceptions. In the case of Nicaragua, the focus of the activities was the resolution of disputes related to land ownership due to the revolutionary process and the later democratic transition. And in the case of Uruguay the project had a regional focus to face the challenges vis a vis disputes arising from regional integration processes.

| Country       | Year | Project Name  | Executing Agency   |
|---------------|------|---|--|
| Colombia      | 1995 | Mediation and Arbitration Program                             | Chamber of Commerce of Bogota                                    |
| Peru          | 1995 | Alternative Dispute Resolution Systems                        | Peruvian Negotiation, Arbitration and Conciliation Center        |
| Uruguay       | 1995 | Conciliation and Arbitration Center                           | Conciliation and Arbitration Center of Montevideo's Stock Market |
| Costa Rica    | 1996 | Alternate Dispute Resolution Systems                          | Chamber of Commerce of Costa Rica                                |
| Ecuador       | 1996 | Mediation and Arbitration Center                              | Chambers of Commerce of Quito and Guayaquil                      |
| El Salvador   | 1996 | Modernization of Commercial Legislation                       | Chamber of Commerce and Industry of El Salvador                  |
| Honduras      | 1996 | Mediation and Arbitration Center                              | Chamber of Commerce and Industry of Cortés and Tegucigalpa       |
| Panama        | 1996 | Mediation and Arbitration Center                              | Chamber of Commerce, Industry and Agriculture of Panama          |
| Guatemala     | 1998 | Strengthening Alternative Dispute Resolution                  | Chamber of Commerce of Guatemala                                 |
| Brazil        | 1999 | Alternative Dispute Resolution                                | Confederation of Commercial Associations of Brazil               |
| Chile         | 1999 | Alternative Dispute Resolution                                | Chamber of Commerce of Santiago                                  |
| Nicaragua     | 1999 | Alternative Dispute Resolution                                | Supreme Court of Justice   |
| Paraguay      | 1999 | Alternative Dispute Resolution                                | Chamber of Commerce and Stock Market of Asuncion                 |
| Venezuela     | 1999 | Alternative Dispute Resolution                                | Chamber of Commercial of Caracas                                 |
| Argentina     | 2000 | National Commercial Mediation and Arbitration Centers Network | Argentinean Chamber of Commerce                                  |
| Bolivia       | 2000 | Commercial Conciliation and Arbitration                       | Chamber of Industry and Commerce of Santa Cruz                   |
| Mexico        | 2000 | Alternative Dispute Resolution                                | Autonomous Technological Institute of Mexico                     |
| Trinidad & T. | 2000 | Strengthening Alternative Dispute Resolution                  | Chamber of Industry and Commerce of Trinidad & Tobago            |
| Haiti         | 2005 | Alternative Dispute Resolution                                | Chamber of Industry and Commerce of Haiti                        |

Table. List of MIF ADR Projects

There were many very important achievements of these MIF projects, both on the country level and from a regional perspective. These include the 2,200 training courses that were given, in which over 250,000 professionals participated. Likewise, approximately 230 arbitration and mediation centers were created and/or strengthened, generating not only local capacity, but also developing a network of centers and specialists that even today continue to advance the process of developing and implementing ADR methods in Latin America.

The MIF's decision to finance projects related to mediation and arbitration had a highly positive impact. When the plan was launched in 1994, mediation and arbitration were scarcely known practices among businessmen. In that sense, the MIF was able to respond to an important need of the private sector related to the lack of effective – or at least adequate – methods to resolve commercial disputes. Although the results vary significantly from country to country, the global impact of the strategy has been satisfactory since, thanks to the MIF's involvement, there are several countries whose centers have been consolidated and which have managed to position their products, generating a stable demand for their arbitration and mediation services.

Over a ten-year period, a total of 19 projects were financed with a total investment of USD 23 million. The most recent project, an operation in Haiti, was approved in August 2005. The partners that were chosen to carry out the projects were, in almost every case, the local chambers of commerce. That interaction with the private sector turned out to be a success since it guaranteed stability in project execution, institutional continuity, and a means of direct communication with the business sector. This alliance was a fundamental element in the success of the projects.

In order to evaluate the results of the MIF's participation, the projects' achievements, and the impact on the arbitration and mediation centers, two studies were carried out to gather information and identify the lessons learned and best practices. The first of these was carried out by the MIF in 1999 and its objective was to analyze the preliminary results of the first select group of ADR projects: "Consultancy to evaluate the first three years of commercial mediation and arbitration programs approved by the Multilateral Investment Fund" (MIF) 1999, which is available on the MIF's web page. This study sought to identify the achievements and problems of the plan after the first years of the MIF's experience with arbitration and mediation. The study discusses the successes as well as the challenges that the projects faced, both in the design and in the execution phases.

The second study was carried out in 2002 by the IDB's Office of Evaluation and Supervision (OVE). This study consisted of a global evaluation of the arbitration and mediation project plan (which formed part of the general evaluation of the MIF conducted by the OVE (MIF/GN-78-2) -- "Evaluation of MIF Projects: Alternative Commercial Dispute Resolution Methods". OVE, November 2002, which is available on the MIF's web page. At that time the impact of ADR projects was analyzed, their contribution towards the dissemination and consolidation of arbitration and mediation, and the lessons learned to design new operations. Likewise, the MIF's general contribution to improvement in the business climate for the private sector was evaluated.

## B. Formation of the ADR Network

In order to take advantage of the knowledge and experience generated by MIF projects in a number of thematic areas, the MIF launched the Partners for Innovation Program in 2004. The purpose of that program was to mobilize the institutions which had successfully executed MIF projects to "participate as leaders in innovation in networks that will increase the stock knowledge on the necessary good practices to strengthen decision-making and the capacity of the private sector in Latin America and the Caribbean".

According to the MIF's explanation, the aim of the Partners for Innovation Program was to consolidate "networks in key thematic areas so that the MIF's partner organizations could exchange experiences in a systematic manner and work together on the construction of new usable models throughout the entire region". This way, MIF hoped to finance the exchange of knowledge – and activities related to the generation of knowledge – within the thematic areas of each of the networks.

| NETWORKS                               | LEAD INSTITUTION  |
|--|---|
| Alternative Dispute Resolution Methods | Cámara de Comercio de Santiago (Chile)                  |
| Microfinance                           | FIE S.A. EEP (Bolivia)                                  |
| Quality Management Standards           | Instituto Colombiano de Normas Técnicas y Certificación |
| Skills Standards and Certification     | Instituto de Hospitalidade (Brazil)                     |
| Venture Capital                        | Latin American Venture Capital Association (U.S.)       |

Table . The MIF Networks

Within that framework, in 2004 the ADR Network was created under the leadership of the Cámara de Comercio de Santiago. The founding member arbitration centers – which are presently part of the Network – were the following:

- Mediation and Arbitration Center of the Argentinean Chamber of Commerce;
- Mediation and Arbitration Center of the Chamber of Industry and Commerce of Santa Cruz (Bolivia);
- Confederation of Commercial and Business Associations of Brazil
- Conciliation and Arbitration Center of the Chamber of Commerce of Bogota (Colombia);
- Arbitration and Mediation Center of the Chamber of Commerce of Santiago (Chile);
- Arbitration and Conciliation Center of the Chamber of Commerce of Guatemala (Guatemala);
- Arbitration Center of the Chamber of Commerce of Lima (Peru);
- Conciliation and Arbitration Center and International Arbitral Court for the **MERCOSUR** of the Commodity Exchange of Montevideo (Uruguay); and
- Arbitration Center of the Chamber of Commerce, Industry, and Services of Caracas (Venezuela).

The ADR Network's mission is to help improve the business environment by increasing the use of alternative dispute resolution methods by companies in the region (large and medium and small).



The Network operates under the leadership of a "Lead Institution", which must administer the program and develop a work plan with goals and products in accordance with an agreement signed with the MIF, planning and carrying out activities consistent with the proposed objectives of the network and the MIF Networks Program.

In 2005 the ADR Network had two general objectives in the context of the mission mentioned above. First, to make the business sector aware of the costs of disputes relative to the settlements achieved, the time, money, and the relations between the parties, in order to show more directly the benefits of ADR methods. Second, to generate and promote specialized services in order to improve and extend present and potential markets in the business sector that would contribute to the financial sustainability of the centers.

## **Methodology**



### **III. Methodology**

Diverse tools were used in the preparation of the present study. At the beginning of this project a survey was designed to collect information on the member centers of the ADR Network to thus evaluate their degree of development, the situation of ADR methods in each one of the countries and identify the main challenges in consolidating the centers. Once the centers completed that survey, the information provided was analyzed and telephone interviews were held with a group of directors from the centers. Based on all this information and additional research, a series of topics were formulated that, due to their importance, were included in the surveys, and others that were treated in the Creativity Laboratory that was developed in the Network's Annual Meeting in Santiago de Chile in mid-2005.

The most important source of information came from a survey that was administered in the nine countries where the ADR Network has member centers. The survey was carried out in large, medium, and small businesses belonging to different sectors of the economy, that were asked questions related to four main topics. The first topic dealt with the most frequent disputes affecting business activities. Here the questions were also aimed at identifying how disputes are managed and resolved inside the company. The second focused on the experience of businessmen in using alternative dispute resolution methods. In that sense, questions were asked about their familiarity with arbitration and mediation methods, and the reasons why they encourage or discourage the use of these tools. The third topic dealt with the economic dimensions of disputes, asking about all the costs incurred to resolve controversies. Finally, the fourth topic dealt with the relations between the companies and the judiciary. The questions on the latter topic tried to determine the frequency of companies' use of courts, the methods used and their perception on the functioning of these institutions.

In each one of the countries the survey sample consisted of 75 companies that were categorized according to size, based on pre-set homogenous criteria. Thus, in each country 25 large companies, 25 medium-sized companies, and 25 small companies were surveyed. That way it was hoped that the whole business spectrum would be covered, making sure that companies in different sectors (production, industry, services, and commerce) were included.

The survey consisted of 42 structured, closed-type questions. The interviews were personal and the interviewer varied according to the type and size of the company. In most cases it was the company's owner, manager or attorney who responded to the questionnaire. An attempt was made to always interview a person who was closely involved in the company's dispute resolution process.

Interviews were also held in some of the countries that participated in this investigation in order to collect additional data and deepen some specific aspects of the topics that were analyzed. These interviews involved businessmen from diverse sectors, attorneys who specialized in advising companies, and specialists in arbitration and mediation.

Studies and research were also compiled to serve as the background for the project. In that sense, academic materials and publications from international and state agencies related to alternative dispute resolution methods, their implementation and development in Latin America, relations between the judiciary and the business sector, and business disputes in general were identified. It should be highlighted that some of these topics are either practically unexplored areas in Latin America or they have not been the subject of systematic empirical studies.

Another important contribution to the present study was the results of the Creativity Laboratory mentioned above, in which the member centers of the ADR Network participated. At that time "red-hot" topics for the centers we analyzed, related to the expansion of the range of services they provide and the identification of new customer segments. Likewise, a series of activities was planned to contribute not only towards the consolidation of the Network itself, but also to deepen knowledge on such topics as the needs of medium-sized and small businesses with respect to dispute resolution, the identification of successful experiences, and innovations in ADR services.

The following chapter presents a brief summary on the state of ADR methods in the region. Chapters V, VI, and VII analyze the results of the surveys. Chapter VIII presents the new approach for evaluating the cost of disputes. Chapter IX gathers the conclusions from the work and chapter X contains a series of recommendations for the arbitration and mediation centers, the ADR Network, and the MIF.

**ADR methods  
for  
commercial  
disputes**





## **IV. ADR methods for commercial disputes**

### **A. Context**

The mediation and arbitration centers that are financed by the MIF, many of which are affiliated with the ADR Network, are the main players in the marketplace for business or commercial dispute resolution services. Although in some countries arbitration and mediation had already reached acceptable levels of use before the MIF's involvement, thanks to the MIF's support, the chambers of commerce's centers were positioned as the natural institutional environment for commercial disputes.

The MIF's support, and the contact between centers due to their membership in the Inter-American Commercial Arbitration Commission (ICAC), created a uniform system of operating principles and methods at the centers. To that we must add the efforts in almost all the region to modernize the legal framework so that ADR methods could function. In other words, in a little less than a decade, the centers in the entire region that are affiliated with chambers of commerce went through a consolidation, modernization and standardization process that positioned them as the natural providers of dispute resolution services for Latin American businesses.

### **B. Progress**

The joint efforts of the chambers of commerce and the MIF generated great advances in institutional and legal matters. The centers modernized their structures, incorporated technology, renovated their procedures, adopted managerial tools, and carried out extensive dissemination activities. The task of educating and training human resources should be especially emphasized, since thousands of arbiters, mediators and trainers were trained. At the same time, up-dating ADR norms was promoted in order to adapt them to the demands of the new international trade and investment environment.

The preceding efforts contributed to the consolidation of the centers and soon statistics began to show a gradual increase in the demand for their services. In turn, this increase contributed towards improving the financial situation of the centers. From the beginning, financial sustainability was presented as one of the main challenges for the consolidation and sustainability of these institutions because, since they were established through MIF projects, in some cases they were forced to demonstrate their feasibility to the chambers of commerce hosting them.

At present the centers offer mediation and arbitration services to the business sector of their respective countries. Medium and large companies are the main users of these services. In almost every case, arbitration is the tool that generates greater income for the centers.

### **C. Challenges**

With great effort, the centers improved and advanced in their performance. Mediation and arbitration cases began to come in and the centers were positioned as institutional references on these topics.

However, some centers continue to have problems generating a sustained demand for their services. Despite all the achievements, there are still challenges to consolidate ADR methods and get the Business community to consistently use these methods.

One of the main challenges is related to dissemination. Different strategies have been tried to reach the business community, and these have not always been successful. There are many reasons for these ups and downs, but most of them are related to resisting the cultural change represented by the adoption of alternative dispute resolution methods. Attorneys, key actors in dispute management, are usually opposed to ADR methods because they are not in accordance with the legal, ritualistic education that is taught in most Law Faculties in the region. Businessmen, on the one hand, delegate a large part of the decision-making powers to the attorneys, and on the other hand, they are not used to resorting to ADR tools. In turn, the Judicial Branch does not always support these processes of change and it opposes any method that threatens its monopoly over the resolution of disputes.

Within this framework, the ADR Network took the initiative to deepen its knowledge on how companies resolve their controversies and it has tried to generate more empirical evidence on the cost of disputes for the business community. Thus, it is hoped that the Network will be able to contribute to improving the position of ADR methods in the business community and consolidate their use in the private sector.

**Companies  
and disputes**



## V. Companies and disputes

The next three chapters present and analyze the results of a survey administered to 675 Latin American businessmen. The findings and the corresponding analysis are divided into three chapters, following the main themes.

### A. Preferred methods for dispute resolution

One of the first aspects that this study addresses is the relationship between businessmen and disputes. In this sense, the report hopes to shed light on how businessmen react when a dispute occurs and how they manage it. When consulted on what steps should be followed when there is a controversy, in 62% of the cases businessmen responded that the first step is to contact the other party to negotiate and try to reach an agreement. As the second step, in 26% of the cases they chose to formally present a claim on the debt, which was closely followed by 17% who attempt negotiations, and 15% who use arbitration or mediation.

The third most frequent step when there is a dispute was distributed almost identically between a formal claim on the debt (14%), resorting to a judicial recourse (14%) and finding a lawyer or notifying the company's lawyer (12% in both cases). With respect to the fourth and fifth steps, the selections revolved around using a judicial recourse (20% and 15% respectively).

| Preferred steps for dispute resolution          |                |                |                |                |                |
|---|----------------|----------------|----------------|----------------|----------------|
|   | 1st Preference | 2nd Preference | 3rd Preference | 4th Preference | 5th Preference |
| Find the other party to reach an agreement      | 62%            | 17%            | 3%             | 1%             | 1%             |
| Notify the company lawyer                       | 18%            | 15%            | 12%            | 8%             | 1%             |
| Formally claim the debt                         | 8%             | 26%            | 14%            | 4%             | 2%             |
| Try to use arbitration or conciliation          | 6%             | 15%            | 10%            | 7%             | 3%             |
| Find an attorney                                | 3%             | 9%             | 12%            | 5%             | 2%             |
| Use a judicial recourse                         | 3%             | 3%             | 14%            | 20%            | 15%            |
| Others  | 1%             | 1%             | 1%             | 0%             | 0%             |
| Threats, violence or another action to pressure | 0%             | 0%             | 1%             | 1%             | 0%             |

Notes: 1. Selection of 1 to 5 in order of preference, with being 1 preferred in the first place.  
2. Colombia is not included in the sample because it did not present valid data.

Two key issues are clear from the results of the survey. In the first place, businessmen systematically prefer negotiation as the primary mechanism when a dispute arises. If we take the group of answers for the first and second step, the option related to negotiation adds up to 77% of those mentioned. In the second place, the use of a judicial recourse is usually relegated as one of the last options for resolving a dispute. Other means are initially given priority and, once they have been exhausted, then one resorts to the judiciary. Accumulated references to the Judicial Branch between the third and fifth steps add up to 48%.

The involvement of the company's lawyer when there is a dispute was also important in the answers.



That option was mentioned 17% of the time as the first step, 14% as the second, and 12% as the third step (which gives a total of 43% of the accumulated references in the first segment). These details are relevant, for example, when identifying towards whom we should orient the dissemination actions on arbitration and mediation services at the centers.

One aspect to highlight is that once the negotiations and the more formal attempts to resolve a dispute are thwarted, businessmen often prefer to give up the claim as lost (e.g., collecting a debt from a debtor) before having to resort to the justice system. Among the businessmen who were interviewed, such phrases as "before litigating, we assume the loss", or "although we have uncollected debts, we never use the justice system", were heard.

Businessmen were also consulted about the concrete methods they use to resolve their disputes. Once again, at the top of the preferences we have the use of informal negotiations, which was referred to in 54% of the cases. In the second place we have voluntary mediation with 23%, followed by the use of the justice system with 17%. Arbitration is way behind, with 3%. A comprehensive analysis of the results of the survey indicate that this low percentage might be due to a lack of availability of the method or a lack of knowledge rather than a lack of interest or will to use it.

| <b>Most used methods for dispute resolution</b> |             |
|---|-------------|
| Informal negotiations                           | 54%         |
| Voluntary mediation                             | 23%         |
| Justice system                                  | 17%         |
| Arbitration                                     | 3%          |
| Others  | 2%          |
| <b>TOTAL</b>                                    | <b>100%</b> |

The option to "try using arbitration or conciliation" was only selected by 6% of those surveyed as the first option, and by 15% as the second option. These percentages show that these methods are not very widespread in terms of businessmen's preferences. The analysis shows that there could be two causes: the lack of knowledge about these methods and/or matters of cultural nature, which prioritize the selection of more traditional methods (judicial recourse). The consolidated analysis discounts the possibility that this low preference is due to the lack of efficiency of mediation or arbitration.

Once again the point should be made that the use of the justice system appears as one of the least used options, while negotiation is presented as the preferred element par excellence in managing and resolving business disputes. There are several reasons to explain this type of preference. In the first place, negotiations are a characteristic element in the business culture, so this is present in all types of business activities. In the second place, negotiations permit one to reach agreements that maintain or contribute towards continued business relations between the parties.

In other words, through negotiations, businessmen not only resolve their disputes, but they manage to maintain their commercial relations. The use of confrontational methods of the jurisdictional type, such as the judiciary, many times leads to the end of the commercial relationship. In the third place, there are cost and time reasons that encourage seeking alternatives before resorting to the justice system i.e. to try and find quick, low cost ways to resolve disputes.

References to using voluntary mediation in the second place do not seem to be due to an extensive use of this tool in the business community. Twenty-three per cent of the responses perhaps might be explained, on the one hand, because mediation or conciliation are methods that are getting to be better known in the region. But on the other, despite not knowing exactly what mediation means, those surveyed still prefer it before the alternative of resorting to the justice system. In other words, since for many businessmen any option is better than resorting to the judiciary, they chose options with which they are not very familiar.

#### **B. Most frequent types of disputes**

One of the most important questions for the centers is which disputes have a greater impact on business activities. This information is very important when expanding the services that the arbitration and mediation centers provide and in designing new dissemination strategies. The results of the survey indicated that the most frequent types of conflicts are, in the first place, those related to collecting debts. In the second place there are labor disputes and noncompliance with contracts in general. This information coincides with the opinions that were gathered in the interviews held with businessmen and attorneys during this research. In the fourth and fifth place there are those disputes related to claims from the State Treasury and Customs, and disputes with creditors. Finally, with a very small percentage, there are disputes deriving from contracts with the State and corporate matters.

| <b>Types of disputes</b>                  |      |
|---|------|
| Collecting debts from my debtors          | 38%  |
| Labor matters                             | 18%  |
| Noncompliance with contracts in general   | 17%  |
| Others                                    | 9%   |
| Tax problems/claims from Treasury/Customs | 7%   |
| Claims from my creditors                  | 6%   |
| Corporate matters/problems with partners  | 3%   |
| State contracts                           | 2%   |
| TOTAL                                     | 100% |

The cases that most frequently come into the centers are noncompliance with contracts. There are also cases related to debt collections, but generally they are loans that were defaulted within the framework of a contractual relationship. According to the surveys, these two categories, added to "claims from my creditors", amount to 61% of the most frequent disputes. This indicates that the centers are well oriented with respect to the type of cases they handle, since they are the most frequent.

The preceding chart presents the whole universe of disputes in the business community. Some of the categories, although they are relevant, they cannot be settled through ADR methods. In most of the countries where the survey was carried out, disputes with the State, the State Treasury, and Customs must be settled in public administration or judicial headquarters, leaving a very small margin in which to expand the centers' services.

The high incidence of labor disputes is important information. In most Latin American countries these disputes cannot be settled through the use of mediation and/or arbitration, so the only means accepted by law to solve them is a judicial recourse or an administrative recourse (at the headquarters of the Ministry of Labor or the equivalent administrative authority). At the same time, costs deriving from labor disputes have an effect on total production costs and the competitiveness of the products or services that are offered. The centers' opportunities in this area will be analyzed in later sections.

| <b>Types of disputes according to company size</b> |                      |                       |                      |              |
|--|----------------------|-----------------------|----------------------|--------------|
|  | <b>Small company</b> | <b>Medium company</b> | <b>Large company</b> | <b>Total</b> |
| Collecting debts from my debtors                   | 42%                  | 40%                   | 32%                  | 38%          |
| Labor matters                                      | 14%                  | 18%                   | 21%                  | 18%          |
| Noncompliance with contracts in general            | 17%                  | 15%                   | 20%                  | 17%          |
| Tax problems/claims from Treasury/Customs          | 7%                   | 8%                    | 6%                   | 7%           |
| Claims from my creditors                           | 6%                   | 6%                    | 6%                   | 6%           |
| Corporate matters/problems with partners           | 4%                   | 3%                    | 1%                   | 3%           |
| State contracts                                    | 1%                   | 2%                    | 3%                   | 2%           |
| Others   | 9%                   | 8%                    | 11%                  | 9%           |
| <b>TOTAL</b>                                       | <b>100%</b>          | <b>100%</b>           | <b>100%</b>          | <b>100%</b>  |

The chart with the disputes classified according to the size of the company shows that, as the size of the company increases, the incidence of disputes related to collections decreases, while noncompliance with contracts and labor matters increase. Although the differences are not large, a clear trend can be seen in this sense. The following could be the causes of this trend:

- (i) in relation to collection, large companies operate with debtors who have better guarantees than those of small companies, who many times face insolvent debtors, without properties to contest;
- (ii) in relation to labor matters, many times small companies employ family members or acquaintances, which is precisely why there are less disputes; besides, in this type of company, employment is usually of the informal type;
- (iii) larger companies have a greater volume of contracts and a greater level of complexity, therefore, it is logical that these companies would declare that they have more disputes related to contractual noncompliance; additionally, smaller companies usually carry out their transactions through simple contracts, many times verbal, and make cash payments.



| Types of disputes by country              |      |      |      |      |      |      |      |      |      |
|---|------|------|------|------|------|------|------|------|------|
|   | AR   | BO   | BR   | CH   | CO   | GU   | PE   | UR   | VE   |
| Collecting debts from my debtors          | 29%  | 17%  | 21%  | 62%  | 53%  | 38%  | 27%  | 50%  | 24%  |
| Labor matters                             | 28%  | 7%   | 30%  | 14%  | 15%  | 14%  | 9%   | 19%  | 41%  |
| Noncompliance with contracts in general   | 8%   | 43%  | 9%   | 8%   | 12%  | 7%   | 38%  | 14%  | 11%  |
| Others                                    | 3%   | 18%  | 6%   | 5%   | 5%   | 29%  | 3%   | 2%   | 4%   |
| Tax problems/claims from Treasury/Customs | 14%  | 3%   | 16%  | 2%   | 6%   | 1%   | 13%  | 3%   | 15%  |
| Claims from my creditors                  | 9%   | 8%   | 7%   | 6%   | 6%   | 6%   | 5%   | 5%   | 3%   |
| Corporate matters/problems with partners  | 4%   | 3%   | 5%   | 1%   | 0%   | 2%   | 4%   | 5%   | 1%   |
| State contracts                           | 5%   | 1%   | 6%   | 2%   | 3%   | 3%   | 1%   | 2%   | 1%   |
| TOTAL                                     | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% |

The classification of the data shows important differences in the most frequent disputes in each one of the countries that were analyzed. In Chile and Uruguay, there is a clear preeminence of debt collection problems, with levels that are above 50% of the references that were made. On the other hand, in Argentina, Brazil, and Venezuela labor matters appear at the top of the preferences. Tax problems with the State Treasury or Customs have an important incidence in Argentina, Brazil, Peru, and Venezuela. Finally, disputes over State contracts were mentioned with greater frequency in Argentina and Brazil.

| BRAZIL  |                 |                  |                 |       |
|---|-----------------|------------------|-----------------|-------|
| Types of disputes in 2004 according to company size |                 |                  |                 |       |
|   | Small companies | Medium companies | Large companies | Total |
| Labor matters                                       | 28%             | 37%              | 27%             | 15%   |
| Collecting debts from my debtors                    | 28%             | 24%              | 30%             | 16%   |
| Tax problems/claims from Treasury/Customs           | 18%             | 12%              | 21%             | 11%   |
| Noncompliance with contracts in general             | 5%              | 10%              | 15%             | 7%    |
| State contracts                                     | 8%              | 5%               | 9%              | 7%    |
| Claims from my creditors                            | 5%              | 7%               | 7%              | 7%    |
| Corporate matters/problems with partners            | 3%              | 5%               | 6%              | 7%    |
| Others  | 5%              | 0%               | 6%              | 10%   |
| Total   | 100%            | 100%             | 100%            | 100%  |

The data from Brazil confirms many of the regional trends. Small companies usually have greater problems with debt collection than large companies. In turn, large companies indicated that they had more contractual disputes. Labor disputes, however, have a high incidence in both small companies and medium-sized and large ones.

### C. Volume of commercial disputes

The charts below reflect the results of the questions related to the incidence disputes have on business activities. The aggregated responses show that 51% of the businessmen indicated they had between 1 and 10 disputes in 2004, while 16% indicated they had between 11 to 20 disputes. Five per cent of those surveyed indicated that they did not have any disputes during 2004.

| Number of disputes the company had in 2004 |      |
|--|------|
| None                                       | 5%   |
| From 1 to 10                               | 51%  |
| From 11 to 20                              | 8%   |
| From 21 to 40                              | 4%   |
| From 41 to 8                               | 7%   |
| DK/DA                                      | 10%  |
| Grand total                                | 100% |

If the answers are compiled according to the companies' size, significant differences can be seen. In the first place, small companies have fewer disputes. Ten per cent of these companies indicated that they did not have any disputes in 2004, in comparison to 5% of the medium-sized companies and 1% of the large companies. In turn, 63% of the small companies indicated they had between 1 and 10 disputes in 2004, a figure that is substantially higher than the 47% for the medium-sized companies and 40% for the large companies.

In the second place, there are few differences between medium-sized and large companies with respect to the number of conflicts. In other words, the gap perceived between small companies on the one hand and medium-sized and large ones on the other.

| Number of disputes the company had in 2004 according to company size |               |                |               |       |
|--|---------------|----------------|---------------|-------|
|  | Small company | Medium company | Large company | Total |
| None   | 10%           | 5%             | 1%            | 5%    |
| From 1 to 10   | 63%           | 47%            | 40%           | 50%   |
| From 11 to 20  | 10%           | 20%            | 19%           | 16%   |
| From 21 to 40  | 5%            | 10%            | 9%            | 8%    |
| From 41 to 8   | 0%            | 4%             | 6%            | 3%    |
| Over 80  | 1%            | 4%             | 16%           | 7%    |
| DK/DA  | 11%           | 10%            | 9%            | 10%   |
| Grand total  | 100%          | 100%           | 100%          | 100%  |

The number of disputes varies from country to country. While in most countries all the companies said they had disputes, 33% of those surveyed in Venezuela said they did not have disputes, i.e., absolutely no disputes. Taking into account the political and economic context of that country, the low number of disputes is impressive. Perhaps the context discourages them from providing details on their business disputes.

| Types of disputes the company had in 2004 by country |      |      |      |      |      |      |      |      |      |       |
|--|------|------|------|------|------|------|------|------|------|-------|
|  | AR   | BO   | BR   | CH   | CO   | GU   | PE   | UR   | VE   | Total |
| None   | 0%   | 0%   | 0%   | 0%   | 5%   | 0%   | 0%   | 0%   | 35%  | 5%    |
| From 1 to 10   | 44%  | 61%  | 45%  | 55%  | 54%  | 41%  | 55%  | 60%  | 33%  | 50%   |
| From 11 to 20  | 27%  | 8%   | 18%  | 8%   | 16%  | 29%  | 17%  | 11%  | 13%  | 16%   |
| From 21 to 40  | 8%   | 7%   | 4%   | 17%  | 5%   | 15%  | 5%   | 1%   | 4%   | 8%    |
| From 41 to 8   | 7%   | 1%   | 7%   | 3%   | 5%   | 11%  | 0%   | 0%   | 1%   | 3%    |
| Over 80  | 11%  | 5%   | 6%   | 8%   | 9%   | 4%   | 4%   | 7%   | 9%   | 7%    |
| DK/DA  | 4%   | 17%  | 20%  | 9%   | 5%   | 0%   | 19%  | 21%  | 4%   | 10%   |
| Grand total  | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100%  |

Argentina and Guatemala stand out for having the greatest number of disputes. Both have less disputes than other countries within the range "from 1 to 10", but a larger number within the range "from 11 to 20". Argentina also has the highest figure within the upper ranges ("over 80 disputes").

Continuing with the incidence that disputes have and in order to dimension their impact in view of the total volume of business each company has, a question was asked about the percentage of businesses having disputes during 2004. Sixty-three per cent of the small companies indicated they had disputes in between 1% and 5% of their business deals. The percentage of disputes in that range in larger companies is less, 48% for medium-sized companies and 54% for large companies.

| <b>Percentage of businesses with disputes in 2004 according to company size</b> |                      |                       |                      |              |
|---|----------------------|-----------------------|----------------------|--------------|
|   | <b>Small company</b> | <b>Medium company</b> | <b>Large company</b> | <b>Total</b> |
| None  | 9%                   | 7%                    | 2%                   | 6%           |
| From 1 to 5 %   | <b>63%</b>           | <b>48%</b>            | <b>54%</b>           | 55%          |
| From 6 to 10%   | 9%                   | 13%                   | 13%                  | 12%          |
| From 11 to 20%  | 3%                   | 12%                   | 7%                   | 7%           |
| Over 20%  | 1%                   | 7%                    | 7%                   | 5%           |
| DK/DA   | 15%                  | 14%                   | 17%                  | 15%          |
| Grand total   | 100%                 | 100%                  | 100%                 | 100%         |

The interesting information is the confirmation of the findings presented in the two previous charts. On the one hand, companies have relatively few disputes both in absolute quantities and in proportion to the volume of business. On the other hand, small companies have fewer conflicts than medium-sized and large companies, both in absolute and relative terms.

This gap might be due to several factors: (i) small companies generally carry out transactions for small amounts and in cash; (ii) small companies have less access to credit, therefore, less chance of not meeting their payments; (iii) smaller companies usually carry out transactions with people they know and they do not risk hiring strangers, even though that might imply an improvement in terms of contracts (Herrero, Alvaro and Keith Henderson, 2003). The Cost of Disputes in Small Companies: the Case of Peru. Washington DC, Inter-American Development Bank. Available online en <http://www.iadb.org>; (iv) the complexity of operations is usually less in small companies, which are basically limited to purchase-sales operations in cash; and (v) as we said before, there are fewer labor risks in smaller companies.

Having analyzed the information by country, a low number of disputes in Venezuela can be observed. The high percentage of disputes in Argentina and Guatemala are also repeated. Bolivia also presents interesting results. It has a low percentage of responses within the range "from 1% to 5%" and a high percentage of "doesn't know/doesn't answer". On its part, Chile has the highest percentage of responses within the range "from 5% to 10%", but the rest of its answers are within average range for the countries being analyzed.



| Percentage of businesses with disputes in 2004, by country |            |      |      |            |      |            |      |      |            |       |
|--|------------|------|------|------------|------|------------|------|------|------------|-------|
|  | AR         | BO   | BR   | CH         | CO   | GU         | PE   | UR   | VE         | Total |
| None   | 0%         | 0%   | 0%   | 3%         | 0%   | 0%         | 0%   | 0%   | <b>45%</b> | 6%    |
| From 1 to 5 %  | <b>41%</b> | 48%  | 59%  | 67%        | 70%  | <b>51%</b> | 60%  | 60%  | <b>43%</b> | 55%   |
| From 6 to 10%  | <b>17%</b> | 8%   | 17%  | <b>21%</b> | 8%   | <b>17%</b> | 11%  | 8%   | 3%         | 12%   |
| From 11 to 20%   | <b>12%</b> | 7%   | 4%   | 0%         | 5%   | <b>19%</b> | 9%   | 1%   | 4%         | 7%    |
| Over 20%   | <b>11%</b> | 5%   | 3%   | 1%         | 4%   | <b>12%</b> | 3%   | 3%   | 1%         | 5%    |
| DK/DA  | 19%        | 32%  | 17%  | 8%         | 13%  | 1%         | 17%  | 28%  | 4%         | 15%   |
| Grand total  | 100%       | 100% | 100% | 100%       | 100% | 100%       | 100% | 100% | 100%       | 100%  |

| Bolivia<br>Percentage of businesses with disputes in 2004 |               |                |               |       |
|---|---------------|----------------|---------------|-------|
|   | Small company | Medium company | Large company | Total |
| From 1 to 5 %   | 56%           | 39%            | 44%           | 48%   |
| From 6 to 10%   | 8%            | 4%             | 13%           | 8%    |
| From 11 to 20%  | 8%            | 9%             | 0%            | 7%    |
| Over 20%  | 3%            | 13%            | 0%            | 5%    |
| DK/DA   | <b>25%</b>    | <b>35%</b>     | <b>44%</b>    | 32%   |
| Grand total   | 100%          | 100%           | 100%          | 100%  |

| Colombia<br>Percentage of businesses with disputes in 2004 |               |                |               |       |
|--|---------------|----------------|---------------|-------|
|  | Small company | Medium company | Large company | Total |
| From 1 to 5 %  | 74%           | 64%            | 71%           | 70%   |
| From 6 to 10%  | 9%            | 8%             | 7%            | 8%    |
| From 11 to 20%   | 4%            | 12%            | 0%            | 5%    |
| Over 20%   | 4%            | 4%             | 4%            | 4%    |
| DK/DA  | 9%            | 12%            | 18%           | 13%   |
| Grand total  | 100%          | 100%           | 100%          | 100%  |

| Chile<br>Percentage of businesses with disputes in 2004 |               |                |               |       |
|---|---------------|----------------|---------------|-------|
|   | Small company | Medium company | Large company | Total |
| From 1 to 5 %   | 76%           | 72%            | 52%           | 67%   |
| From 6 to 10%   | 16%           | 20%            | 28%           | 21%   |
| From 11 to 20%  | 0%            | 0%             | 0%            | 0%    |
| Over 20%  | 0%            | 0%             | 4%            | 1%    |
| DK/DA   | 8%            | 4%             | 12%           | 8%    |
| None  | 0%            | 4%             | 4%            | 3%    |
| Grand total   | 100%          | 100%           | 100%          | 100%  |



#### D. Dispute Management

One important aspect to understand the relationship between companies and disputes consists of identifying how a dispute is managed once it occurs, who decides how to settle it and who is responsible for managing it. To this end, the businessmen were consulted about the decision-making process in relation to disputes and the human resources that are involved.

With respect to the existence of a legal department inside the company, 40% of those interviewed indicated that they had one. However, the results by company size are different; the data shows that 64% of the large companies have legal departments, facing 35% of the medium-sized companies and only 22% of the small ones. The data indicates that the larger the company, the greater the possibility of its having its own legal department. With respect to hiring external attorneys, medium-sized companies do so more frequently, followed by small companies and then the large ones.

| Existence of a legal department according to company size |               |                |               |       |
|---|---------------|----------------|---------------|-------|
|   | Small company | Medium company | Large company | Total |
| Yes, the company has a legal department                   | 22%           | 35%            | 64%           | 40%   |
| No, the company does not have a legal department          | 42%           | 19%            | 14%           | 25%   |
| The company hires external attorneys                      | 35%           | 46%            | 21%           | 34%   |
| DK/DA   | 1%            | 1%             | 0%            | 1%    |
| Grand total   | 100%          | 100%           | 100%          | 100%  |

When differentiating the information by country, Chile and Uruguay are the countries with the lowest percentage of companies having their own legal departments. Additionally, Bolivia, Guatemala, Peru, and Venezuela are the countries with the highest percentage of the same. Bolivia is a curious case since it has the greatest percentage of affirmative and negative answers, but there are no references to hiring external attorneys.

Additionally, Chile and Colombia, with 64% and 54% respectively, are the countries with the greatest percentage of firms hiring external attorneys. They are followed by Argentina (39%) and Uruguay (33%).

| Existence of a legal department in the company by country |      |      |      |      |      |      |      |      |      |       |
|---|------|------|------|------|------|------|------|------|------|-------|
|   | AR   | BO   | BR   | CH   | CO   | GU   | PE   | UR   | VE   | Total |
| The company has a legal department                        | 37%  | 49%  | 43%  | 28%  | 43%  | 48%  | 49%  | 16%  | 47%  | 40%   |
| The company does not have a legal department              | 23%  | 51%  | 41%  | 8%   | 3%   | 25%  | 24%  | 45%  | 25%  | 25%   |
| The company hires external attorneys                      | 39%  | 0%   | 16%  | 64%  | 54%  | 27%  | 27%  | 33%  | 28%  | 34%   |
| DK/DA   | 1%   | 0%   | 0%   | 0%   | 0%   | 0%   | 0%   | 5%   | 0%   | 1%    |
| Grand total   | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100%  |

Likewise, businessmen were asked who in the company is responsible for deciding how to resolve the disputes that arise in the business activity. In 44% of the cases, the company's general manager or CEO is responsible. In 39% of the cases, the owner of the company assumes that role. In the third and fourth places we have the area managers and the company's attorney, with 25% and 17% respectively.

| <b>Who in the company decides how to resolve the disputes?</b>   |     |
|--|-----|
| General manager/CEO  | 44% |
| Company owner  | 39% |
| Area managers  | 25% |
| Company lawyer   | 17% |
| Other  | 14% |
| Head of the legal department   | 9%  |
| Note: Peru is not included because it did not present valid data. The total adds up to over 100% because the decision can be shared, in which case, more than one option was selected. |     |

According to those interviewed, once the decision is made, in 53% of the cases the person who is responsible for managing the dispute is the attorney, and in 38% of the cases it is the manager. Legal managers and owners of the companies have also been mentioned as having a responsibility in dispute management, with 16% and 6% respectively. In the item of "others", those interviewed indicated that area managers, accountants, people responsible for collections and personnel also share the responsibility in this sense.

| <b>Person responsible for managing company disputes</b>  |     |
|--|-----|
| Company or external lawyer   | 53% |
| Manager  | 38% |
| Legal Department Manager   | 16% |
| Other  | 16% |
| Owner  | 6%  |
| Note: Peru is not included because it did not present valid data. adds up to over 100% because the decision can be shared, in which case, more than one option was selected. |     |

Findings related to the people who decide how to resolve disputes and those who are in charge of their later management are very important in planning the dissemination activities for the mediation and arbitration services offered by the centers. Not only should the activities be designed differently for those who "decide" and those who "manage", but they must also be based on the professional expertise of each of them. The information that is provided to an attorney on the convenience of arbitration and mediation is not the same as that geared towards convincing an economist, an engineer, or a business administrator.

In the interviews with the businessmen, a very active role on the part of the owner and manager of the small and medium-sized companies was seen. They participate in a personal, intensive manner in the initial stages of the dispute. Some of the phrases that illustrated this are "the person in charge of collections notifies me about the problem and I try to solve it", "I avoid disputes through my personal actions as the owner and service provider", or "I do the negotiations myself and, if the company is bigger than us, we end up adjusting to what they decide".

As a general conclusion it can be said that and by large, it is the company owners and general managers who are in charge of making the decision on the strategy to be followed to resolve disputes, i.e., they decide whether they will give priority to informal negotiations, arbitration or mediation, or use the justice system. But it is the company attorneys, either external or internal, who have the responsibility for directing the strategy that is adopted.

### E. Effectiveness of the different dispute resolution methods

One part of the survey focused on the effectiveness of the methods used by businessmen to resolve their disputes. When consulted about the percentage of the amounts they recovered in litigations in 2004, 18% answered that they recovered between 1% and 15%, 10% recovered between 16% and 25% of the disputed amount, and 11% of those interviewed indicated that they recovered between 26% and 50%. It should be highlighted that only 20% of those interviewed said that they recovered over 50%.

| Percentage of the amount in dispute recovered in 2004 |      |
|---|------|
| There was no money in dispute                         | 7%   |
| From 1 to 15%   | 18%  |
| From 16 to 25%  | 10%  |
| From 26 to 50%  | 11%  |
| Over 50%  | 20%  |
| DK/DA   | 33%  |
| Grand total   | 100% |

From the valid answers that were given, excluding the responses of "doesn't know/doesn't answer", 59% of those interviewed admitted to recovering less than half of the disputed money. This percentage is alarmingly high because it implies a very high loss level for businessmen. There are several causes for businessmen losing money when they have a dispute:

- (i) the methods they use to resolve their disputes are inadequate or inefficient;
- (ii) the people responsible for deciding and directing the negotiation strategy make mistakes when doing so;
- (iii) the necessary precautions were not taken when hiring or, expressed in different terms, there is a lack of sufficient guarantee; and
- (iv) the non-existence of preventive detection methods and an early solution of the dispute.

What is expressed in the previous paragraph constitutes a clear justification of businessmen's need to consider in more detail the options provided by ADR methods, as long as they can be presented as the most efficient means to prevent disputes and recover a greater percentage of the disputed money.

The high percentage of "doesn't know/doesn't answer" responses is probably due to the fact that in some cases those who responded to the survey's questions were persons who did not have profound knowledge on the results of the litigations (e.g., accountants) or else they were not used to quantifying the percentage of the total disputed amount that was recovered.



|             | No disputes | From 1 to 15% | From 16 to 25% | From 26 to 50% | Over 50% | DK/DA | Total |
|-------------|-------------|---------------|----------------|----------------|----------|-------|-------|
| Owner       | 12%         | 11%           | 21%            | 19%            | 8%       | 29%   | 18%   |
| CEO         | 17%         | 12%           | 14%            | 25%            | 20%      | 12%   | 16%   |
| Manager     | 19%         | 40%           | 39%            | 31%            | 34%      | 24%   | 31%   |
| Director    | 0%          | 1%            | 4%             | 6%             | 6%       | 4%    | 4%    |
| Attorney    | 7%          | 4%            | 9%             | 6%             | 7%       | 6%    | 6%    |
| Other       | 45%         | 31%           | 13%            | 12%            | 25%      | 24%   | 24%   |
| Grand total | 100%        | 100%          | 100%           | 100%           | 100%     | 100%  | 100%  |

|                | Small company | Medium company | Large company | Total |
|----------------|---------------|----------------|---------------|-------|
| No disputes    | 9%            | 8%             | 4%            | 7%    |
| From 1 to 15%  | 17%           | 16%            | 21%           | 18%   |
| From 16 to 25% | 8%            | 12%            | 11%           | 10%   |
| From 26 to 50% | 10%           | 13%            | 12%           | 11%   |
| Over 50%       | 20%           | 17%            | 24%           | 20%   |
| DK/DA          | 37%           | 34%            | 28%           | 33%   |
| Grand total    | 100%          | 100%           | 100%          | 100%  |

On the country level, results vary substantially. Responses from Venezuelan businessmen seemed to be marked by a certain reluctance to give out information on their disputes, something that did not happen in the other countries that were analyzed.

Additionally, Chile and Colombia have the highest percentages of recovering disputed money, with 41% and 43% respectively. On the other hand, Argentina, Peru, and Venezuela have the lowest percentages, all of them with 9%. Guatemala presents the lowest indexes for recovering disputed money, with a total of 55% in the two lowest bands.

|                     | AR         | BO   | BR | CH         | CO         | GU         | PE         | UR         | VE         | Total General |
|---------------------|------------|------|----|------------|------------|------------|------------|------------|------------|---------------|
| No money in dispute | 0%         | 0%   |    | 5%         | 0%         | 0%         | 0%         | 0%         | <b>51%</b> | 7%            |
| From 1 to 15%       | 21%        | 15%  |    | 16%        | 16%        | <b>32%</b> | <b>28%</b> | 5%         | 12%        | 18%           |
| From 16 to 25%      | <b>19%</b> | 7%   |    | 8%         | 4%         | <b>23%</b> | 13%        | 7%         | 1%         | 10%           |
| From 26 to 50%      | 15%        | 15%  |    | 12%        | 9%         | 13%        | 11%        | 13%        | 3%         | 11%           |
| Over 50%            | <b>9%</b>  | 24%  |    | <b>41%</b> | <b>43%</b> | 13%        | <b>9%</b>  | 12%        | <b>9%</b>  | 20%           |
| DK/DA               | 36%        | 40%  |    | 17%        | 28%        | 19%        | 39%        | <b>63%</b> | 24%        | 33%           |
| Grand total         | 100%       | 100% |    | 100%       | 100%       | 100%       | 100%       | 100%       | 100%       | 100%          |

Uruguay's case is very interesting; it presents 63% of "doesn't know/doesn't answer" responses. This could be due to the low level of the use of the judiciary – only 39% of the sample said that they had used it - and this is the lowest level of all the countries. Another possible cause is that 75% of the people who answered the questionnaire were company owners or managers; it is possible that these people do not know the ratio between the percentages of the amounts that were recovered to the total, because the attorneys manage those figures.

### 1. Recovery through the justice system

Since the previous questions deliberately did not make any differences between the methods that were used to resolve disputes, the businessmen were again asked about the use of the judiciary and alternative dispute resolution methods. Twenty-one per cent of those surveyed indicated that they recovered over 50% of the disputed amount of money through the judiciary. Eight per cent indicated that they recovered between 31% and 50%, and 9% of the businessmen indicated that they recovered between 16% and 30%. Finally, 17% of the businessmen said that they recovered between 1% and 15% of the disputed amount.

| Percentage of the total claimed recovered through the judiciary |      |
|---|------|
| From 1 to 15%   | 17%  |
| From 16 to 30%  | 9%   |
| From 31 to 50%  | 8%   |
| Over 50%  | 21%  |
| DK/DA or does not use the judiciary                             | 45%  |
| Grand total   | 100% |

If the differentiated responses are presented by company size, the most outstanding information is that almost 60% of the small businesses that were surveyed did not answer the question. We estimate that this is largely due to two factors: they do not resort to the justice system and they do not keep detailed records of the information they were asked to give.

| Percentage of the total claimed recovered through the judiciary according to company size |               |                |               |       |
|---|---------------|----------------|---------------|-------|
|   | Small company | Medium company | Large company | Total |
| From 1 to 15%   | 14%           | 16%            | 23%           | 17%   |
| From 16 to 30%  | 6%            | 12%            | 8%            | 9%    |
| From 31 to 50%  | 4%            | 10%            | 11%           | 8%    |
| Over 50%  | 18%           | 22%            | 23%           | 21%   |
| DK/DA or does not use the judiciary   | 59%           | 40%            | 35%           | 45%   |
| Grand total   | 100%          | 100%           | 100%          | 100%  |

The data classified per country indicate that the justice systems of Bolivia, Colombia, and Chile are the most effective for recovering debts (measuring this based only on the disputed amounts). On the other hand, Guatemala presents the lowest levels of effectiveness, with a total of 67% accumulated in the first two rows, followed by Peru with 44%. Finally, we highlight the high percentage of "DK/DA or doesn't use them" answers in Uruguay and Venezuela.

| Percentage of total claimed recovered through the judiciary by country |      |            |            |            |            |            |            |            |            |       |
|--|------|------------|------------|------------|------------|------------|------------|------------|------------|-------|
|  | AR   | BO         | BR         | CH         | CO         | GU         | PE         | UR         | VE         | Total |
| From 1 to 15%  | 21%  | 4%         | 7%         | 15%        | 8%         | <b>36%</b> | <b>39%</b> | 9%         | 8%         | 17%   |
| From 16 to 30%   | 15%  | 5%         | 4%         | 5%         | 4%         | <b>31%</b> | 5%         | 4%         | 0%         | 9%    |
| From 31 to 50%   | 13%  | 9%         | 16%        | 8%         | 11%        | 9%         | 8%         | 1%         | 5%         | 8%    |
| Over 50%   | 19%  | <b>37%</b> | <b>44%</b> | <b>28%</b> | <b>36%</b> | 4%         | 12%        | 9%         | 21%        | 21%   |
| DK/DA or does not use  | 32%  | 44%        | 29%        | 44%        | 42%        | 20%        | 36%        | <b>76%</b> | <b>65%</b> | 45%   |
| Grand total  | 100% | 100%       | 100%       | 100%       | 100%       | 100%       | 100%       | 100%       | 100%       | 100%  |

If the answers are analyzed based on the position in the company held by the person who responded, interesting results can be seen. When the people consulted were the owners of the company, 61% did not respond to the question or said that they did not use the justice system, while only 31% of the attorneys responded thus. In turn, attorneys proved to be much more optimistic when evaluating the amount that was recovered through the judiciary, facing the owners and managers; thus, 47% of the lawyers said that they recovered over 50%, while this percentage goes down substantially for owners and managers (5% and 18% respectively). This difference could be due to different causes. On the one hand, it is possible that attorneys have more specific information for evaluating this point; on the other, possibly due to their professional education, lawyers show greater trust in the justice system, although this is not necessarily verified in the facts.

| Percentage of total claimed recovered through the judiciary according to position in company |               |                |                |          |                       |       |
|--|---------------|----------------|----------------|----------|-----------------------|-------|
|  | From 1 to 15% | From 16 to 30% | From 31 to 50% | Over 50% | DK/DA or does not use | Total |
| Owner  | 12%           | 11%            | 21%            | 19%      | 29%                   | 18%   |
| CEO  | 17%           | 12%            | 14%            | 25%      | 12%                   | 16%   |
| Manager  | 19%           | 40%            | 39%            | 31%      | 24%                   | 31%   |
| Director   | 0%            | 1%             | 4%             | 6%       | 4%                    | 4%    |
| Attorney   | 7%            | 4%             | 9%             | 6%       | 6%                    | 6%    |
| Other  | 45%           | 31%            | 13%            | 12%      | 24%                   | 24%   |
| Grand total  | 100%          | 100%           | 100%           | 100%     | 100%                  | 100%  |

## 2. Recovery through mediation and arbitration

Consulted about the results of using mediation or arbitration, 31% of those surveyed indicated that they recovered over 50% of the disputed amount through these methods. Eight per cent of the businessmen indicated that they recovered between 31% and 50% of the money; 6% of the businessmen said they recovered between 16% and 30%; and, finally, 5% of those surveyed said they recovered between 1% and 15% of the money.

| Percentage of total claimed recovered through mediation or arbitration |      |
|--|------|
| From 1 to 15%  | 5%   |
| From 16 to 30%   | 6%   |
| From 31 to 50%   | 8%   |
| Over 50%   | 31%  |
| DK/DA or does not use mediation  | 50%  |
| Grand total  | 100% |

Results according to company size present a few minor variations. Large and medium-sized companies consider that a greater percentage of money is recovered through mediation or arbitration. On their part, small companies present a larger number of "doesn't know/doesn't answer" responses that are probably due to their lack of experience with these practices.



| Percentage of total claimed recovered through mediation or arbitration according to company size |                 |                 |                |       |
|--|-----------------|-----------------|----------------|-------|
|  | Empresa pequeña | Empresa mediana | Empresa grande | Total |
| From 1 to 15%  | 6%              | 3%              | 7%             | 5%    |
| From 16 to 30%   | 3%              | 8%              | 8%             | 6%    |
| From 31 to 50%   | 5%              | 8%              | 10%            | 8%    |
| Over 50%   | 25%             | <b>34%</b>      | <b>35%</b>     | 31%   |
| DK/DA  | <b>61%</b>      | 48%             | 41%            | 50%   |
| Grand total  | 100%            | 100%            | 100%           | 100%  |

When analyzed by country, the responses are highly significant. For example, Peru is the country with the lowest percentage of recovery through the use of ADR methods. In the first two categories it adds up to a total of 37%. On its part, Guatemala appears with the highest range of effectiveness since 12% selected "from 31 to 50%" and 57% indicated "over 50%". Finally, Uruguay, Chile, and Venezuela responded with the highest number of "DK/DA or doesn't use them" answers.

| Percentage of total claimed recovered through mediation or arbitration by country |      |            |      |            |      |            |            |            |            |       |
|---|------|------------|------|------------|------|------------|------------|------------|------------|-------|
|   | AR   | BO         | BR   | CH         | CO   | GU         | PE         | UR         | VE         | Total |
| From 1 to 15%   | 5%   | 4%         | 3%   | 3%         | 3%   | 0%         | <b>17%</b> | 5%         | 4%         | 5%    |
| From 16 to 30%  | 11%  | 8%         | 9%   | 1%         | 5%   | 0%         | <b>20%</b> | 1%         | 3%         | 6%    |
| From 31 to 50%  | 13%  | <b>7%</b>  | 4%   | 5%         | 3%   | <b>12%</b> | 7%         | 7%         | 8%         | 8%    |
| Over 50%  | 23%  | <b>40%</b> | 32%  | 25%        | 37%  | <b>57%</b> | 24%        | 19%        | 23%        | 31%   |
| DK/DA or does not use   | 48%  | 41%        | 52%  | <b>65%</b> | 53%  | 31%        | 32%        | <b>68%</b> | <b>63%</b> | 50%   |
| Grand total   | 100% | 100%       | 100% | 100%       | 100% | 100%       | 100%       | 100%       | 100%       | 100%  |

The answers related to the effectiveness of the use of ADR methods are more or less similar to those received with respect to the use of the justice system. However, two aspects stand out. First, the difference in the row for a recovery between 1% to 15% of the disputed amount. Second, the ten points difference in the row corresponding to "more than 50%". It should be mentioned that there was a higher percentage of businessmen that indicated they did not use arbitration or mediation.

| Percentage of total claimed that is recovered: | Mediation or arbitration | Justice system |
|--|--------------------------|----------------|
| From 1 to 15%                                  | 5%                       | <b>17%</b>     |
| From 16 to 30%                                 | 6%                       | 9%             |
| From 31 to 50%                                 | 8%                       | 8%             |
| Over 50%                                       | <b>31%</b>               | 21%            |
| DK/DA or does not use mediation                | <b>50%</b>               | 45%            |
| Grand total                                    | 100%                     | 100%           |

Of the valid answers that were given, excluding the "doesn't know/doesn't answer" responses, we have an aggregated percentage of 62% of those surveyed who admitted to recovering less than half of the disputed money through the judiciary. This percentage falls to 38% when the recovery method that was used was mediation or arbitration. This data clearly shows the greater effectiveness of recovering credits through ADR methods vis a vis the traditional justice system.





**Companies  
and  
Arbitration  
and  
Mediation**



## VI. Companies and Arbitration and Mediation

One of the main purposes of this survey was to gather more information on the knowledge and use of alternative dispute resolution methods on the part of businessmen. That, on the one hand, will allow a detailed analysis of the present levels of dissemination on arbitration and mediation to be made and, on the other, it will identify business areas and segments that should be targeted by eventual marketing campaigns.

### A. Knowledge of arbitration and mediation methods

Results from the surveys clearly indicate that the level of knowledge of arbitration and mediation methods varies in proportion to the size of the company. Sixty-five per cent of the large companies indicated that they knew about both tools, while only 54% of the medium-sized and 48% of the small companies said they knew about them.

At the same time, 39% of the small businessmen said they did not know about arbitration or mediation, followed by 27% of the medium-sized businesses and 16% of the large companies. Again, there is a direct relationship between company size and the extent of ADR knowledge: the larger the company, the more knowledge they have about alternative dispute resolution methods.

| Knowledge about mediation and arbitration according to type of company |               |                |               |       |
|--|---------------|----------------|---------------|-------|
|  | Small company | Medium company | Large company | Total |
| Knows both   | 48%           | 54%            | 65%           | 56%   |
| Knows about arbitration  | 4%            | 3%             | 2%            | 3%    |
| Knows about mediation  | 7%            | 15%            | 14%           | 12%   |
| Does not know either   | 39%           | 27%            | 16%           | 28%   |
| DK/DA  | 2%            | 1%             | 2%            | 2%    |
| Grand total  | 100%          | 100%           | 100%          | 100%  |

When differentiated by country, there are some variations in the level of knowledge. On the one hand Colombia stands out: 76% of the businessmen indicated that they knew about both arbitration and mediation. That figure indicates businessmen's high level of knowledge vis a vis ADR methods. Chile and Bolivia follow with 64%, Venezuela with 61%, and Argentina with 60%.

On the other hand, Guatemala presents the lowest level of knowledge about ADR methods. Only 33% of those surveyed said they knew about arbitration and mediation, while 52% said they did not know about either one. Brazil follows closely with 43% knowledge about both tools and 53% who said they did not know either one. Uruguay presents 41% knowledge about both tools and 47% that said they had no knowledge about them.

| Knowledge about mediation and arbitration by country |      |      |            |      |            |            |      |            |      |       |
|--|------|------|------------|------|------------|------------|------|------------|------|-------|
|  | AR   | BO   | BR         | CH   | CO         | GU         | PE   | UR         | VE   | Total |
| Knows both   | 60%  | 64%  | 43%        | 64%  | <b>76%</b> | <b>33%</b> | 44%  | 41%        | 61%  | 56%   |
| Knows about arbitration                              | 3%   | 7%   | 1%         | 5%   | 0%         | 1%         | 7%   | 0%         | 1%   | 3%    |
| Knows about mediation                                | 21%  | 3%   | 1%         | 5%   | 17%        | 13%        | 28%  | 7%         | 1%   | 12%   |
| Does not know either                                 | 15%  | 20%  | <b>53%</b> | 25%  | 7%         | <b>52%</b> | 20%  | <b>47%</b> | 36%  | 28%   |
| DK/DA  | 1%   | 7%   | 2%         | 0%   | 0%         | 0%         | 1%   | 5%         | 0%   | 2%    |
| Grand total  | 100% | 100% | 100%       | 100% | 100%       | 100%       | 100% | 100%       | 100% | 100%  |

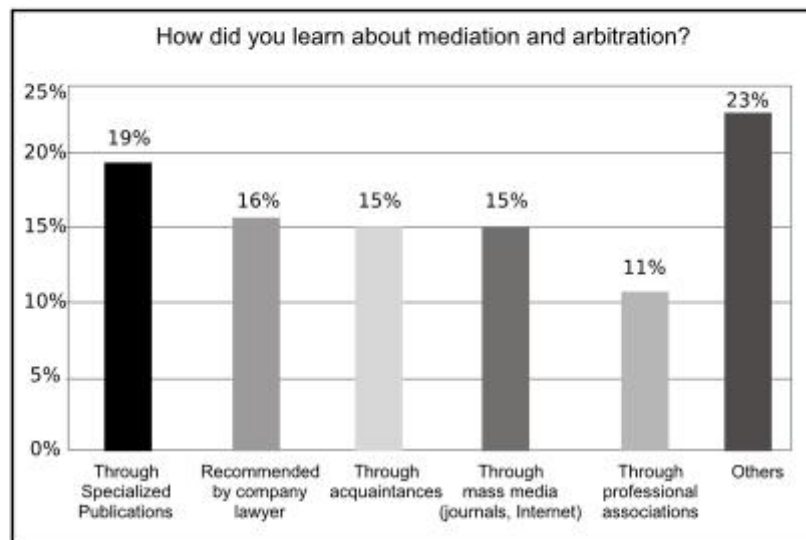
| Bolivia<br>Knowledge about mediation and arbitration |               |                |               |       |
|--|---------------|----------------|---------------|-------|
|  | Small company | Medium company | Large company | Total |
| Both   | 44%           | 78%            | 88%           | 64%   |
| Arbitration  | 14%           | 0%             | 0%            | 7%    |
| Mediation  | 3%            | 0%             | 6%            | 3%    |
| Neither  | 31%           | 17%            | 0%            | 20%   |
| DK/DA  | 8%            | 4%             | 6%            | 7%    |
| Grand total  | 100%          | 100%           | 100%          | 100%  |

| Chile<br>Knowledge about mediation and arbitration |               |                |               |       |
|--|---------------|----------------|---------------|-------|
|  | Small company | Medium company | Large company | Total |
| Both   | 52%           | 68%            | 72%           | 64%   |
| Arbitration  | 4%            | 4%             | 8%            | 5%    |
| Mediation  | 8%            | 8%             | 0%            | 5%    |
| Neither  | 36%           | 20%            | 20%           | 25%   |
| Grand total  | 100%          | 100%           | 100%          | 100%  |

| Colombia<br>Knowledge about mediation and arbitration |               |                |               |       |
|---|---------------|----------------|---------------|-------|
|   | Small company | Medium company | Large company | Total |
| Both  | 87%           | 52%            | 89%           | 76%   |
| Arbitration   | 0%            | 0%             | 0%            | 0%    |
| Mediation   | 4%            | 36%            | 11%           | 17%   |
| Neither   | 9%            | 12%            | 0%            | 7%    |
| Grand total   | 100%          | 100%           | 100%          | 100%  |

### B. Ways of learning about arbitration and mediation

The way companies make contact with arbitration and mediation varies significantly. Nineteen per cent of survey respondents said that they heard about ADR methods through specialized publications; 16% through the recommendation of the company's lawyer; and 15% of the businessmen learned about ADR methods through acquaintances. Fifteen per cent of respondents said mass media and 11% said professional associations. The category "others" - with 23% - received the most references. This group refers to universities, professional practices, and the experiences of other companies. Numerous references were also made to professional advice from external attorneys and dissemination carried out by chambers of commerce (this is especially the case in Colombia and Bolivia, and to a lesser extent, in Venezuela).



### C. Use of arbitration and mediation

Besides asking businessmen about their knowledge of arbitration and mediation, they were specifically asked if they had ever used these tools. The results again confirm the relationship between the size of the company and the use of ADR methods. That relationship can be clearly seen in the data presented in the next chart, which shows that large companies have used arbitration and mediation more than medium-sized companies and, in turn, the latter have used them more than small ones.

|                       | Small company | Medium company | Large company | Total |
|-----------------------|---------------|----------------|---------------|-------|
| Used both             | 7%            | 11%            | 19%           | 12%   |
| Only used mediation   | 13%           | 27%            | 31%           | 23%   |
| Only used arbitration | 0%            | 3%             | 4%            | 2%    |
| Did not use either    | 36%           | 29%            | 26%           | 30%   |
| DK/DA                 | 44%           | 30%            | 20%           | 32%   |
| Grand total           | 100%          | 100%           | 100%          | 100%  |



Likewise, note that the categories of “did not use any” and “doesn’t know/doesn’t answer” add up to 80% of the responses of small companies. The results verify several of our hypotheses. The first relates to the lack of knowledge about and the use of methods among small companies. The second hypothesis indicates that small companies have very little – if not no – experience with arbitration, which is a tool that is used more by medium-sized and large companies. Finally, the third hypothesis is that mediation is used to a greater degree than arbitration among businessmen in small companies.

| Use of mediation and arbitration, by country |      |      |      |      |      |      |      |      |      |       |
|--|------|------|------|------|------|------|------|------|------|-------|
|  | AR   | BO   | BR   | CH   | CO   | GU   | PE   | UR   | VE   | Total |
| Used both                                    | 23%  | 5%   | 6%   | 7%   | 8%   | 27%  | 13%  | 5%   | 9%   | 12%   |
| Only used mediation                          | 33%  | 7%   | 15%  | 19%  | 42%  | 19%  | 41%  | 20%  | 7%   | 23%   |
| Only used arbitration                        | 1%   | 8%   | 3%   | 5%   | 0%   | 0%   | 4%   | 1%   | 0%   | 2%    |
| Did not use either                           | 25%  | 51%  | 73%  | 43%  | 37%  | 3%   | 17%  | 21%  | 45%  | 30%   |
| DK/DA  | 17%  | 29%  | 3%   | 27%  | 13%  | 52%  | 24%  | 52%  | 39%  | 32%   |
| Grand total                                  | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100%  |

On the regional level the data indicates that there are disparities in the level of the use of arbitration and mediation. With respect to mediation, Argentina, Peru, and Colombia present the highest results with 56%, 54%, and 50% of businessmen, respectively, who said they had used this tool to resolve disputes. Guatemala follows closely with 46% of the respondents, and then Chile with 26%. Bolivia and Venezuela present the lowest results, where less than 20% of the businessmen have used mediation at least once.

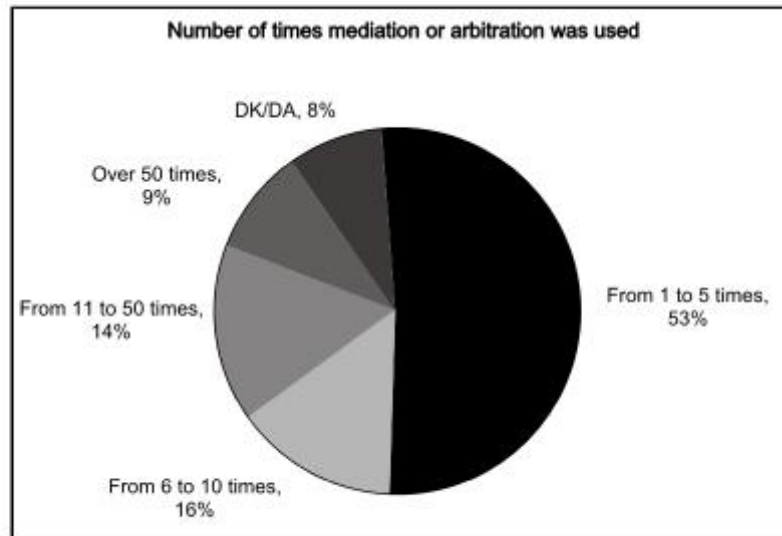
With respect to arbitration, Guatemala and Argentina present the highest results, with 27% and 24% respectively. In Peru and Chile 17% and 12% of the businessmen, respectively, said they had used arbitration at some point. Additionally, based on the data that was collected and the interviews that were held during this investigation, the low level of the use of arbitration in Colombia, a country that is a pioneer and leader in this area, stands out.

It should be pointed out that Bolivia, Venezuela, and Chile were the countries having the highest number of businessmen who said they had not used either arbitration or mediation.

#### D. Frequency of the use of arbitration and mediation

Those who responded that they had used mediation and/or arbitration were consulted about the number of times they did so. Fifty-three per cent of the businessmen indicated they had used ADR methods between 1 and 5 times, 16% said they had used them between 6 and 10 times, and 14% indicated that they had done so between 11 and 50 times. The results indicate a downward trend in which most respondents indicated that they used arbitration and mediation infrequently.





Here once again the relationship between the company size and the use of ADR methods appears. On the following chart we observe that 77% of the small companies used arbitration or mediation between 1 to 5 times, while that figure is equivalent to 45% among the large companies. As the number of times the system was used increases, we observe a greater presence of the medium and large companies, in contrast with small ones.

|                     | Small company | Medium company | Large company | Total |
|---------------------|---------------|----------------|---------------|-------|
| From 1 to 5 times   | 77%           | 51%            | 45%           | 53%   |
| From 6 to 10 times  | 9%            | 13%            | 21%           | 16%   |
| From 11 to 50 times | 0%            | 21%            | 13%           | 14%   |
| Over 50 times       | 0%            | 10%            | 13%           | 9%    |
| DK/DA               | 14%           | 5%             | 8%            | 8%    |
| Grand total         | 100%          | 100%           | 100%          | 100%  |

Distributed by country, in most cases the number of times businessmen used arbitration or mediation ranged between 1 and 5 times. That range was selected in 67% of the responses that were given in Bolivia, Chile, Peru, and Venezuela. The "from 6 to 10 times" range was selected in 30% of the cases in Argentina, 21% in Guatemala, and 20% in Colombia. In Guatemala, 44% of the responses were in the range between 11 to 50 times, just as 18% of its businessmen said they had used arbitration or mediation over 50 times, and this is notable.

The greatest percentage of answers was concentrated in the range between 1 to 10 times. It can thus be concluded that although there is experience in using ADR methods, this option was only selected a few times.

| Number of times mediation or arbitration was used, by country |            |            |      |            |      |            |            |            |            |       |
|---|------------|------------|------|------------|------|------------|------------|------------|------------|-------|
|   | AR         | BO         | BR   | CH         | CO   | GU         | PE         | UR         | VE         | Total |
| From 1 to 5 times   | 51%        | <b>67%</b> | 45%  | <b>67%</b> | 57%  | 18%        | <b>67%</b> | 45%        | <b>67%</b> | 53%   |
| From 6 to 10 times  | <b>30%</b> | 7%         | 0%   | 13%        | 20%  | 21%        | 4%         | 10%        | 17%        | 16%   |
| From 11 to 50 times   | 7%         | 0%         | 22%  | 13%        | 11%  | <b>44%</b> | 9%         | 5%         | 8%         | 14%   |
| Over 50 times   | 75%        | 13%        | 11%  | 0%         | 9%   | <b>18%</b> | 13%        | 5%         | 0%         | 9%    |
| DK/DA   | 5%         | 13%        | 22%  | 8%         | 3%   | 0%         | 7%         | <b>35%</b> | 8%         | 8%    |
| Grand total   | 100%       | 100%       | 100% | 100%       | 100% | 100%       | 100%       | 100%       | 100%       | 100%  |

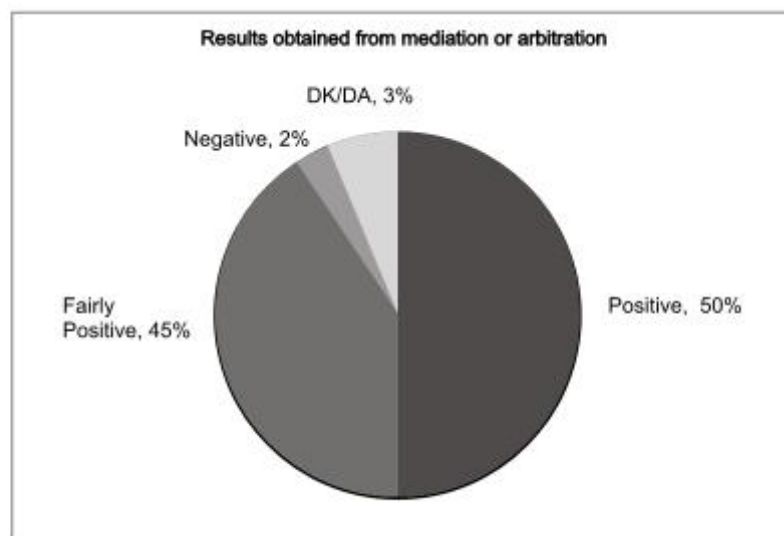
Note: only those who said they used mediation or arbitration answered (approximately 35% of the sample)

| Guatemala<br>Number of times mediation or arbitration was used |               |                |               |       |
|--|---------------|----------------|---------------|-------|
|  | Small company | Medium company | Large company | Total |
| From 1 to 5 times  | 100%          | 7%             | 6%            | 18%   |
| From 6 to 10 times   | 0%            | 21%            | 25%           | 21%   |
| From 11 to 50 times  | 0%            | 57%            | 44%           | 44%   |
| Over 50 times  | 0%            | 14%            | 25%           | 18%   |
| Grand total  | 100%          | 100%           | 100%          | 100%  |

#### E. Results from using mediation and arbitration

One very positive finding from the survey is that those who have used mediation or arbitration report high indexes of satisfaction with the results they obtained. Fifty per cent of the businessmen considered the results to be "positive" and 45% "more or less positive".

Only 2% considered them to be negative and 3% answered "doesn't know/doesn't answer".



If we differentiate the answers according to company size, we see a slight difference in small companies, who show degrees of satisfaction that are slightly lower. Although 33% of the small businessmen described their experience as "positive", 50% described it as "more or less positive". In large companies those figures are 53% and 41%, respectively. In other words, there is a greater number of large companies that are more satisfied with the results obtained through using mediation and arbitration.

| Results obtained from mediation or arbitration |               |                |               |       |
|--|---------------|----------------|---------------|-------|
|  | Small company | Medium company | Large company | Total |
| Positive                                       | 33%           | 55%            | 53%           | 50%   |
| Fairly Positive                                | 60%           | 41%            | 41%           | 45%   |
| Negative                                       | 2%            | 1%             | 3%            | 2%    |
| DK/DA  | 5%            | 2%             | 3%            | 3%    |
| Grand total                                    | 100%          | 100%           | 100%          | 100%  |

When ranked by country, the responses based on the results obtained with mediation and arbitration are highly positive. Guatemala and Venezuela show the highest indexes of satisfaction, with 71% and 67% of the companies, respectively that consider the result to be "positive". Colombia, Uruguay, Chile, and Peru follow with percentages within the range of 45% to 57%. Argentina and Bolivia present slightly lower indexes, since most of their answers were concentrated in the category of "more or less positive", with 65% and 67% respectively.

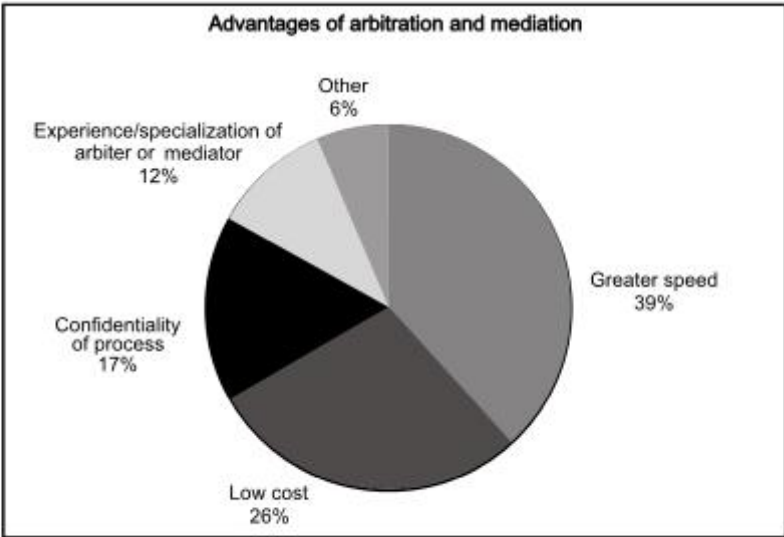
| Results obtained from mediation and arbitration, by country |            |            |           |           |      |            |           |            |            |       |
|---|------------|------------|-----------|-----------|------|------------|-----------|------------|------------|-------|
|   | AR         | BO         | BR        | CH        | CO   | GU         | PE        | UR         | VE         | Total |
| Positive  | 35%        | 27%        | 33%       | 50%       | 57%  | <b>71%</b> | 48%       | 45%        | <b>67%</b> | 50%   |
| Fairly Positive   | <b>65%</b> | <b>67%</b> | 56%       | 50%       | 37%  | 29%        | 46%       | 35%        | 17%        | 45%   |
| Negative  | <b>0%</b>  | 7%         | <b>0%</b> | <b>0%</b> | 6%   | <b>0%</b>  | <b>0%</b> | <b>0%</b>  | <b>17%</b> | 2%    |
| DK/DA   | 0%         | 0%         | 11%       | 0%        | 0%   | 0%         | 7%        | <b>20%</b> | 0%         | 3%    |
| Grand total   | 100%       | 100%       | 100%      | 100%      | 100% | 100%       | 100%      | 100%       | 100%       | 100%  |

Note: only those who said they used mediation or arbitration answered (approximately 35% of the sample)

Venezuela leads the answers considering the results obtained from mediation or arbitration to be negative, with 17%. Only two other countries had answers in that category. These were Peru and Colombia, with 7% and 6% respectively. Lastly, once again the large number of "doesn't know/doesn't answer" responses in Uruguay is significant.

#### F. Advantages of mediation and arbitration

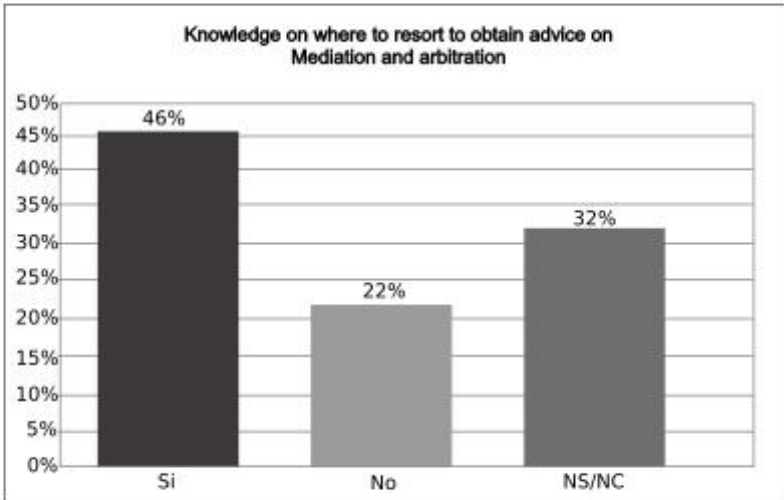
From the perspective of businessmen, there are many advantages to ADR methods. In the first place, disputes are resolved faster and this was stated in 41% of the cases. In the second place, references were made to the low cost, 27% of respondents, followed by confidentiality, 17% of respondents. In the last place we have the experience and/or specialization of the arbiter or mediator, 12%.



Interesting references are made to the advantages of arbitration and mediation in the category of "others", such as: ADR methods avoiding "judicializing" disputes, ADR being more attractive to customers, preserving the commercial relationship, and it being a trustworthy system. It should be noted that the wish to avoid the "judicialization" of disputes was specially emphasized in the corresponding sampling of Colombian businessmen.

**G. Knowledge on how to obtain information**

When the businessmen were questioned about whether they knew where to go to get advice on mediation and arbitration, only 46% responded affirmatively. Twenty-two per cent responded negatively and 32% responded "doesn't know/doesn't answer".





Differentiated according to company size, it can be clearly seen that large companies have more information than medium-sized and small ones. There is almost a 100% difference between small and large companies that know where to go for information. Additionally, medium-sized companies do not appear to be too far behind their larger counterparts on the subject of information. Forty-seven per cent of the medium-sized companies said they knew where to go to get advice on ADR methods, versus 60% of the large companies.

| <b>Knowledge on where to resort to obtain advice on mediation and arbitration</b> |                      |                       |                      |              |
|---|----------------------|-----------------------|----------------------|--------------|
|   | <b>Small company</b> | <b>Medium company</b> | <b>Large company</b> | <b>Total</b> |
| Yes   | 34%                  | 47%                   | <b>60%</b>           | 46%          |
| No  | <b>23%</b>           | 23%                   | 19%                  | 22%          |
| DK/DA   | <b>43%</b>           | 30%                   | 21%                  | 32%          |
| Grand total   | 100%                 | 100%                  | 100%                 | 100%         |

On a country-by-country basis, the levels of knowledge about where to go to get advice on mediation and arbitration are different. In Colombia, for example, 74% of the businessmen said they knew where to go, which is a very high figure. This is followed by Bolivia, 61%, Peru, 57%, Chile, 55%, and Argentina 53%.

The lowest level of knowledge can be seen, in the first place, in Guatemala where there were no businessmen who knew where to go in search of advice. In fact, 53% responded "doesn't know/doesn't answer". In Uruguay only 23% said they knew where to go and 23% directly stated that they did not know. Here once again, 53% of "doesn't know/doesn't answer" responses stands out.

| <b>Knowledge on where to resort to obtain advice on mediation and arbitration, by country</b> |           |           |           |           |            |            |           |            |           |              |
|---|-----------|-----------|-----------|-----------|------------|------------|-----------|------------|-----------|--------------|
|   | <b>AR</b> | <b>BO</b> | <b>BR</b> | <b>CH</b> | <b>CO</b>  | <b>GU</b>  | <b>PE</b> | <b>UR</b>  | <b>VE</b> | <b>Total</b> |
| Yes   | 53%       | 61%       | 62%       | 55%       | <b>74%</b> | <b>0%</b>  | 57%       | 24%        | 47%       | 46%          |
| No  | 19%       | 8%        | 38%       | 20%       | 18%        | <b>47%</b> | 21%       | 23%        | 20%       | 22%          |
| DK/DA   | 28%       | 31%       | 0%        | 25%       | 8%         | <b>53%</b> | 21%       | <b>53%</b> | 33%       | 32%          |
| Grand total   | 100%      | 100%      | 100%      | 100%      | 100%       | 100%       | 100%      | 100%       | 100%      | 100%         |

#### **H. Challenges for Arbitration and Mediation**

Once the areas related to knowledge and use of arbitration and mediation were covered, businessmen were consulted about the circumstances that limit the use of said tools and the necessary conditions to increase their use.

With respect to obstacles, responses from the businessmen were varied. Nineteen per cent responded that there is no culture of using arbitration and mediation. Eighteen per cent related the obstacles to the lack of information about those tools. Then, fewer respondents mentioned the excessive cost and the lack of expertise or specialization on the part of the arbiters and mediators.

In fifth and sixth place there are two very interesting references. One refers to "the company is very small" to use arbitration and mediation. The other says that the company lawyer recommends not using those tools.

In both cases these are highly relevant topics for the dissemination and consolidation of the use of mediation and arbitration. The belief that small companies are not good candidates for ADR is widespread and this was verified in the interviews with businessmen from small companies. Although some characteristics of arbitration (the cost and duration of the process) are not very attractive for medium and small businessmen, mediation perfectly adapts to their needs.

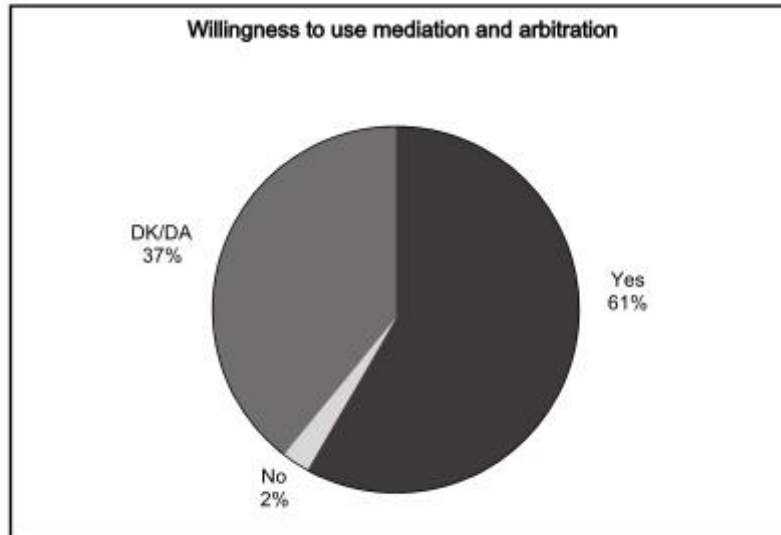
Likewise, lawyers' resistance to the use of alternative methods to resolve their disputes is a problem of legal culture that could well be added to the answer that appears at the top of the table. In almost every country lawyers are mentioned as obstacles to the development and use of alternative dispute resolution methods. The centers should treat this stumbling block appropriately in order to facilitate the dissemination of arbitration and mediation.

It should be emphasized that the obstacles mentioned in the first, second, and sixth places correspond to matters of a "cultural" nature, which could be overcome in the mid- and long-term with an effective information campaign and an adequate communications strategy that includes universities and bar associations.

| <b>Obstacles for using mediation and arbitration services</b>                    |     |
|--|-----|
| There is no culture or practice for using arbitration and mediation              | 19% |
| A lack of information with respect to these processes                            | 18% |
| Excessive cost of mediation or arbitration                                       | 8%  |
| The arbiters or mediators are not suitable/specialized                           | 7%  |
| My company is very small   | 4%  |
| The company attorney recommends that we do not use arbitration and mediation     | 4%  |
| Others   | 3%  |
| My clients do not see it as something positive                                   | 3%  |
| Mediation and arbitration processes are not efficient                            | 3%  |
| In your country the arbitral decisions or mediation agreements are not respected | 2%  |
| Execution of decisions and mediation is too complex                              | 2%  |
| Lack of transparency in mediation and arbitration                                | 2%  |
| None   | 17% |

#### **I. Willingness to use mediation and arbitration**

Nevertheless, despite the obstacles mentioned above, the chart below indicates that businessmen are willing to use mediation and arbitration. When asked whether they would dare to use these tools if ADR was shown to be cheaper, faster and more effective in resolving disputes, 61% of the businessmen responded affirmatively.



Differentiated by company size, large companies appear to be more willing to use arbitration and mediation. Sixty-eight per cent of the large companies showed a positive attitude, followed by medium-sized companies with almost identical figures, and small ones, 53%.

| Willingness to use mediation and arbitration |               |                |               |       |
|--|---------------|----------------|---------------|-------|
|  | Small company | Medium company | Large company | Total |
| Yes  | 53%           | 64%            | 68%           | 61%   |
| No   | 1%            | 2%             | 3%            | 2%    |
| DK/DA  | 46%           | 35%            | 29%           | 37%   |
| Grand total                                  | 100%          | 100%           | 100%          | 100%  |

On the country level, we emphasize Argentina's case where 84% of the businessmen responded that they were willing to use mediation or arbitration. In the second place we have Peru, 77%, followed by Bolivia, Chile, and Venezuela, with 67%, 64%, and 61% respectively.

Two aspects should be highlighted. The first indicates that of those who actually responded yes or no, the percentage of negative responses is very low (an average of 2%), while the baseline for affirmative answers can be considered high since it was approximately 40%. The second aspect is that there was a high percentage of "doesn't know/doesn't answer" responses (in some countries it surpassed 50%). This could be related to the lack of information on these practices at the time the questions were answered. In other words, given that the businessmen had no knowledge on the advantages and qualities of arbitration and mediation, it was not possible for them to judge whether they would be willing or not to use something that was unknown to them.



| Willingness to use mediation and arbitration, by country |            |      |            |      |            |            |            |            |      |       |
|--|------------|------|------------|------|------------|------------|------------|------------|------|-------|
|  | AR         | BO   | BR         | CH   | CO         | GU         | PE         | UR         | VE   | Total |
| Yes  | <b>84%</b> | 67%  | <b>79%</b> | 64%  | 49%        | 47%        | <b>77%</b> | 43%        | 61%  | 61%   |
| No   | 3%         | 1%   | 15%        | 4%   | 0%         | 1%         | 1%         | 4%         | 1%   | 2%    |
| DK/DA  | 13%        | 32%  | 6%         | 32%  | <b>51%</b> | <b>52%</b> | 21%        | <b>53%</b> | 37%  | 37%   |
| Grand total  | 100%       | 100% | 100%       | 100% | 100%       | 100%       | 100%       | 100%       | 100% | 100%  |

The answers related to willingness can be analyzed based on the person who responded to the questionnaire. The desegregated results can be seen in the chart below, where there is a noticeable gap between "Directors" and "Lawyers", with over 80% positive answers, on the one hand, and "Owner" on the other, with just 40% positive answers. This type of difference is important, for example, when designing dissemination campaigns and searching for intermediaries among businessmen.

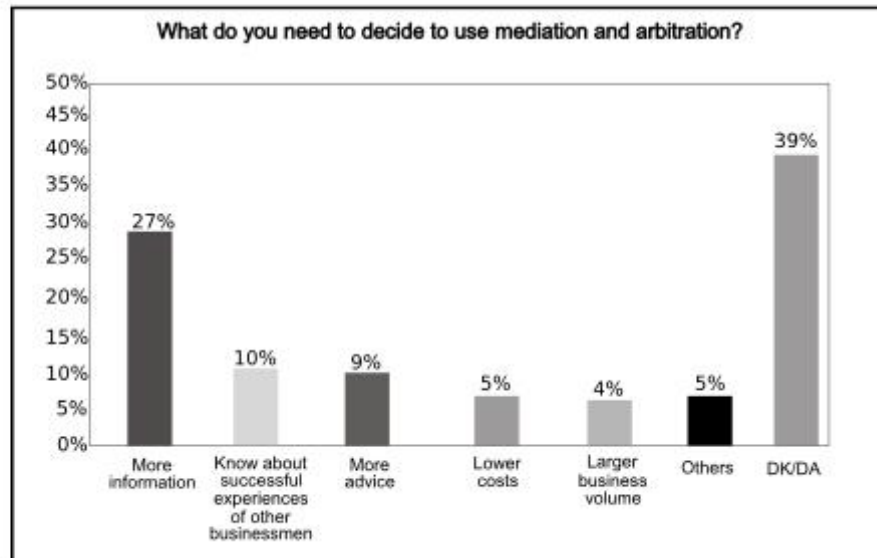
| Willingness to use mediation and arbitration<br>According to position in the company |            |      |         |            |            |       |       |
|--|------------|------|---------|------------|------------|-------|-------|
|  | Owner      | CEO  | Manager | Director   | Attorney   | Other | Total |
| Yes  | 40%        | 61%  | 65%     | <b>82%</b> | <b>86%</b> | 65%   | 62%   |
| No   | 4%         | 1%   | 1%      | 0%         | 0%         | 3%    | 2%    |
| DK/DA  | <b>56%</b> | 38%  | 34%     | 18%        | 14%        | 32%   | 36%   |
| Grand total  | 100%       | 100% | 100%    | 100%       | 100%       | 100%  | 100%  |

In response to the question relating to the effects of deciding to use mediation and arbitration to resolve their disputes, businessmen indicated that the most important need was more information. In the second and third place was the importance of knowing about successful experiences of other businessmen and getting more advice. Few references were made to matters related to the need to lower costs and have more business.

The need for more information (27%) and more advice (9%) are closely related. Together they add up to 36% of the responses, which is evidence of the lack of information among businessmen about arbitration and mediation.

Some businessmen indicated that they would be willing to use arbitration or mediation, but that they could not get ADR clauses included because they generally do business with larger companies and they do not have negotiating power over the contents of the contracts.

Additionally, some of the responses classified in the category of "others" should be mentioned. Several times businessmen responded that they did not need anything. In some cases it is clear that this is either because they are already convinced about using arbitration and mediation or because they would not use ADR methods under any circumstances. Other businessmen responded that in order to use ADR methods, they would first have to have disputes, underscoring the low level of conflicts in their business activities.



If we differentiate the results according to company size, their needs are similar. There are no significant gaps between large, medium-sized and small companies. The only category that stands out slightly is “doesn’t know/doesn’t answer”, where small companies account for 46% of the responses versus 37% for medium-sized and 34% for large companies. This could be due to a greater lack of knowledge on ADR methods among the small companies which, in view of the lack of specific information on the characteristics and ends of said tools, would force them to not answer the question. Remember that 39% of the small companies said they had no knowledge about mediation and arbitration.

|  | Small company | Medium company | Large company | Total |
|--|---------------|----------------|---------------|-------|
| More information                                       | 25%           | 31%            | 26%           | 27%   |
| Know about successful experiences of other businessmen | 9%            | 9%             | 11%           | 9%    |
| More advice  | 6%            | 5%             | 2%            | 4%    |
| Lower costs  | 4%            | 7%             | 5%            | 5%    |
| Larger business volume                                 | 4%            | 3%             | 9%            | 5%    |
| Others   | 7%            | 9%             | 13%           | 10%   |
| DK/DA  | 46%           | 37%            | 34%           | 39%   |
| Grand total  | 100%          | 100%           | 100%          | 100%  |

On the country level, in Argentina and Peru the lack of information and the need for advice were presented as the main challenges to being able to convince businessmen to use arbitration and mediation. The need for more information was the main concern in all the countries, added to the need for more advice, which was stressed.

The answers also emphasize the importance of successful examples among businessmen. With a 10% average, it was the second category in importance in the sample. In some countries it was above 10% of the responses, as in Peru 17%, Argentina and Chile 12%, and Bolivia 11%. In some countries the high costs were also the object of businessmen's concern; among these are Bolivia, Chile, Uruguay, and Venezuela.

| What do you need to use mediation and arbitration? By country |            |      |            |      |            |            |            |            |      |       |
|---|------------|------|------------|------|------------|------------|------------|------------|------|-------|
|   | AR         | BO   | BR         | CH   | CO         | GU         | PE         | UR         | VE   | Total |
| More information  | <b>40%</b> | 27%  | 20%        | 17%  | 13%        | 29%        | <b>37%</b> | 25%        | 29%  | 27%   |
| More advice   | <b>16%</b> | 5%   | 12%        | 11%  | 9%         | 8%         | <b>16%</b> | 3%         | 8%   | 9%    |
| Larger business volume  | 8%         | 4%   | 6%         | 8%   | 5%         | 1%         | 3%         | 1%         | 3%   | 4%    |
| Lower costs   | 0%         | 9%   | 18%        | 9%   | 4%         | 1%         | 5%         | 7%         | 8%   | 5%    |
| Know about successful experiences of other businessmen        | 12%        | 11%  | <b>21%</b> | 12%  | 9%         | 7%         | <b>17%</b> | 3%         | 8%   | 10%   |
| Others  | 3%         | 8%   | 14%        | 13%  | 4%         | 0%         | 0%         | 5%         | 7%   | 5%    |
| DK/DA   | 21%        | 36%  | 9%         | 29%  | <b>55%</b> | <b>53%</b> | 21%        | <b>56%</b> | 37%  | 39%   |
| Grand total   | 100%       | 100% | 100%       | 100% | 100%       | 100%       | 100%       | 100%       | 100% | 100%  |

#### J. Motivating factors for using mediation and arbitration

Consulted about the factors that would motivate them to use arbitration and mediation, in the first place businessmen mentioned their attorney's advice and the existence of a serious institution to support those practices. In the second place, they mentioned the need to have proof that these are more effective than the justice system. Finally, in the third place, they mentioned the importance of knowing about the successful experiences of other businessmen.

Here the important role that lawyers play in businessmen's decisions on whether to use arbitration or mediation, stands out. They are the key intermediaries between businessmen and their disputes, without whose support there can be no progress in the challenge of expanding the use of ADR methods. It also highlights the weight the "imitation" effect has, in which businessmen adopt practices used by other businessmen – especially if they perceive that these have a positive result.

| Factors that would motivate you to use arbitration or mediation |          |          |          |          |          |
|---|----------|----------|----------|----------|----------|
|   | 1 Factor | 2 Factor | 3 Factor | 4 Factor | 5 Factor |
| Advice from your attorney                                       | 37%      | 16%      | 8%       | 12%      | 0%       |
| The existence of a serious institution to support it            | 29%      | 17%      | 15%      | 10%      | 0%       |
| Have evidence that they are more effective than the judiciary   | 19%      | 24%      | 19%      | 9%       | 0%       |
| Know about successful experiences of other businessmen          | 10%      | 19%      | 18%      | 18%      | 1%       |
| Others  | 6%       | 2%       | 0%       | 0%       | 1%       |

Notes: 1. Selection from 1 to 5 in order of preference, with 1 preferred in first place.  
2. Colombia is not included in the sample because it did not present valid data  
3. Total people surveyed who responded to the question: 344



**Companies  
and the  
Judicial  
Branch**

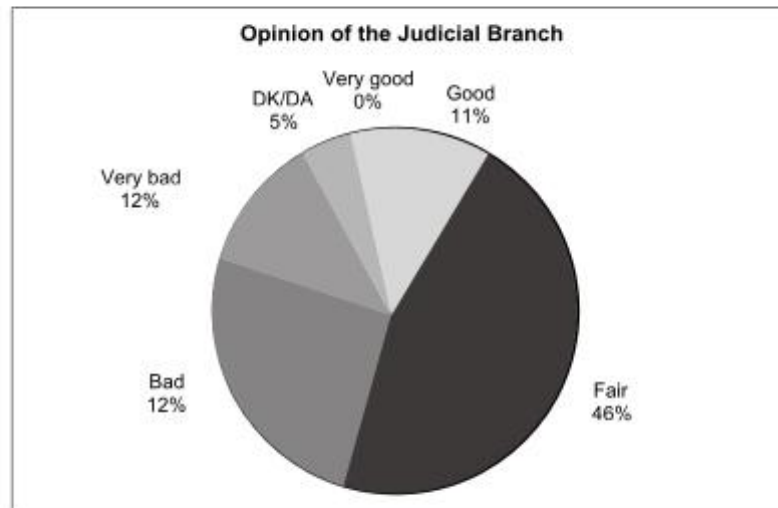




## VII. Companies and the Judicial Branch

One of the classical arguments when marketing ADR methods states that one advantage is that this is an excellent alternative in view of the problems of slowness, unpredictability and inefficiency of the Judicial Branch. In other words, the arguments take advantage of the problems with the Judicial Branch to make the products of the arbitration and mediation centers more attractive. Within this context, businessmen were consulted about their perception of the judiciary.

The results were overwhelming with respect to the negative image of the Judicial Branch's functioning. Forty-six per cent of the businessmen said that they had a "moderate" opinion and 26% said they had a "bad" opinion of it. Only 11% per cent said that they had a "good" opinion of it, and none of the businessmen considered it "very good".



When differentiating the results by company size, it can be seen that businessmen's opinion on the Judicial Branch's functioning is extremely homogenous. The levels of responses for each of the categories are practically identical. This, unfortunately, reflects businessmen's bad perception of the justice system's performance. We should clarify that these perceptions are not exclusive to the business world, but they are also shared by society as a whole.

| Opinion of the Judicial Branch |               |                |               |       |
|--------------------------------|---------------|----------------|---------------|-------|
|                                | Small company | Medium company | Large company | Total |
| Very good                      | 1%            | 0%             | 0%            | 0%    |
| Good                           | 11%           | 10%            | 12%           | 11%   |
| Fair                           | <b>47%</b>    | <b>46%</b>     | <b>46%</b>    | 46%   |
| Bad                            | <b>27%</b>    | <b>29%</b>     | <b>21%</b>    | 26%   |
| Very bad                       | 8%            | 13%            | 15%           | 12%   |
| DK/DA                          | 7%            | 3%             | 5%            | 5%    |
| Grand total                    | 100%          | 100%           | 100%          | 100%  |

| Opinion of the Judicial Branch, by country |      |      |      |      |      |      |      |      |            |       |
|--|------|------|------|------|------|------|------|------|------------|-------|
|  | AR   | BO   | BR   | CH   | CO   | GU   | PE   | UR   | VE         | Total |
| Very good                                  | 3%   | 0%   | 1%   | 0%   | 0%   | 0%   | 0%   | 0%   | 0%         | 0%    |
| Good                                       | 13%  | 4%   | 20%  | 13%  | 21%  | 8%   | 3%   | 20%  | 7%         | 11%   |
| Fair                                       | 40%  | 49%  | 47%  | 59%  | 53%  | 52%  | 40%  | 43%  | 36%        | 46%   |
| Bad  | 33%  | 27%  | 15%  | 19%  | 13%  | 32%  | 37%  | 21%  | 23%        | 26%   |
| Very bad                                   | 11%  | 12%  | 13%  | 9%   | 11%  | 4%   | 17%  | 3%   | <b>27%</b> | 12%   |
| DK/DA                                      | 0%   | 8%   | 4%   | 0%   | 3%   | 4%   | 3%   | 13%  | 8%         | 5%    |
| Grand total                                | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100%       | 100%  |

### A. Using the justice system

One of our hypotheses was that, despite the Judicial Branch's bad image, businessmen still resort to the courts to resolve their disputes. Consulted about this, 64% of the businessmen responded that they usually resort to the justice system when they have disputes.

| Use of the judiciary to resolve disputes |      |
|--|------|
| Yes                                      | 64%  |
| No                                       | 33%  |
| DK/DA                                    | 2%   |
| Grand total                              | 100% |

However, when differentiating the responses by company size, they are not homogenous. For example, while large companies indicated that they resort to the judiciary 78% of the time to resolve their disputes, only 47% of the small businesses do so. In other words, over half the small companies do not use the Judicial Branch as a mechanism for resolving their disputes.

| Use of the judiciary to resolve disputes |               |                |               |       |
|--|---------------|----------------|---------------|-------|
|  | Small company | Medium company | Large company | Total |
| Yes                                      | 47%           | 69%            | <b>78%</b>    | 64%   |
| No                                       | <b>52%</b>    | 27%            | 20%           | 33%   |
| DK/DA                                    | 1%            | 4%             | 2%            | 2%    |
| Grand total                              | 100%          | 100%           | 100%          | 100%  |

The gap between small companies, on the one hand, and large and medium-sized companies, on the other, is an important finding since this might indicate that there is some kind of accessibility problem for small businesses. If we take into account the results of the survey on the subject of using ADR and the justice system, we observe that small companies do not use either one of the two methods. There is no risk in indicating that there is a problem of access to methods for dispute resolution, whether under state tutelage (Judicial Branch) or else in the private arena (mediation and arbitration centers).

The results by country highlight several discrepancies. While in some countries a larger percentage of businessmen resort to the justice system, in others the number of businessmen that actually resorted to that system is lower. In Argentina, for example, 85% of the businessmen said they had resorted

to the justice system, followed by Guatemala 81% and Colombia 71%. On its part, in Uruguay 57% of the businessmen have never resorted to the justice system to resolve their disputes.

Although the first reaction would be to compare these answers to the opinion of the businessmen with respect to the Judicial Branch, if the results from the question on their opinion of the Judicial Branch is cross-referenced with the question on the actual use of the same, one observes that Argentina and Uruguay have similar indexes of favorable opinions on the Judicial Branch, but nevertheless, in the first country they resort to judges and in the second, no.

| Use of the judiciary to resolve disputes, by country |            |      |      |      |      |            |      |            |      |       |
|--|------------|------|------|------|------|------------|------|------------|------|-------|
|  | AR         | BO   | BR   | CH   | CO   | GU         | PE   | UR         | VE   | Total |
| Yes  | <b>85%</b> | 64%  | 76%  | 67%  | 71%  | <b>81%</b> | 57%  | 39%        | 51%  | 64%   |
| No   | 15%        | 32%  | 24%  | 33%  | 28%  | 17%        | 36%  | <b>57%</b> | 49%  | 33%   |
| DK/DA  | 0%         | 4%   | 0%   | 0%   | 1%   | 1%         | 7%   | 4%         | 0%   | 2%    |
| Grand total  | 100%       | 100% | 100% | 100% | 100% | 100%       | 100% | 100%       | 100% | 100%  |

The companies that indicated that they resorted to the Judicial Branch were asked how often they did so. In other words, if they used it to resolve all their disputes, or just some. Nine per cent indicated that they used it always, i.e., for all their disputes. Eleven per cent said they used it for their disputes "more than half the time". Thirty-five per cent indicated they used it "less than half the time" and 45% "almost never".

| Frequency in using the judiciary   |      |
|--|------|
| Always   | 9%   |
| More than half the times   | 11%  |
| Less than half the times   | 35%  |
| Almost never   | 45%  |
| Grand total  | 100% |
| Note: The option "never" does not appear because only those that used the judiciary at least once were considered. |      |

Here we can see that the frequency with which the justice system is used is lower in relation to the number of disputes. Remember that 51% of the businessmen said they had between 1 and 10 disputes a year. And if we apply the data from the previous chart, we can conclude that the number of disputes that are taken to the justice system is extremely low.

If the responses are analyzed based on company size, we see that large companies use the justice system more frequently. And if we compare the percentages in the first three rows of the following chart, it shows that large companies use the Judicial Branch more frequently.



| Frequency in using the judiciary |               |                |               |       |
|----------------------------------|---------------|----------------|---------------|-------|
|                                  | Small company | Medium company | Large company | Total |
| Always                           | 5%            | 3%             | <b>10%</b>    | 6%    |
| More than half the time          | 2%            | 7%             | <b>11%</b>    | 7%    |
| Less than half the time          | 13%           | 25%            | <b>29%</b>    | 22%   |
| Almost never                     | 26%           | 32%            | 27%           | 28%   |
| DK/DA                            | <b>54%</b>    | 32%            | 23%           | 37%   |
| Grand total                      | 100%          | 100%           | 100%          | 100%  |

Note: The option "never" does not appear because only those that used the judiciary at least once were considered.

Classifying the information by country, we observe that there are more answers located in the "less than half the time" and "almost never" categories. In other words, when disputes arise, they are very rarely taken to the justice system. This could indicate two things: (i) businessmen use other methods to resolve their disputes; and/or (ii) businessmen lack the proper methods to resolve their disputes and, therefore, some disputes are either unresolved or assumed as losses after several attempts to negotiate.

At 12%, Venezuela is the country with the highest number of responses indicating that they always use the judiciary when they have disputes. Argentina presents the highest figure (23%) for the "more than half the time" category and for the "less than half the time" category, 28%. Guatemala, on the other hand, presents the lowest percentages of frequency in using the justice system, where 52% said "almost never" and 27% said "less than half the time".

| Frequency in using the judiciary, by country |            |      |            |      |      |            |      |            |            |       |
|--|------------|------|------------|------|------|------------|------|------------|------------|-------|
|  | AR         | BO   | BR         | CH   | CO   | GU         | PE   | UR         | VE         | Total |
| Always                                       | 5%         | 7%   | <b>20%</b> | 5%   | 5%   | 1%         | 5%   | 7%         | 12%        | 6%    |
| More than half the time                      | <b>23%</b> | 8%   | 16%        | 1%   | 7%   | 3%         | 1%   | 3%         | 8%         | 7%    |
| Less than half the time                      | <b>28%</b> | 31%  | <b>39%</b> | 24%  | 22%  | <b>27%</b> | 23%  | 11%        | 12%        | 22%   |
| Almost never                                 | 27%        | 15%  | 21%        | 33%  | 37%  | <b>52%</b> | 27%  | 20%        | 16%        | 28%   |
| DK/DA  | 17%        | 40%  | 5%         | 36%  | 29%  | 17%        | 44%  | <b>60%</b> | <b>52%</b> | 37%   |
| Grand total                                  | 100%       | 100% | 100%       | 100% | 100% | 100%       | 100% | 100%       | 100%       | 100%  |

#### B. Views of those who use the justice system

Among those who actually resort to the judiciary, there is a moderate level of satisfaction from its use. Although only 4% answered that the experience was "very good", 22% classified it as "good" and 47% as "moderate". Eighteen per cent and 6% classified it as "bad" or "very bad", respectively.

| Evaluation of the use of the judiciary |            |
|--|------------|
| Very good                              | 4%         |
| Good                                   | 22%        |
| Fair                                   | <b>47%</b> |
| Bad                                    | 18%        |
| Very bad                               | 6%         |
| DK/DA                                  | 3%         |
| Grand total                            | 100%       |

Note: This question was only answered by those who had specific experience with the judiciary..

When the answers are classified by country, some results are seen which need to be emphasized. For example, almost no one responded that their experience with using the judiciary was very good, except for Colombia. In that country 24% of the businessmen that resorted to the Judicial Branch said they had had a very good experience. Likewise, 46% of the Colombian businessmen said they had had a "good" experience, which makes Colombia the country with the highest level of satisfaction with respect to the courts' performance – 98% were within the range of "very good", "good" and "moderate". In the case of Uruguay, a greater level of positive responses was expected as that country has the best view of the Judicial Branch in the region (Latin barometer).

The highest percentage of responses uniformly fell in the "moderate" category in almost all the countries (except for the already mentioned case of Colombia). And the percentages are similar in the subsequent categories ("good" upwards and "bad" downwards). Therefore, from an optimistic perspective, an average of over 70% of the businessmen said they had moderate or good experiences.

| Evaluation of the judiciary, by country |      |      |            |      |            |            |            |            |            |       |
|---|------|------|------------|------|------------|------------|------------|------------|------------|-------|
|   | AR   | BO   | BR         | CH   | CO         | GU         | PE         | UR         | VE         | Total |
| Very good                               | 2%   | 2%   |            | 0%   | <b>24%</b> | 0%         | 2%         | 0%         | 0%         | 4%    |
| Good                                    | 22%  | 23%  | <b>44%</b> | 18%  | <b>46%</b> | 10%        | 2%         | <b>41%</b> | 16%        | 22%   |
| Fair                                    | 47%  | 48%  | <b>45%</b> | 52%  | <b>28%</b> | 56%        | <b>67%</b> | 34%        | 42%        | 47%   |
| Bad                                     | 19%  | 21%  | 7%         | 16%  | 2%         | <b>31%</b> | 16%        | 21%        | 21%        | 18%   |
| Very bad                                | 6%   | 4%   | 4%         | 8%   | 0%         | 3%         | 9%         | 0%         | <b>18%</b> | 6%    |
| DK/DA                                   | 5%   | 2%   | 0%         | 6%   | 0%         | 0%         | 2%         | 3%         | <b>31%</b> | 3%    |
| Grand total                             | 100% | 100% | 100%       | 100% | 100%       | 100%       | 100%       | 100%       | 100%       | 100%  |

Note: This question was only answered by those who had specific experience with the judiciary..

Venezuela's case shows the least satisfaction with the use of the Judicial Branch. There 42% of respondents said that they had had moderate experiences, 21% bad experiences and 18% very bad experiences. Next is Guatemala, where 56% of the businessmen had moderate experiences and 31% negative experiences.

It is interesting to highlight that the Judicial Branch's image is usually more negative than ratings of its actual performance, In other words, the public in general has a much more negative opinion than the system's users. This information indicates that public opinion is not only linked to the institution's performance, but that other factors influence it. This is not only valid for the Judicial Branch, but also



for other institutions. In this sense, how the institution's public image is built is almost as important as the institution's efficiency per se. The Centers must take this information into account when designing their communication strategies.

| <b>Users opinion of the Judicial Branch</b> |  |  |
|---|--|--|
|   | <b>Perception of all the businessmen</b> | <b>Opinion of businessmen who used the judiciary</b> |
| Very good                                   | 0%                                       | 4%   |
| Good  | 11%                                      | 22%  |
| Fair  | 46%                                      | 47%  |
| Bad   | 26%                                      | 18%  |
| Very bad                                    | 12%                                      | 6%   |
| DK/DA                                       | 5%                                       | 3%   |
| Grand total                                 | 100%                                     | 100%   |

### **C. Reasons for resorting to the judiciary**

There are many reasons that cause businessmen resort to the judiciary to resolve their disputes. Thirty-seven per cent indicated they had done so because they had exhausted every other instance to resolve the problem. Twenty-five per cent said they did so because the other party in the dispute took the case to the Judicial Branch. Then, 21% said they had resorted to the Judicial Branch through their attorney's advice. Curiously, 9% responded that they used the Judicial Branch because it is the only available method for resolving disputes and 3% because "I do not know of any other system to resolve them".

| <b>Reason for taking your disputes to the judiciary</b>                  |            |
|--|------------|
| Because I exhausted all prior instances                                  | <b>37%</b> |
| The other party sued me or started the process before the justice system | 25%        |
| At my attorney's advice  | 21%        |
| It is the only available mechanism for dispute resolution                | 9%         |
| I do not know of any other system for resolving them                     | 3%         |
| It is the only system I trust for resolving my disputes                  | 2%         |
| DK/DA  | 3%         |
| Grand total  | 100%       |

On the country level there are certain variations in the answers. The use of the judicial system due to having exhausted all prior instances had a high incidence in several countries, but especially in Colombia and Guatemala, where it reached 56%. They were followed by Chile 39%, and Argentina, Bolivia, and Peru which were closer to 30%.

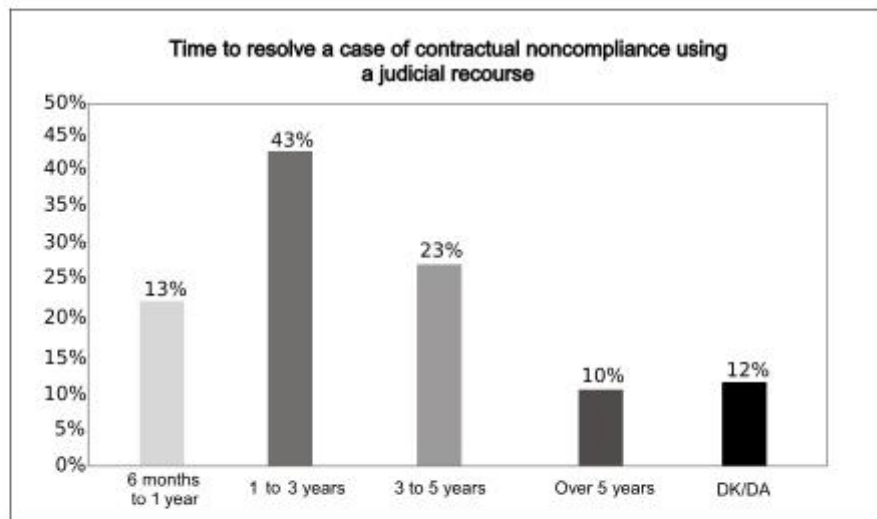
The influence of the Bar Association was important in the responses, which accounted for around 30% in Peru, Uruguay, Guatemala, and Argentina. In Venezuela we perceived a rather passive attitude vis a vis disputes as 56% of respondents said they had used the Judicial Branch because the other party started the suit and they had not made the decision to resort to that option. Likewise, a curious trend was observed in Chile, Colombia, and Guatemala. Those were the countries that mentioned that they used the Judicial Branch due to having exhausted all prior instances. But

at the same time, all those countries had 0% responses in the option “it is the only system I trust”. This might indicate that intensive efforts are made to avoid a judicial recourse, since there might be other systems that are trusted, and they only resort to this option once all other alternatives have been exhausted.

| Reason why you took your disputes to the judiciary, by country           |      |      |      |      |      |      |      |      |      |       |
|--|------|------|------|------|------|------|------|------|------|-------|
|  | AR   | BO   | BR   | CH   | CO   | GU   | PE   | UR   | VE   | Total |
| Because I exhausted all prior instances                                  | 3%   | 15%  | 28%  | 12%  | 6%   | 3%   | 9%   | 17%  | 11%  | 9%    |
| The other party sued me or started the process before the justice system | 0%   | 6%   | 17%  | 20%  | 13%  | 29%  | 33%  | 31%  | 8%   | 21%   |
| At my attorney's advice  | 33%  | 29%  | 13%  | 22%  | 22%  | 10%  | 14%  | 24%  | 56%  | 25%   |
| It is the only available mechanism for dispute resolution                | 0%   | 6%   | 0%   | 6%   | 4%   | 2%   | 7%   | 0%   | 3%   | 3%    |
| I do not know of any other system for resolving them                     | 3%   | 6%   | 11%  | 0%   | 0%   | 0%   | 5%   | 3%   | 3%   | 2%    |
| It is the only system I trust for resolving my disputes                  | 30%  | 31%  | 27%  | 39%  | 56%  | 56%  | 33%  | 21%  | 14%  | 37%   |
| DK/DA  | 6%   | 6%   | 4%   | 0%   | 0%   | 0%   | 0%   | 3%   | 6%   | 3%    |
| Grand total  | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100%  |

#### D. Delays in the Judicial Branch

Businessmen use the Judicial Branch despite knowing clearly that there are delays with this system. Consulted about the time needed to resolve a case of noncompliance with a contract when resorting to the judiciary, 13% responded “between 6 months to 1 year”, while 43% said “between 1 and 3 years”, followed by 23% who said “from 3 to 5 years”, and finally 10% who answered “over 5 years”.



If the answers are classified by country, some interesting differences can be observed. In general terms, in almost all the countries businessmen estimated that it takes between 1 and 3 years to resolve a case using the judiciary. However, in Bolivia 25% of the businessmen indicated that it takes between 6 months and 1 year. We observed the same in 17% of the responses in Chile and 16% of the responses in Colombia.

Chile and Argentina stand out with high percentages in the 1 to 3 year category, In both cases this received almost 60% of the answers, which shows a certain consensus among the businessmen with respect to how long judicial processes last. However, Argentina, together with Colombia and Venezuela, presented the highest percentages in the "over 5 years" category.

| Time for resolving a case of contractual noncompliance using a judicial recourse, by country |      |      |      |      |      |      |      |      |      |       |
|--|------|------|------|------|------|------|------|------|------|-------|
|  | AR   | BO   | BR   | CH   | CO   | GU   | PE   | UR   | VE   | Total |
| From 6 months to 1 year  | 4%   | 25%  | 20%  | 17%  | 16%  | 5%   | 8%   | 13%  | 13%  | 13%   |
| From 1 to 3 years  | 57%  | 25%  | 47%  | 59%  | 38%  | 48%  | 41%  | 44%  | 29%  | 43%   |
| From 3 to 5 years  | 21%  | 19%  | 11%  | 17%  | 26%  | 29%  | 32%  | 13%  | 25%  | 23%   |
| Over 5 years   | 13%  | 9%   | 18%  | 4%   | 14%  | 9%   | 9%   | 4%   | 15%  | 10%   |
| DK/DA  | 4%   | 21%  | 4%   | 3%   | 5%   | 8%   | 9%   | 25%  | 18%  | 12%   |
| Grand total  | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100%  |

#### E. Reasons to avoid using the justice system

Additionally, when consulted about the reasons motivating them to not use the judicial system, the problem of the delay appears at the top of the list. Thirty-seven per cent chose the slowness of the justice system as the first reason for not resorting to the Judicial Branch. Twenty-eight per cent chose that same problem in the second place, and 11% in the third place. The centers must take advantage of this because their services are much more efficient in terms of time.

The second most important reason for not resorting to the judicial system is the excessive cost of this option, closely followed by judicial corruption, the existence of other more convenient alternatives, the length of the processes and judicial inefficiency in general.

| Reasons that motivated you to NOT resort of a judicial recourse |            |            |            |            |            |
|---|------------|------------|------------|------------|------------|
| Criteria  | 1st Reason | 2nd Reason | 3rd Reason | 4th Reason | 5th Reason |
| Excessive slowness of the judiciary                             | 37%        | 28%        | 11%        | 12%        | 3%         |
| Excessive costs of the judiciary                                | 16%        | 14%        | 11%        | 11%        | 12%        |
| There are other better alternative for dispute resolution       | 10%        | 5%         | 9%         | 12%        | 11%        |
| Judicial corruption   | 9%         | 7%         | 11%        | 9%         | 5%         |
| Long, complex procedures  | 8%         | 13%        | 13%        | 12%        | 10%        |
| Lack of Judicial efficiency                                     | 7%         | 12%        | 11%        | 9%         | 10%        |
| Low probability of compliance with the judges' decisions        | 3%         | 5%         | 8%         | 6%         | 8%         |
| Lack of access to information on the legal and judicial system  | 2%         | 6%         | 5%         | 6%         | 6%         |
| Lack of impartiality of the judges                              | 2%         | 4%         | 8%         | 7%         | 10%        |
| Lack of effective sanctions for noncompliance with decisions    | 1%         | 3%         | 7%         | 6%         | 13%        |
| Others  | 2%         | 0%         | 0%         | 0%         | 1%         |

Notes: 1. Selection from 1 to 5 in order of preference, with 1 being preferred in the first place  
2 Colombia is not included in the sample because it did not present valid data  
3 This question was answered by half of those surveyed (301 cases).

In summary, the reasons indicated by those surveyed for not resorting to justice - long delays, high costs, and judicial corruption - are presented as opportunities that the Centers must exploit when marketing ADR. An efficient communications strategy must certainly include a demonstration of the speed, low cost, and transparency of the mediation and arbitration methods.





**C o s t o f  
D i s p u t e s**



## **VIII. Cost of Disputes**

One of the main objectives mentioned at the beginning of this research was to deepen knowledge about the cost of commercial disputes. Within this context, after gathering information with respect to fee arrangements used by the centers from interviews with directors of those centers and reviewing literature on ADR methods, it was concluded that the most important challenge was how to take a new approach to the predominant view on how to measure the cost of disputes.

Arbitration and mediation centers usually state that the cost of resolving disputes using their services is less than that which is incurred using the Judicial Branch. However, there is a double weakness in this type of statement. On the one hand, it lacks empirical support, since the centers have not generated any solid information with respect to the differences in terms of costs between their services and those provided by the Judicial Branch. Although the presumption that it is cheaper to resort to the centers is reasonable, based on intuition, there is not sufficient supporting evidence. On the other hand, the concept of costs that is used is extremely incomplete since the only things that are generally taken into account are the direct costs, i.e., those related to the arbiters' and mediators' rates, the center's administrative rates, lawyers' fees and, in some cases, eventual technical or experts reports. The time factor is also usually incorporated into the costs, but only vaguely, as this has not been precisely quantified.

In that sense, from the beginning this report hoped to develop an approach that would allow the centers to identify and quantify the cost of disputes for the business community and thus be able to promote the advantages of their services in view of the costs of their competitors. To this end, a multidisciplinary approach was taken which, with a large variety of tools, would allow the centers to adopt a holistic – closer to reality – approach to analyzing costs. This approach would help to generate solid support for what until now was fundamentally based on intuition and common sense: that the conflict resolution services of the centers are cheaper than those of the Judicial Branch.

### **A. Towards a new approach**

A new model for measuring the cost of disputes was tested through the surveys. This model stands out because it is simple and, in turn, more inclusive than the approach that is traditionally used. However, in order to design this new approach it was necessary to carry out a detailed study of the literature on the subject.

The costs related to companies' disputes cover a broad range of areas and vary significantly according to the type of dispute in question. There are numerous works on the subject from the perspective of "Law and Economics", others from an exclusively legal perspective, and others from a business administration perspective. In general, they emphasize those aspects that are related to labor disputes as well as the internal effects of the disputes on the company. In that sense, they emphasize such topics as sabotage or damages caused due to strikes, losses deriving from union disputes or

deterioration caused by disloyal employees. In general, these works concentrate more on the disputes per se than on their economic impact. There are also numerous works that concentrate on the cost of disputes in specific sectors of production and industry.

With respect to how the cost of disputes per se are measured or quantified, there is very little background. The few publications on the topic are mainly concentrated on the cost differences in resolving disputes through ADR methods or the justice system. These are case studies of companies that gradually began to incorporate arbitration or mediation into the organization as part of a policy to reduce disputes in general and specifically to lower the costs associated to litigation. Over the last few decades, the use of ADR methods has grown so much in the United States that there was talk about the emergence of a phenomenon called "Corporate ADR Movement". In the literature, the successful experiences of Motorola and several U.S. Government agencies are frequently mentioned as they achieved substantial reductions in the costs associated with disputes thanks to the use of mediation and arbitration.

Based on the literature that was analyzed and after discussions with the research team in charge of this study, a methodology was designed to evaluate the cost of disputes. Two objectives were pursued: (i) the new system should capture the most tangible monetary costs; and (ii) in turn, it should be relatively easy to implement (both in terms of data collection and in the quantification process). Following those two criteria, some costs were set aside which, although important, were not easily quantifiable. For example, the costs related to the loss of quality in business decisions were set aside. These are generated when, instead of investing their time in evaluating how to optimize production, businessmen dedicate their time to dispute management. The costs associated with the loss of personnel due to disputes were also set aside. Many times important disputes include the resignation or dismissal of company personnel, which implies searching for a replacement, training him, familiarizing him with company practices, etc. The costs deriving from the deterioration in the health of company personnel due to disputes or the costs associated with the effects on commercial relations between companies in dispute were also not included.

The chart below illustrates the different costs identified, segregating those that were incorporated into our methodology.

| <b>Selected</b>       | <b>Not selected</b>                    |
|-----------------------|--|
| Cost by time invested | Disloyal employees                     |
| Opportunity-cost      | Destruction of company property        |
| Legal costs           | Deterioration of commercial relation   |
|                       | Health of managerial personnel         |
|                       | Quality of business decisions          |
|                       | Labor and internal disputes            |
|                       | Dismissal and replacement of personnel |

Table 2. Costs of Disputes that were identified



The three main elements that comply with both requirements (tangible monetary costs and easy quantification) that form part of the new approach are:

- (a) costs of time invested;
- (b) opportunity-cost; and
- (c) legal costs.

**Costs of time invested** (or lost) are those deriving from the time used by the company to face a dispute. Here we include the time of all the relevant actors in the company such as, for example, the CEO, managers, attorneys, and accountants. The cost is obtained by calculating the weeks dedicated by each of them to resolving the dispute(s) in relation to their respective salaries.

This ratio allows us to measure the cost of time invested over time, observing the different costs based on the duration of the dispute resolution processes. In the case of arbitration, for example, legislation usually establishes a maximum term of 180 days. This gives us a temporary framework within which we can calculate the dedication of the company's officials and thus obtain an estimate of the cost of the personnel's time. If in a company, for example, a manager – with a salary of 4,000 dollars a month – dedicated 4 weeks in 2004 to attend to and manage disputes, and the company lawyer – who earns 3,000 dollars a month – did the same for 8 weeks, it is estimated that the value of the time invested is 10,000 dollars (4,000 for the general manager and 6,000 for the company's lawyer).

Since this cost is related to the value of the work that is provided, some associated benefits must be taken into account, many of which cannot be easily quantified. We are referring, for example, to the services and associated costs of such benefits as vacations, end of the year bonuses, and food tickets, among many others. In order to capture these costs we recommend adding a 50% safety cushion to the invested cost. This way a more realistic range of values that represents the integral cost of invested time can be obtained.

**Opportunity-cost** is the benefit that you sacrifice when you do not follow an alternative course of action. For example, if a businessman stops receiving money because a client does not pay him what was agreed upon, it generates a cost that derives from the impossibility of having the money in dispute available. That money could be used in different ways, e.g., for financial investments or save it for the future needs of the company. However, we assume that it is obvious that the main purpose of the funds generated in the productive process is for investment in the company.

To determine **opportunity-cost**, first it is necessary to identify the exact amount of money for the litigation and the company's rate of profitability. If it is related to non-monetary services, this can be solved by estimating their value in monetary terms. If in 2004 the company had 100,000 dollars that were frozen due to litigations and the profitability of the same was 20% per annum, the opportunity-



cost for that year adds up to 20,000 dollars (USD100,000 x 20%). In terms of the present investigation, the opportunity-cost was quantified following a slightly different procedure. Since businessmen are reluctant to give out economic information, in the survey we opted not to ask about the total amount of money in dispute because of company litigations. Instead, we asked them for the percentage of disputes in their businesses and this was compared with the question on the company's annual billing. Both data was taken for 2004.

**Legal costs** are all the expenses related to the legal treatment of the conflict, such as lawyers' and expert's fees, judicial costs such as tariffs or taxes for using the justice system, payments to speed up processes, and business agents' fees. Payments of arbitrators and mediators fees and administrative fees – when it is related to disputes resolved in arbitration or mediation centers - also fall within this category. A 50% safety cushion must be added to the final value that results from the sum of all the items described above in order to include the chance you might lose the dispute.

| COSTS            | DEFINITION  | CALCULATION  |
|------------------|---|--|
| TIME INVESTED    | This is the cost of the time invested by all those people involved in the disputed within the company, both at the decision-making level and controversy resolution management.   | The basic salary of each of the people involved in the dispute is taken, including those who attend to any tangential confrontations. The number of hours destined to the dispute during the month (usually between 30 – 50% of the total work time) is taken and that number of hours is multiplied by the value per hour and an additional 50% is added for services and other associated labor costs. |
| OPPORTUNITY-COST | Opportunity-cost refers to the earnings the company would have received if it had invested the amount of money in dispute in the productive process of the company. In other words, it is the cost generated by the unavailability of the amount of money in dispute. | The total amount of money in dispute is taken and multiplied by the rate of profitability of the business.   |
| LEGAL COSTS      | This refers to the basic legal costs incurred because of the disputes.  | Direct costs, such as attorneys' fees, salaries of the personnel who attended the case internally, experts' costs, courts costs, etc., are taken into account. The possibility of losing the case must also be considered. The value of the expectations of the claim must be multiplied by 50%, as a safety cushion to cover the chance of losing the dispute.  |

Chart 1. Definition of the Cost of Disputes

The chart below illustrates a simple model for calculating the opportunity-cost of money in dispute, i.e., the alternative use that the money might have had. These scenarios are outlined for the ratio between the duration of the dispute and the company's profitability for every 100,000 dollars. The chart presents a simple, visually effective way to illustrate one of the dimensions of the economic impact of a dispute.

#### Time/profitability ratio (for every US\$ 100,000)

| Profitability | Duration of the conflict (in years) |                  |                  |                  |                  |                  |                  |                  |                  |                  |
|---------------|-------------------------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|
|               | 0.5                                 | 1                | 1.5              | 2                | 2.5              | 3                | 3.5              | 4                | 4.5              | 5                |
| 5%            | \$2,500                             | \$5,000          | \$7,500          | \$10,000         | \$12,500         | \$15,000         | \$17,500         | \$20,000         | \$22,500         | \$25,000         |
| 10%           | \$5,000                             | \$10,000         | \$15,000         | \$20,000         | \$25,000         | \$30,000         | \$35,000         | \$40,000         | \$45,000         | \$50,000         |
| 15%           | \$7,500                             | \$15,000         | \$22,500         | \$30,000         | \$37,500         | \$45,000         | \$52,500         | \$60,000         | \$67,500         | \$75,000         |
| 20%           | \$10,000                            | \$20,000         | \$30,000         | \$40,000         | \$50,000         | \$60,000         | \$70,000         | \$80,000         | \$90,000         | <b>\$100,000</b> |
| 25%           | \$12,500                            | \$25,000         | \$37,500         | \$50,000         | \$62,500         | \$75,000         | \$87,500         | <b>\$100,000</b> | <b>\$112,500</b> | \$125,000        |
| 30%           | \$15,000                            | \$30,000         | \$45,000         | \$60,000         | \$75,000         | \$90,000         | <b>\$105,000</b> | \$120,000        | \$135,000        | \$150,000        |
| 35%           | \$17,500                            | \$35,000         | \$52,500         | \$70,000         | \$87,500         | <b>\$105,000</b> | \$122,500        | \$140,000        | \$157,500        | \$175,000        |
| 40%           | \$20,000                            | \$40,000         | \$60,000         | \$80,000         | <b>\$100,000</b> | \$120,000        | \$140,000        | \$160,000        | \$180,000        | \$200,000        |
| 45%           | \$22,000                            | \$45,000         | \$67,500         | \$90,000         | \$112,500        | \$135,000        | \$157,500        | \$180,000        | \$202,500        | \$225,000        |
| 50%           | \$25,000                            | \$50,000         | \$75,000         | <b>\$100,000</b> | \$125,000        | \$150,000        | \$175,000        | \$200,000        | \$225,000        | \$250,000        |
| 75%           | \$37,500                            | \$75,000         | <b>\$112,500</b> | \$150,000        | \$187,500        | \$225,000        | \$262,500        | \$300,000        | \$337,500        | \$375,000        |
| 100%          | \$50,000                            | <b>\$100,000</b> | \$150,000        | \$200,000        | \$250,000        | \$300,000        | \$350,000        | \$400,000        | \$450,000        | \$500,000        |

As we can see, for a company with 20% profitability and litigation in an amount of 200,000 dollars that took six months to resolve – which is usual when arbitration is used – the opportunity-cost is USD 20,000. But if it is resolved in 3 years, an average figure when the Judicial Branch is used, the opportunity-cost is USD 120,000 – nothing less than 60% of the amount in litigation.

#### B. Results of the survey

The compilation of data through the survey permitted us to test the approach we are proposing and generate information on the costs for companies. This is significant progress, since it allows us to evaluate whether the proposed methodology is viable, as well as to polish and improve the same. Aside from some difficulties in gathering the information, the results served to increase our knowledge on the different dimensions of the economic cost of disputes.

In the case of Guatemala we were able to quantify the value of the time invested in dispute resolution. This value fluctuates within a range of USD4,920 to USD29,859, according to whether it was a small, medium-sized or large company. The value of the time invested by the medium-sized companies in resolving disputes is three times that corresponding to small companies, and 50% of the value invested by the large one.

On the subject of opportunity-cost, the ratio is similar for average costs, which are located within the range of USD6,967 to USD30,903. Something similar occurs with average legal costs, which fluctuate between USD9,638 and USD42,334, depending upon the size of the company.

| <b>Guatemala</b>              |              |               |              |
|-------------------------------|--------------|---------------|--------------|
| <b>Cost of disputes (USD)</b> |              |               |              |
|                               | <b>Small</b> | <b>Medium</b> | <b>Large</b> |
| Average cost of lost time     | 1,718        | 7,289         | 15,876       |
| (including benefits)          | 2,577        | 10,933        | 23,814       |
| Average Opportunity-cost      | 3,515        | 13,393        | 3,105,658    |
| (with 50% safety cushion)     | 5,273        | 20,089        | 4,658,487    |

The results corresponding to Argentina are similar to those from Guatemala. The average cost of time invested varies between USD1,718 and USD15,876. The value of the time invested by medium-sized companies is four times higher than the value invested by small companies, and 50% of the same item for the large ones.

The opportunity-cost is presented as the second in importance. For small businesses it is USD3,515, for medium-sized ones USD13,393 and for large ones USD3,105,658. Once again the direct relation between company size and costs is confirmed.

With respect to legal costs, we observe that small companies have an average of USD2,655, followed by medium-sized ones with USD11,820 and large ones with USD2,589,000. Although this last amount is extremely high, when taking the average as an additional element for analysis, we observe a stable trend. Large companies average USD21,939 in legal costs.

| <b>Argentina</b>              |              |               |              |
|-------------------------------|--------------|---------------|--------------|
| <b>Cost of disputes (USD)</b> |              |               |              |
|                               | <b>Small</b> | <b>Medium</b> | <b>Large</b> |
| Average cost of lost time     | 1,718        | 7,289         | 15,876       |
| (including benefits)          | 2,577        | 10,933        | 23,814       |
| Average Opportunity-cost      | 3,515        | 13,393        | 3,105,658    |
| (with 50% safety cushion)     | 5,273        | 20,089        | 4,658,487    |
| Average legal costs           | 2,655        | 11,820        | 2,589,212    |
| (with 50% safety cushion)     | 3,983        | 17,731        | 3,883,819    |

One important finding is related to the differences in the people within a company whose time is invested in the dispute resolution process. As we explained before, to analyze the cost of the time invested, we identified the time dedicated by the different people who approached the dispute in the company as weeks per year. This was then multiplied by the weekly salary of each one of them. Within this framework, the data that was gathered for the different company sizes suggest that the smaller the company, the greater is the participation of the owners in dispute resolution. As the company grows in size, this participation falls noticeably.

In medium-sized companies one notes the active participation of the general manager, the legal area manager and the attorney (either the company's or external). In large companies, on the other hand, less participation of the general manager is noted and a greater involvement of the legal area manager and the attorneys is seen.

In the case of Argentina, the participation of accountants stands out in small companies. The results of the survey indicate that they participate actively in dispute resolution.



Although this is not their normal field, this also confirms the information that was collected in the interviews, where it was mentioned that accountants usually take part in the company's disputes. Accountants also usually provide advice on the topic of contracts and disputes of labor, tax, or administrative nature related to the company's activity.

### C. Practical case: cost of disputes in Argentina

Part of the usefulness of the information that is collected in the surveys is the possibility of carrying out concrete mediations on the cost of disputes. Below we present a case study with the objective of comparing costs from using the different dispute resolution methods

We designed a hypothetical case for a company that is trying to claim and recover a USD10,000 debt by using three different means: mediation, arbitration and the Judicial Branch. The estimated time for each is one month for mediation, six months for arbitration and 30 months for the Judicial Branch. The company has an annual profitability of 20%.

The information corresponding to costs, services and terms of the mediation and arbitration processes was obtained from a local provider. The information related to terms and costs of using the justice system were taken from an empirical investigation on the execution of judicial sentences that was carried out in 2004. Finally, the data on the time invested by the companies was taken from the survey carried out in Argentina for the present investigation.

| Cost                  | Mediation    | Arbitration    | Judicial Branch |
|-----------------------|--------------|----------------|-----------------|
| Cost of time invested | \$214        | \$1,284        | \$6,420         |
| Opportunity-cost      | \$167        | \$1,000        | \$5,000         |
| Legal costs           | \$50,19      | \$380,20       | \$2,875         |
| <b>TOTAL</b>          | <b>\$431</b> | <b>\$2,536</b> | <b>\$14,295</b> |

Table. Comparison of costs, in USD

The results clearly illustrate the differences in terms of costs for recovering the debt. While resorting to mediation would cost USD431 and arbitration USD2,538, the use of the Judicial Branch would generate a total cost of USD14,295. For the case that was analyzed, legal costs are by far the category with the greatest difference. There are also important differences in the time invested and opportunity-cost.

It should be mentioned that in mediation and arbitration, costs related to the judicial execution of the settlement agreement and the arbitral decision are not calculated, since our investigation showed that those tools have a high percentage of voluntary compliance. In other words, those who use mediation and arbitration usually comply spontaneously and voluntarily with what was agreed upon in the conciliation or what was decided by the arbitrators; therefore, there is no need to claim their compliance in the judicial headquarters.

This type of exercise is vitally important to identify the advantages of the centers' services and thus be able to differentiate their products from those of the "competition". Likewise, these estimates provide precise data on the actual cost of resolving disputes using ADR methods and provide solid evidence of its advantage in economic terms (there are other, non-economic advantages that are equally important, such as confidentiality, specialization of the service, speed, etc.).





## **Conclusions**



## **IX. Conclusions**

Throughout the preceding chapters we presented the results of the survey. The information that was analyzed allowed us to gather a broad spectrum of empirical evidence on various aspects of the relationship between businessmen and disputes. In that sense, the breakdown of the data by country and by company size provided valuable elements to deepen our knowledge about disputes in the different segments of the business world.

There are five broad themes which, due to their importance and impact, deserve special attention. Each one will be dealt with below.

### **A. Disputes**

The rate of disputes is a key element to understanding the incidence of disputes on business activities. This allows us to evaluate the frequency with which companies have disputes and their proportion in relation to the total volume of business.

In chapter V we presented the results of the survey grouped by countries and by company size. Said data is a valuable contribution for the centers' planning process as it will allow them to estimate the number of disputes companies have and thus, for example, adapt their activities of dissemination, marketing and attracting new customers. The analysis of the data differentiated by company size illustrates the different needs and encourages the development of different strategies for the different business segments.

In the global sample of companies it was observed that 51% of them had from 1 to 10 disputes in 2004 and that 16% had between 11 and 20 disputes. This indicates that dispute levels are relatively low. Companies tend to have few disputes. Analyzing this information from the point of view of the centers, they should aim at attracting the highest number of companies because of the few disputes to resolve, especially if one takes into account that of the few existing disputes, only a small percentage are resolved using judicial recourses, mediation or arbitration.

Likewise, the results by company size provide valuable references on the differences with respect to disputes. While 63% of the small companies said they had had between 1 and 10 disputes in 2004, only 40% of the large companies selected that range - their answers fell into higher ranges. As the range of the categories increases, the presence of large companies increases, while that of small businesses decreases.

Two important facts stand out. The first is that 10% of the small businesses said that they had not had disputes in 2004. This might be due to the lower business volume of small companies or else to the nature of the transactions they carry out (minimizing the risks with only cash transactions, only known clients and suppliers, etc.) The second outstanding fact is that 16% of the large companies said they had had over 80 disputes. That indicates a significantly high rate of disputes and it is related

to the complexity of the commercial operations of large businesses and the greater levels of infrastructure, human resources and capital involved.

| Small versus Large Companies, Number of disputes in 2004 |               |               |
|--|---------------|---------------|
|  | Small company | Large company |
| None   | 10%           | 1%            |
| From 1 to 10   | 63%           | 40%           |
| From 11 to 20  | 10%           | 19%           |
| From 21 to 40  | 5%            | 9%            |
| From 41 to 80  | 0%            | 6%            |
| Over 80  | 1%            | 16%           |
| DK/DA  | 11%           | 9%            |
| Grand total  | 100%          | 100%          |

At first glance, this data could be interpreted as suggesting the advantage of the centers' focusing their dissemination efforts on large companies because they present higher rates of disputes than small ones. In turn, these companies carry out an indirect dissemination of ADR as when this clauses are included in their numerous contracts they put their counterparts in contact with these ADR tools (especially small companies, who are contractors or suppliers of the large ones). In Argentina, for example, a businessman explained that at the time of preparing a contract with smaller companies, he usually copies things from contracts imposed upon him by larger companies and which he found attractive (and this is how he first learned about arbitration).

However, that interpretation would be flawed since it does not consider the true dimension of the small businesses segment in the business community. On a regional level, the presence of small businesses is especially high. In Peru, for example, large companies only represent 1% of the total companies. Small and micro enterprises, on the other hand, represent 95.8% of the business community.

|           | Micro | SME   | Large |
|-----------|-------|-------|-------|
| Argentina | 87.2% | 12.6% | 0.1%  |
| Brazil    | 92.3% | 7.1%  | 0.6%  |
| Chile     | 88.8% | 10.4% | 0.7%  |
| Colombia  | 97.5% | 2.4%  | 0.1%  |

Table 4. Incidence of companies by size.  
Source: Inter-American Development Bank (2003)

The percentage data on the chart illustrate the importance of small businesses in Latin America. The presence of SMEs is not only important in quantitative terms. In view of the statistics on their economic impact, small companies continue to be key actors in the region's economy.

| Country   | Indicator                               | Micro | SME   | Large |
|-----------|---|-------|-------|-------|
| Argentina | Participation in production (%)         | 87.2% | 12.6% | 0.1%  |
| Brazil    | Salaries (million of US\$)              | 92.3% | 7.1%  | 0.6%  |
| Chile     | Sales (millions of US\$)                | 88.8% | 10.4% | 0.7%  |
| Colombia  | Participation in GDP (millions of US\$) | 97.5% | 2.4%  | 0.1%  |

**Table 5. Economic incidence of companies by size.**  
Source: Inter-American Development Bank (2003)

The optimum strategy for the ADR centers is to attract all the segments of the business community. This way the centers increase their coverage of companies both in terms of quantity and in economic activity. Although small companies have contracts for smaller economic amounts, or they might not be primarily interested in arbitration – the most profitable service for the centers – altogether they represent a volume of business that could be very profitable for these centers.

The differences that were identified among the companies of different sizes suggest that special attention must be paid to the language and content used in ADR marketing and dissemination activities. The small companies segment has particularities that make it completely different from that of the large ones. Therefore, the same strategy or the same language cannot be used to reach the entire business community, but rather each segment needs different content and activities.

| Dissemination       | Small                             | Medium   | Large   |
|---------------------|-----------------------------------|--|---|
| <b>Language</b>     | Simple, businesslike, "non-legal" | Combination of language for small and large.           | More complex, with more data, economic and legal content. |
| <b>Intermediary</b> | Owner, manager, accountant        | Owner, general manager, area manager, company attorney | CEO, general manager, Legal Department Director.          |

### B. Type of disputes

With respect to the most frequent types of disputes, the results confirmed the perception that debt collection, which was referred to in 38% of the cases, is companies' (of all sizes) most frequent problem. This coincides with the opinions that were gathered during the interviews with businessmen, lawyers and directors of arbitration and mediation centers. If we add noncompliance with contracts to that, together they represent a total of 55% of the business disputes.

However, the data also presents some surprises. The second most frequent type of dispute turned out to be in the area of labor.. That is, those that are related to labor relations within the company, such as dismissals, indemnities, contracting personnel, etc. They represented 14% of small companies' disputes, 18% of medium-sized companies, and 21% of the large ones. But in some countries this incidence is even higher, for example, in Venezuela, where labor disputes account for 41% of the conflicts, or Argentina, where they reach an average of 28%.



The high incidence of labor disputes deserves to be analyzed in more detail. We should evaluate what can be done – and especially, who can do it – to help companies that have this kind of disputes. Although the objective of this investigation was not to analyze the causes of labor disputes, the surveys indicate that they have great potential for the centers. Therefore, it would be necessary to carry out new studies that specifically address the topic, analyzing such aspects as what type of disputes they are, if they are the result of changes in the legal framework, or if they are related to economic instability, tax pressure, union demands or the characteristics of specific legislation, etc.

Finally, another of the lessons from the survey is that although there are patterns that are repeated, it is also true that each country has its peculiarities with respect to types of disputes. In the case of Guatemala, for example, problems deriving from transportation contracts were mentioned very frequently. Additionally, in Peru, Argentina, and Venezuela, tax problems were related to 15% of the conflicts. Therefore, it is necessary to continue with the data collection process in each of the countries, emphasizing not only the different needs according to company size, but also within the different sectors of economic activities. There are indications that, for example, disputes in the agricultural or industrial sector are not the same as those in construction or trade.

### **C. Dispute management**

One of the big challenges for the arbitration and mediation centers is finding the proper means to attract the highest number of customers in the business community. Within that framework, the identification of the people who are responsible for dispute resolution, the selection of the most effective means to reach them and the determination of the proper language become key aspects in designing a successful dissemination and marketing strategy.

The results of the survey provide valuable data with respect to the universe of people who, inside and outside the company, are involved in supervising and managing disputes. In previous chapters we analyzed the abundant evidence with respect to the diversity of actors who participate in managing and resolving controversies. We find that there are people who decide upon how to resolve the dispute and others who are in charge of implementing that decision. While managers, CEO's and owners prevail in the first area (they decide on how to resolve them), attorneys mainly dominate the second (they manage the resolution).



Figure 1. Actors in a dispute.

This multiplicity of actors is vitally important to the effects of designing adequate methods to reach each one of them, selecting the language and information that adapts better to the characteristics of each intermediary. The findings of this investigation indicate that companies are highly heterogeneous organizations. Even the organizational model is different in companies of the same or similar size and activity, just like their hierarchal structure, authorities, etc. Therefore, the decisions that are taken by the CEO in one company might perhaps be taken by the legal area manager or the shareholders in another. One of the conclusions of this survey is that the centers must, on the one hand, identify the characteristics of their intermediary within each company and, on the other, adapt the communications language according to the needs.

|              | <b>Responsibility:</b>                      |   |
|--------------|---|---|
|              | <i>Decide on how to resolve the dispute</i> | <i>Manage the resolution of the dispute</i> |
| <b>Actor</b> | CEO, general manager, owner, partners       | Attorney, Legal Department Manager          |

#### D. Preferred methods of dispute resolution

Businessmen showed a preference for negotiations as the tool for dispute resolution. When there is a problem they naturally resort to informal negotiations to try to reach an agreement. Only after negotiations fail do they take more formal measures, such as the intervention of the company's lawyer or formally claim the debt. That is part of the business culture, both in small and large businesses. The last step is resorting to a judicial recourse.

Likewise, it was observed that the use of ADR is not widely disseminated within the business community. Although 6% said they used arbitration or mediation as the first step when there is a dispute, 15% as the second and 10% as the third, and 71% said they knew about some of these tools, a low percentage have actually used them in concrete cases. Thirty-seven per cent of the businessmen said they had used arbitration and/or mediation at some time and of these, 53% did so between 1 and 5 times. Although the percentages are not low, there is still a very important part of the business community that does not know about or have never used those tools.

It should be mentioned that the surveys were carried out in large urban centers where chambers of commerce, business associations and union organizations have a greater presence, so it would be logical to expect a greater level of knowledge on ADR methods. Therefore, there is still a need to work systematically on ADR information dissemination. Although it could be onerous, efforts to disseminate these tools must be a constant activity of the centers, chambers and associated institutions.

The data clearly show that mediation is much better known than arbitration. That trend was verified both by company size and at the country level. And although in many cases centers usually see arbitration as being more attractive, the truth is that mediation could be used as a kind of "Trojan horse" that would serve to put businessmen who do not yet use the tool in contact with ADR in general and arbitration in particular.

One very important finding of the survey was that when comparing the responses from companies that use arbitration and/or mediation to resolve their disputes with those that use the judiciary, we observed that the first recover a greater percentage of the amount in litigation. That suggests that ADR methods are more effective for recovering the amounts in dispute. This type of economic advantage of ADR methods must be used in their dissemination, especially in the information directed towards businessmen, managers and CEO's, because they pay more attention to the cost-related aspects.

From the valid answers that were given, excluding the "doesn't know/doesn't answer" responses, we obtain an aggregate percentage of 62% of those who were surveyed who admitted they recovered less than half the money in dispute through the justice system. This percentage falls to 38% when the recovery mechanism that is used is mediation or arbitration. This data clearly show that ADR methods are more effective in the face of the traditional justice system for recovering credits.

The reason why ADR methods are more effective in recovering money in dispute could be the greater level of voluntary compliance with their decisions and conciliatory agreements on the part of the parties. This explanation was supported by many of the specialists who were interviewed and by the directors of several centers.

#### **E. Cost of disputes**

One important stumbling block with respect to the surveys was that the businessmen were very reluctant to give out economic information about their companies. When asked about profitability or



the salaries of the personnel involved in dispute management, an important number of people did not respond. This impediment had been foreseen in the planning phase of the surveys and steps were taken in order to mitigate this such as, for example, assuring the businessmen about the confidentiality of the information, the anonymity of the surveys, and also offering them the support of the chambers of commerce as a guarantee of the seriousness of the investigation. Nevertheless, in many cases that was not sufficient to encourage them to provide information. In some countries political instability or tension between the public and the private sectors did not help to encourage answers related to profitability or salaries either. However, in general terms the exercise was highly positive since the information that was gathered allowed us to make estimates for several countries.

The success of the surveys related to the fact that when the businessmen did decide to answer the economic questions they did so diligently, providing valuable information with respect to the economic cost of disputes. The data that was provided allowed us to make estimates for some countries and thus test the feasibility of the methodology.

Therefore, despite the ups and downs with the compilation of the economic information, what we want to highlight is the model that is proposed for quantifying the economic cost of disputes, without emphasizing the final figures of the costs for each country. In other words, the findings of this investigation are a good starting point to begin compiling data and formulating estimates using a new methodological approach, one that will allow a realistic cost analysis.

With respect to costs, the results confirmed some of our hypotheses. First, costs increase with company size. This is verified in all the cost categories (time invested, opportunity-cost, and legal). In both Argentina and Guatemala there was a relationship between "the greater the size, the greater the costs". Second, both countries were also identical in that the highest costs are legal costs, followed by opportunity-cost and time invested.

Third, the data gathered with respect to time invested by the different people in the company who had some level of participation in dispute resolution corroborated the hypothesis that in small companies owners and general managers participate actively, but that participation decreases as the company grows in size. In medium-sized and large companies a high level of participation of legal managers and attorneys (whether the company's or external) was detected.

The most important conclusion is related to the confirmation that, as they are presently measured, the costs of disputes are extremely under-estimated. In other words, in the cost of disputes we have dimensions that to date were mostly minimized. It is necessary to move towards a new conception of the cost scheme that will permit, on the one hand, a proper valuation of the same and, on the other, will help to emphasize the comparative advantages of the mediation and arbitration centers.

The main advantage of the centers is the speed of their dispute resolution services. The time factor is a key element in that framework, and this monetary value needs to be quantified in order to be able to contrast it with the time that it takes for the services of the centers' main competitor (the Judicial Branch). This time factor affects both the time invested by the company and opportunity-cost. However, more information needs to be collected, both on the performance of the ADR services by the centers and on the services of the justice system, based on an approach that adequately captures and quantifies the amount and value of the time invested.



## **Recommendations**



## **X. Recommendations**

Based on the data that was collected and the analysis carried out in the preceding chapters, we now present a series of recommendations for the ADR Network. In general terms, these recommendations seek to improve the centers' performance and increase the demand for their services. The recommendations are organized by thematic areas to make reviewing them easier.

### **A. Marketing and Dissemination**

Marketing, dissemination, and client training efforts must be segmented according to company size. This report has documented profound differences between small, medium-sized and large companies, both with respect to the rate of disputes and the nature of these disputes, as well as with respect to the people who manage the disputes and the preferred methods for resolving them. The dissemination materials, language and recipients must be different according to the size of the company and the person who is the company's intermediary.

#### **Recommendation # 1:**

**The market must be segmented by company size, attending to the particularities and needs of each sector. This way the different sectors of the business community can be effectively reached.**

Marketing efforts must be designed taking into account the multiplicity of actors involved in the dispute management process. The same arguments or the same language must not be used when talking to the head of a legal department or when talking to the company's owner or CEO. Each one of these actors has different needs, training and concerns, and therefore, their receptivity towards ADR methods will be different according to the language and approach that is used.

#### **Recommendation # 2:**

**In dissemination campaigns, marketing programs, visits to companies or in advisory sessions with the same, different language and content must be used, according to the intermediary.**

One of the most important obstacles to the use and consolidation of ADR methods continues to be the resistance of legal professionals. This problem requires constant work with professional associations and, especially, with future lawyers, so work with Law Faculties must continue. By and large, under-graduate legal education continues training lawyers that have a confrontational, litigation-oriented mentality, completely ignoring such aspects as collaboration between parties to resolve disputes, negotiations, and ADR. It should be clarified that ADR courses should not be offered exclusively in graduate programs, but they should occupy an important place in the initial years of training future attorneys.

**Recommendation # 3:**

**Work to overcome cultural obstacles, especially in the dissemination and training programs for lawyers, must be continued, including ADR methods in the curricula of Law Schools.**

The results of the survey and the interviews indicate that there are professionals from different disciplines who are involved in dispute management, such as accountants, business administrators, economists and engineers. Therefore, it is necessary for these professionals to learn more about ADR. We must reach those professional groups through under-graduate and graduate university education, since they hold key posts in the decision-making processes of the companies. We can also reach them through dissemination activities with their respective professional associations.

**Recommendation # 4:**

**Expand the dissemination and training work towards other Faculties and professional training schools, including engineers, accountants, business administrators, and economists. Business management education programs – commonly known as MBA – are vitally important vehicles for the proposed objective. Close, active work must also be carried out with respective union associations (engineers', accountants' professional associations, etc.)**

In some countries serious obstacles, aside from the courts, were detected in the development and/or consolidation of arbitration and mediation, such as the erroneous application of ADR legislation, the abusive acceptance of nullity of the sentences, and problems with the execution of the sentences and conciliatory agreements. This type of problem is a serious threat to ADR since it discourages the use of this methods. During the investigation we found multiple examples of the bad performance of the Judicial Branch such as, for example, cases where the judiciary annulled a sentence up to three times for reasons that are not contemplated in the legislation or that are due to the misinterpretation of it.

The problems with delays that usually affect the proceedings in cases in the Judicial Branch also affect the functioning of ADR. For example, when a sentence is taken to the judiciary to be executed and that process takes several years, the ADR methods characteristic principle of speed is noticeably weakened.

**Recommendation # 5:**

**Dissemination and training efforts must extend to the Judicial Branch, judges' associations and judicial associations. Working closely with the Judicial Branch assures that the legal and institutional system is involved in ADR functions harmoniously.**

In previous chapters we highlighted that when measuring the public image of the Judicial Branch it usually presented more negative results than the measurement of its performance per se. In other words, emerging from the analysis of the surveys was that the public in general has a much more negative opinion of the Judicial Branch than those who had actually used the justice system at some time. That indicates that the public's opinion is not only linked to the institution's performance, but that other factors also influence it. Therefore, building a public image of an institution – in this case ADR methods and the centers – is almost as important as the efficiency of the institution itself and that is why it is vital that ADR exhibit a transparent, honest and efficient image to the public, as contrasted with the values represented by the public image of the Judicial Branch.

**Recommendation # 6:**

**Consolidate the public image of mediation and arbitration methods.**

The "imitation effect" is a relatively important factor among businessmen. The surveys indicated that many businessmen would use ADR if they knew about the successful experiences of their peers. The centers must take advantage of this and disseminate information on the type of companies that use their services, within the limitations imposed by confidentiality. If they can eventually make some of them known, their dissemination would have a greater impact. The fact that, for example, companies that form the Board of Directors of the chambers use the mediation and arbitration services of their centers generates trust in those services and encourages other businessmen to use them. Likewise, the identification and dissemination of leading companies in the market that use ADR methods could be very influential in motivating the business community to take "the first step". By dissemination, it should not be understood as marketing or publicity, but rather such activities as presentations by businessmen in seminars and workshops, preparing lessons learned, or successful cases, etc.

**Recommendation # 7:**

**Identify the experiences of leading companies that use or have used ADR methods to resolve their disputes and use those experiences to promote the centers' services.**

In the same sense, the fact that some international agencies promote the use of mediation and arbitration clauses in work and public service contracts for their projects – generally carried out by governments – generates a window of opportunity for the centers. On the one hand, the centers must request the local offices of international agencies to promote the use of local centers and not international ones.



For example, given that IDB has financed mediation and arbitration centers throughout Latin America, it would be expected that they use the clauses of said centers (and not those of onerous, distant international centers as we have corroborated in the contracts of some international agencies). On the other hand, the inclusion of centers' clauses in contracts for projects financed by international agencies would be a real achievement for the centers, which would also contribute towards consolidating an image of efficient, quality service.

**Recommendation # 8:**

**The centers must work with the main and local offices of international agencies so that they – insofar as possible – promote the use of the centers' services in contracts with funds for their projects.**

The surveys indicated that mediation is better known than arbitration. Although for some centers mediation might not be attractive in financial terms, it can be used to put businessmen in contact with arbitration – and even with the centers themselves. If businessmen resort to the centers in search of mediation services, that is at least an approach to the centers, ADR and, eventually, arbitration. The centers must take advantage of this opportunity to disseminate all the products that form part of their service portfolio.

**Recommendation # 9:**

**Mediation must be considered as a way to encourage the business community's contact with the centers and ADR in general. We must not make the mistake of marginalizing this tool due to financial matters, but rather, we must take advantage of it being more effective in reaching the business community.**

**B. Cost of disputes**

The evidence that was gathered during this investigation indicates that the cost of disputes are much more expensive – and greater in terms of money – than legal costs, highlighting Opportunity-cost and the cost of time invested. Given that the services of the centers are characterized by resolving disputes in much shorter terms in comparison to the judicial system the centers have an important advantage in the competitiveness of their services.

**Recommendation # 10:**

**Marketing and dissemination efforts must incorporate the findings related to the cost of disputes, as well as any information related to the costs deriving from using the Judicial Branch. The economic advantages of using quick dispute methods must be highlighted, emphasizing Opportunity-cost and cost for lost time.**

The information on costs can be very helpful when convincing company lawyers, and especially the businessmen themselves, about the convenience of using methods that shorten the time frame for resolving conflicts. However, there is not much information on this since it is a topic that has not been explored in depth. Therefore, based on the model proposed by this investigation, the centers must continue to collect information and estimate costs.

**Recommendation # 11:**

**Generate more information related to the cost of disputes in order to offer businessmen solid evidence in relation to the convenience of arbitration and mediation services.**

Company presidents, managers and CEO's are especially attentive to cost matters. Their function is to produce at the lowest possible cost and thus offer better prices than their competition. If they are provided with solidly collected empirical information on the economic advantages of ADR methods, they will have greater incentives to use those methods. At the same time, they will be more demanding with their attorneys so that they actually include these clauses in contracts. Many businessmen said that when they ask their lawyers to use arbitration or mediation, they discourage them and recommend that they use traditional recourses for resolving disputes. In other words, if what is at stake is a legal matter, the attorneys have more decision-making power in terms of how to manage a dispute. But if it is a solidly backed economic matter, the owners, CEO's and managers play a greater role. Therefore, the centers must convince the business community about the cost advantages of ADR.

**Recommendation # 12:**

**Information on costs must be specially used in the dissemination information and advice for company owners, managers and CEOs.**

Competitiveness is one of the main challenges of the business sector in Latin America. Judicial security and the existence of efficient, reliable methods to resolve controversies are key elements in improving the competitiveness of economies. Businessmen know the problems, terminology and slang related to the concept of competitiveness. However, very few associate the idea of having faster, cheaper dispute resolution services with the competitiveness of their productive activity in general and that of their products in particular. The association of ADR with competitiveness and not with the company's legal matters could be a potential path towards achieving greater acceptance of ADR in the business community.

**Recommendation # 13:**

**The language used in the dissemination directed towards businessmen must associate the idea of dispute resolution to the concept of competitiveness. Legal jargon must be kept at a minimum, replacing it with a clear economic profile, placing more emphasis on the cost of disputes as a fundamental aspect of companies' competitiveness.**

Centers must continue their efforts to generate more information on how they function and on the evolution of the demand for their services. Likewise, they could generate valuable information on the types of most frequent cases, the amounts, the procedural terms, and the costs of resolving conflicts through arbitration or mediation.

**Recommendation # 14:**

**Centers must improve their capacity to collect, present and analyze data related to their internal management.**

**Recommendation # 15**

**The centres must identify the real cost for the use of its services by applying the model proposed in this document (cost by time invested, opportunity cost and legal cost). This implies that information on the typology of conflicts, exact duration of the processes, and cost related to the process of arbitration and mediation must be previously classified.**

The centers have always tried to differentiate their services from those of the Judicial Branch. In that sense, they usually highlight the various advantages of arbitration and mediation, but mainly in terms of costs and time. However, it is necessary to generate more information on the real cost of a litigation through the judicial system. That data is vitally important for demonstrating the comparative advantage of the services of the ADR centers in a more solid manner and this will allow the centers to make an appropriate differentiation of their products vis a vis the services of the Judicial Branch.

**Recommendation # 16:**

**Collect information with respect to the cost of litigation through judicial means, vis a vis the differentiating of these costs from those of the arbitration and mediation centers.**

In differentiating their products versus those of the Judicial Branch, the centers must incorporate the findings of the survey in relation to the greater effectiveness of ADR in recovering the amount in

dispute. This is an element that will be of special interest for those in the companies who are concerned with the economic aspects.

**Recommendation # 17:**

**Centers must emphasize the findings indicating that companies said they recovered a larger percentage of the amount of money in dispute through the use of arbitration and mediation. This information must be incorporated into the dissemination, including marketing, publicity, lessons learned, workshops and seminars.**

**C. SME**

Small and medium-sized enterprises represent a high percentage of the Latin American companies. And although their rates of disputes are lower than those of large companies, they have the potential to become an important source of demand for the centers' services since they have less contact with the Judicial Branch and present responses indicating unsatisfied needs on the subject of dispute resolution. For this type of company, mediation becomes more attractive due to a matter of costs and duration. For the same reason, arbitration is outside of the scope of many small and medium-sized businesses.

**Recommendation # 18:**

**Concentrate the efforts on disseminating mediation as a dispute resolution tool for SME.**

For SME it is especially important that dispute resolution methods be fast. A reduction in the time leads to a reduction in costs. A process that takes six months to resolve a dispute, e.g. arbitration, is not very attractive for small businessmen. SMEs need to resolve their disputes in less time, especially those that are not so complex. Tools such as mediation and abbreviated arbitration can have very important potential.

**Recommendation # 19:**

**Design new services specifically directed towards the needs of SME based on the premise "low costs and shorter terms" – such as abbreviated or simplified arbitration.**

**D. Types of disputes**

The activities of dissemination, planning, and even the evaluation of the centers' services, must bear in mind the characteristics of the demand. Companies have specific needs on the subject of conflict resolution. The topics of collecting debts and contractual noncompliance are a common denominator in every country. However, each country has its own peculiarities in the matter of disputes. It becomes



necessary for the centers to analyze their present services based on businessmen's needs. On the one hand, we have the common problems. Can the centers do something on the subject of problems with collecting debts? Can they provide a service to reduce contractual noncompliance? On the other hand, the type of dispute varies from country to country. Guatemala has a greater incidence of problems associated with transportation contracts. Argentina has a high index of labor problems. Each center should deepen its study on the specifics of the conflicts in its country.

**Recommendation # 20:**

**Concentrate more efforts on the demand, identifying the broad spectrum of specific needs of the companies with respect to dispute resolution.**

One outstanding finding of the survey refers to the high incidence of labor conflicts in business activities. However, at present not much can be done by the centers to resolve this type of problem since in almost all the countries in the region, legislation forbids using mediation or arbitration in labor conflicts. However, not much is known about the nature of the labor conflicts, their characteristics, and their causes.

**Recommendation # 21:**

**Deepen the study on labor disputes in the business community, analyzing the most frequent types, their characteristics and causes.**

Additionally, the use of mediation for this type of disputes should be evaluated from their origin – in other words, apply techniques based on negotiating relations between employers and employees to thus avoid disputes, prevent them from escalating, and intercede in the internal negotiations processes. In European countries and the United States, this type of activity has contributed towards a reduction in the incidence of labor disputes and the identification of situations that cause recurrent conflicts.

**Recommendation # 22:**

**Design products based on negotiation and mediation for companies with a high incidence of labor disputes. Besides mediation services, the products could include training company personnel in mediation.**

The system for resolving conflicts that is in effect in most of Latin America encourages confrontation and leaves very little room for the prevention of disputes. ADR methods are not usually seen as methods that can play a fundamental role in avoiding the escalation of incipient disputes until they become unsolvable. Negotiation and mediation should be permanently used methods inside companies.



**Recommendation # 23:**

**Design and implement a preventive labor mediation pilot case to test and improve the mechanism.**

**Recommendation # 24:**

**Encourage the capacity of ADR methods as a preventive dispute mechanism by promoting periodic mediation meetings within companies.**

This investigation presents detailed findings on the type and frequency of disputes in the business community. This information should not be considered as being merely illustrative, but it should be taken as a valuable contribution when preparing dissemination strategies, activities, and carrying out new studies. In other words, the data that is collected must be incorporated into the different activities of the centers in order to demonstrate that they know what the business community's needs are, that efforts have been made to understand their conflicts, and that proactive strategies were adopted in view of companies' legal needs.

**Recommendation # 25:**

**Use the findings on the types of conflicts to design specific activities and an appropriate communication language for the different business sectors.**

**E. New lines of action for the MIF**

One of the most outstanding areas of opportunity for MIF is with respect to SME's. Small businessmen have many needs with respect to dispute resolution. On the one hand, of all the services provided by the centers, only mediation is suitable for resolving the problems of smaller companies. Arbitration, on the other hand, is expensive, complex, and takes too much time. Therefore, only mediation would adapt to the expectations of small businessmen who need to resolve their conflicts. One possible line of action is to finance the study and implementation of a new tool to complement mediation and which would adapt to SME's.

The adaptation of arbitration so that it could be a useful mechanism based on the characteristics of SME conflicts would be an especially promising action. Although businessmen give priority to negotiations and non-confrontational methods to resolve disputes, it is also true that many times businessmen wish to submit their controversies to a system where it is a third, neutral party who has the authority to resolve the dispute. An arbitral procedure with reduced terms, with a cost system that is in accordance to the amounts, with simplified procedural rules and less presence of legal rituals could be very attractive to the small and medium-sized business community.

**Recommendation # 26:**

**Support the study, design and implementation of ADR tools adapted to SME needs.**

Dispute resolution programs for SME's must take into account the asymmetries between the large chambers of commerce and the small business community. The chambers of commerce that are associated to the ADR Network - who also participated in the ADR programs financed by the MIF - are institutions of great prestige and institutional presence in the economic and political life of their respective countries. They generally gather the large companies and are integrated by the most outstanding local businessmen. They operate in modern buildings that are located in the centers of large cities. These factors can generate certain reluctance in small businessmen to resort to the centers of the above-mentioned chambers. The chambers, on the one hand, instill great respect when faced by a small humble company, and on the other, they are located outside of their habitual radius of performance.

**Recommendation # 27:**

**MIF, together with the Chambers of Commerce, must carry on a process to decentralize the centers' services, installing points to service SME in the areas where these companies have a greater presence. Likewise, it should incorporate the participation and/or sponsoring of union entities representing the small business community.**

Another way to help SME's get closer to ADR is to link these tools to other needs of similar nature in small companies. Many SME's are lacking expertise with respect to legal advice, drafting contracts, and using judicial and legal figures in relation to their activity (e.g., choosing and adopting a type of association, acquiring legal incorporation, registering brands, associating with other SME's to make joint purchases or productive consortiums, etc.) Likewise, in some cases they lack the appropriate knowledge about administrative regulations, tax requirements and obligations, as well as labor laws for their activity. If ADR methods are included in an attractive portfolio of products related to the business environment for SMEs and provided by reliable entities, an important linkage would be achieved between alternative dispute resolution methods and the small business community.

**Recommendation # 28:**

**Offer ADR together with other similar legal products as part of a broader integrated advisory strategy for small and medium businesses.**

**Recommendation # 29:**

**Deepen the study on business disputes, paying attention to the diversity in terms of company size and the sectors of the business community and the specific problems of each country. Alliances could be made with universities and representative entities of the region's private sector in order to do this.**





**ANNEX A**





## ANNEX A. Characteristics of the Sample

### 1. Information about the person who responded to the questionnaire.

| Position in the company |      |
|-------------------------|------|
| Owner                   | 18%  |
| CEO                     | 16%  |
| Manager                 | 31%  |
| Director                | 4%   |
| Attorney                | 6%   |
| Other                   | 25%  |
| Grand total             | 100% |

| Sex         |      |
|-------------|------|
| Male        | 71%  |
| Female      | 29%  |
| Grand total | 100% |

| Age           |      |
|---------------|------|
| From 18 to 30 | 16%  |
| From 31 to 45 | 49%  |
| Over 46       | 35%  |
| Grand total   | 100% |

### 2. Information about the company

| Number of Employees |      |
|---------------------|------|
| From 1 to 50        | 35%  |
| From 51 to 150      | 33%  |
| Over 150            | 32%  |
| Grand total         | 100% |

| Sector in which it carries out its business activities |      |
|--|------|
| Agriculture  | 2%   |
| Fishing  | 1%   |
| Mining   | 1%   |
| Manufacturing  | 13%  |
| Electricity  | 1%   |
| Construction   | 5%   |
| Commerce   | 23%  |
| Hotels   | 7%   |
| Transportation   | 6%   |
| Financial intermediation                               | 4%   |
| Real estate activities                                 | 2%   |
| Public administration and defense                      | 0%   |
| Teaching   | 3%   |
| Social and health services                             | 5%   |
| Community, social and personal service activities      | 4%   |
| Private home activities                                | 0%   |
| Other  | 21%  |
| DK/DA  | 1%   |
| Grand total  | 100% |

| Where do you sell your products? |      |
|----------------------------------|------|
| National                         | 81%  |
| Overseas                         | 3%   |
| National and Overseas            | 16%  |
| Grand total                      | 100% |

| Number of Suppliers |      |
|---------------------|------|
| From 1 to 10        | 27%  |
| From 11 to 20       | 19%  |
| From 21 to 30       | 13%  |
| Over 30             | 37%  |
| DK/DA               | 3%   |
| Grand total         | 100% |

| Number of Clients |      |
|-------------------|------|
| From 1 to 20      | 8%   |
| From 21 to 50     | 8%   |
| Over 50           | 82%  |
| DK/DA             | 1%   |
| Grand total       | 100% |



**ANNEX B**





## ANNEX B

| <b>SMALL COMPANIES</b>        |                                 |                                 |   |                        |  |                          |  |  |  |
|-------------------------------|---------------------------------|---------------------------------|---|------------------------|--|--------------------------|--|--|--|
| Average Cost<br>Lost time     | Cost<br>Lost time<br>(inc serv) | Average<br>cost-<br>opportunity | Opportunity-cost<br>(with 50% safety cushion) | Average<br>Legal costs | Legal costs (with 50%<br>safety cushion) | Average<br>exchange rate |  |  |  |
| Guatemala                     | 409.98                          | 6,967.00                        | 10,450.50                                     | 9,368.10               | 14,052.15                                | 7.9354                   |  |  |  |
| Bolivia                       |                                 | 13,895.40                       | 20,843.10                                     | 6,206.89               | 9,310.34                                 | 7.94                     |  |  |  |
| Chile                         |                                 | 6,865.84                        | 10,298.76                                     | 5,700.93               | 8,551.39                                 | 609.55                   |  |  |  |
| Argentina                     | 348.30                          | 3,515.91                        | 5,273.86                                      | 2,655.43               | 3,983.14                                 | 2.94                     |  |  |  |
| Uruguay                       |                                 | 1,934.19                        | 2,901.29                                      | 1,544.56               | 2,316.84                                 | 28.65                    |  |  |  |
| Venezuela                     |                                 | Muestra insuficiente            | -   | Muestra insuficiente   | -  | 1,880.78                 |  |  |  |
| Colombia                      |                                 | 4,225.56                        | 6,338.34                                      | 3,392.59               | 5,088.89                                 | 2,628.20                 |  |  |  |
| Perú                          | 61.67                           | 81,048.18                       | 121,572.27                                    | 70,928.68              | 106,393.03                               | data en USD              |  |  |  |
| <b>MEDIUM-SIZED COMPANIES</b> |                                 |                                 |   |                        |  |                          |  |  |  |
| Average Cost<br>Lost time     | Cost<br>Lost time<br>(inc serv) | Average<br>cost-<br>opportunity | Opportunity-cost<br>(with 50% safety cushion) | Average<br>Legal costs | Legal costs (with 50%<br>safety cushion) | Average<br>exchange rate |  |  |  |
| Guatemala                     | 1,412.60                        | 20,462.55                       | 30,693.82                                     | 28,168.57              | 42,252.86                                | 7.9354                   |  |  |  |
| Bolivia                       |                                 | 10,384.37                       | 15,576.56                                     | 3,816.73               | 5,725.09                                 | 7.94                     |  |  |  |
| Chile                         |                                 | 10,541.93                       | 15,812.90                                     | 9,091.41               | 13,637.11                                | 609.55                   |  |  |  |
| Argentina                     | 997.55                          | 13,393.06                       | 20,089.58                                     | 11,820.90              | 17,731.35                                | 2.94                     |  |  |  |
| Uruguay                       |                                 | 3,076.56                        | 4,614.83                                      | 2,983.24               | 4,474.86                                 | 28.65                    |  |  |  |
| Venezuela                     |                                 | 7,828.49                        | 11,742.73                                     | 8,169.48               | 12,254.22                                | 1,880.78                 |  |  |  |
| Colombia                      |                                 | 17,955.66                       | 26,933.48                                     | 18,954.20              | 28,431.30                                | 2,628.20                 |  |  |  |
| Perú                          | 368.41                          | 105,048.07                      | 157,572.10                                    | 94,789.96              | 142,184.94                               | data en USD              |  |  |  |
| <b>LARGE COMPANIES</b>        |                                 |                                 |   |                        |  |                          |  |  |  |
| Average Cost<br>Lost time     | Cost<br>Lost time<br>(inc serv) | Average<br>cost-<br>opportunity | Opportunity-cost<br>(with 50% safety cushion) | Average<br>Legal costs | Legal costs (with 50%<br>safety cushion) | Average<br>exchange rate |  |  |  |
| Guatemala                     | 3,244.15                        | 30,902.81                       | 46,354.22                                     | 42,334.14              | 63,501.20                                | 7.9354                   |  |  |  |
| Bolivia                       |                                 | Muestra insuficiente            | -   | ,024.57                | 4,536.86                                 | 7.94                     |  |  |  |
| Chile                         |                                 | 146,208.25                      | 219,312.37                                    | 136,912.89             | 205,369.33                               | 609.55                   |  |  |  |
| Argentina                     | 2,143.66                        | 3,105,658.65                    | 4,658,487.97                                  | 2,589,212.89           | 3,883,819.33                             | 2.94                     |  |  |  |
| Uruguay                       |                                 | Muestra insuficiente            | -   | Muestra insuficiente   | -  | 28.65                    |  |  |  |
| Venezuela                     |                                 | 571,617.00                      | 857,425.51                                    | 350,708.75             | 526,063.12                               | 1,880.78                 |  |  |  |
| Colombia                      |                                 | 8,799.78                        | 13,199.67                                     | 11,298.61              | 16,947.92                                | 2,628.20                 |  |  |  |
| Perú                          | 555.14                          | 13,184.00                       | 19,776.00                                     | 8,047.89               | 12,071.83                                | data en USD              |  |  |  |





**ANNEX C**



## ANNEX C

### Practical Guide for Companies: Evaluation of the Costs of Disputes: ADR vs. Judicial Branch

#### Definition and Evaluation of Costs

The cost of disputes has different components that must be taken into account to the effects of measuring the global cost of resolving a conflict (GCRC) and, in turn, compare the economic efficiency of the different methods for resolving disputes. The components of the GCRC are grouped into three dimensions. The first refers to the time invested, the second to Opportunity-cost, and the third to legal costs.

| COSTS                    | DEFINITION   | CALCULATION  |
|--------------------------|--|--|
| <b>TIME INVESTED</b>     | This is the cost of the time invested by all those people involved in the disputed within the company, both at the decision-making level and controversy resolution management.  | The basic salary of each of the people involved in the dispute is taken, including those who attend to any tangential confrontations. The number of hours destined to the dispute during the month (usually between 30 – 50% of the total work time) is taken and that number of hours is multiplied by the value per hour and an additional 50% is added for services and other associated labor costs. |
| <b>Costo Oportunidad</b> | El costo oportunidad se refiere a la ganancia que hubiera percibido la empresa en caso que hubiera invertido el monto de dinero en conflicto en el proceso productivo de la empresa. En otras palabras, es el costo generado por la indisponibilidad del monto de dinero en conflicto.   | Tomar el monto total del dinero en disputa y multiplicarlo por la tasa de rentabilidad del negocio.  |
| <b>Costos Legales</b>    | Se refiere a los costos legales básicos incurridos a causa de los conflictos. Para conflictos resueltos por la vía judicial, se deben incluir los honorarios de abogados, tasas e impuestos judiciales, honorarios de peritos, gastos por notificaciones, pedidos de informe y demás diligencias asociadas al proceso legal. Para conflictos resueltos usando arbitraje o mediación se deben calcular la tasa administrativa del centro, los honorarios de los árbitros o mediadores y los honorarios de los abogados. | Identificar los costos asociados al proceso judicial o al uso de los MASC. Se debe incluir el costo correspondiente a la posibilidad de perder el caso. El valor de las pretensiones de la demanda debe ser multiplicado por un valor del 50% como colchón de seguridad.   |



## Practical Case

Below we will present a case study that allows us to compare the costs of recovering a **USD 10,000 debt** using different methods: mediation, arbitration, and the Judicial Branch. The case contemplates the following presuppositions:

1. The case study considers a company that is in Argentina.

To calculate the **cost by time invested**, the people within the company who took time in resolving the dispute and the time dedicated to this task were considered. The figures used below were taken from the survey carried out in Argentina to the ends of the present investigation. The values are indicated in U.S. dollars.

| Person in charge of managing disputes, salary and estimated time dedicated to the same |               |                            |                       |
|--|---------------|----------------------------|-----------------------|
| Position   | Weekly Salary | Annual dedication in weeks | Salary for dedication |
| Company owner  | \$441         | 2                          | \$881                 |
| General Manager  | \$596         | 0,8                        | \$476                 |
| Company Attorney   | \$160         | 3,2                        | \$332                 |
| Legal Manager  | \$365         | 2,2                        | \$804                 |
| Area Manager   | \$199         | 0,3                        | \$60                  |
| Head of Human Relations  | \$50          | 0,3                        | \$15                  |
| <b>Total annual cost</b>   |               |                            | <b>\$2568</b>         |

To the effects that centers may generate their own estimates on the time invested in resolving disputes, the previous table should be used for orientation on what information is required.

3. The duration of the processes has been estimated at 1 month if the controversy is resolved through mediation, 6 months for arbitration, and 2 and a half years (30 months) if it is submitted to the judiciary. This data emerges from our own survey plus other estimates on the duration of the processes according to the methods chosen.

4. The company that presents this case study has an annual profitability of 20%.

5. The calculation of the legal costs, which include lawyers' and experts' fees, judicial costs such as tariffs or taxes, payments to speed up the processes, agents, etc., were taken from the publication "Regional Best Practices: Enforcement of Court Judgments – Lessons Learned from Latin America" by Keith Henderson et al, IFES, 2004. This article calculates that legal costs to recover a USD10,000 debt amount to 29% of the same.

6. The amounts are calculated in U.S. dollars.

After carrying out the corresponding measurements for the three recourses proposed for dispute resolution, the results indicate important differences between the costs for mediation, arbitration, and the Judicial Branch. The use of the judiciary is placed as the most onerous option, almost 700% more expensive than arbitration. In other words, the Judicial Branch is a much more expensive service and consumes much more time.

| Cost                   | Mediation    | Arbitration    | Judicial Branch |
|------------------------|--------------|----------------|-----------------|
| Cost for time invested | \$214        | \$1.284        | \$6.420         |
| Opportunity-cost       | \$167        | \$1.000        | \$5.000         |
| Legal costs            | \$50.22      | \$380.23       | \$2.875         |
| <b>TOTAL</b>           | <b>\$431</b> | <b>\$2.536</b> | <b>\$14.295</b> |

**Table 7. Comparison of dispute resolution costs inflicted in Argentina**

It should be highlighted that, according to the information gathered in the interviews with lawyers, arbiters and centers' directors, the use of arbitration or mediation presents higher indexes of voluntary compliance with the decision or conciliatory agreement. In the judiciary you can almost not avoid resorting to an execution process to the effects of obtaining compliance with the judge's sentence. This important advantage in favor of ADR would have its consequent impact on the levels of effectiveness in recovering debts or compliance with the due services.

### **Legal Costs**

The estimate for the legal costs if a judicial recourse is used was taken from an investigation by IFES in Argentina that was already mentioned. The work made a detailed analysis of all the necessary procedural steps from the presentation of the suit until the auction of the seized property and the collection of the debt. The items that were identified and whose cost was quantified were:

- Judiciary tariff;
- Different certificates of records of ownership (inhibition of property, ownership title, etc.)
- Publicity (in the necessary cases) both in official and commercial journals
- Cost of the place for the auction
- Seizure
- Freight
- Storage (the case contemplates the seizure of a vehicle)
- Unofficial costs (payments to speed up the process)
- Attorney's fees
- Auctioneer's fees

The above-mentioned work, published by IFES, has examples for measuring legal costs for other countries. It also recommends the work of Herrero and Henderson on the cost of disputes in Peru, Herrero, Alvaro and Keith Henderson. "The Costs of Disputes in Small Companies: the Peruvian Case". Inter-American Development Bank, 2003. Available online at: [http://www.iadb.org/sds/author/author\\_887\\_s.htm](http://www.iadb.org/sds/author/author_887_s.htm).

If the information on the cost of using the judicial system is not available, the centers should make an effort to generate this data. The exercise is not very complex and only requires the participation of a lawyer having average experience in litigations on civil and commercial topics. The Civil Procedural Code is a valuable source of information that must be complemented with the norms on judicial rates and Law professionals' fees.

#### **How to use the information on costs**

The methodology and tools included in this section must be used as a means to increase interest in the ADR among the business community and disseminate the comparative advantages of the centers' services. They must serve to complement the range of tools and contents that are already available to the centers. In other words, the information on costs should not suppress other contents used in marketing efforts, but rather, they should complement them.

Likewise, it should be highlighted that economic information is not of interest to every audience. It is recommended to use it when the company's intermediary is the owner, CEO, members of the Board, general manager, and the accountant. These people, due to their role inside the company and due to their professional training, will certainly be more interested in data related to costs than the company's attorney, the Legal Department's manager, or an area manager.

Finally, the impact of the information on costs can be increased if it is presented within the framework of topics such as competitiveness, production costs, and business environment for investments and production. A simple mention of the cost of disputes might not be of interest to businessmen, but rather, it would be for professionals who have legal training. Some businessmen said that when they receive invitations for events related to disputes or strictly legal topics, they do not attend, but they send the company's lawyer instead.

#### **Dissemination**

The information on costs is very useful in the efforts to disseminate and market the centers' services. However, when it is used, it should take into account the diversity of the business world. Many small businesses, for example, perhaps might not be in a condition to absorb the economic data.

Besides the company's size, the language and contents must vary in accordance to the intermediary in the company. It is not the same to address the Legal Department's Manager or the CEO or the company's owner. Each one of them has different training and his own characteristics. Therefore, it is very important to modify the language and contents according to the intermediary.



| Dissemination | Small                             | Medium   | Large   |
|---------------|-----------------------------------|--|---|
| Language      | Simple, businesslike, "non-legal" | Combination of language for small and large.           | More complex, with more data, economic and legal content. |
| Intermediary  | Owner, manager, accountant        | Owner, general manager, area manager, company attorney | CEO, general manager, Legal Department Director.          |

Throughout the present investigation it was confirmed that businessmen are reluctant to provide company information of economic nature. Therefore, to the effects of making the calculations on the economic cost of disputes, in many cases it will be convenient to give businessmen the tools for them to make the estimates. To this end, easily understandable graphic methods can be used, such as, for example, the following chart on Opportunity-cost:

**Time / Profitability Ratio (for every USD 100,000)**

|               |          | Duration of the conflict (in years) |           |           |           |           |           |           |           |           |
|---------------|----------|-------------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Profitability | 0.5      | 1                                   | 1.5       | 2         | 2.5       | 3         | 3.5       | 4         | 4.5       | 5         |
| 5%            | \$2,500  | \$5,000                             | \$7,500   | \$10,000  | \$12,500  | \$15,000  | \$17,500  | \$20,000  | \$22,500  | \$25,000  |
| 10%           | \$5,000  | \$10,000                            | \$15,000  | \$20,000  | \$25,000  | \$30,000  | \$35,000  | \$40,000  | \$45,000  | \$50,000  |
| 15%           | \$7,500  | \$15,000                            | \$22,500  | \$30,000  | \$37,500  | \$45,000  | \$52,500  | \$60,000  | \$67,500  | \$75,000  |
| 20%           | \$10,000 | \$20,000                            | \$30,000  | \$40,000  | \$50,000  | \$60,000  | \$70,000  | \$80,000  | \$90,000  | \$100,000 |
| 25%           | \$12,500 | \$25,000                            | \$37,500  | \$50,000  | \$62,500  | \$75,000  | \$87,500  | \$100,000 | \$112,500 | \$125,000 |
| 30%           | \$15,000 | \$30,000                            | \$45,000  | \$60,000  | \$75,000  | \$90,000  | \$105,000 | \$120,000 | \$135,000 | \$150,000 |
| 35%           | \$17,500 | \$35,000                            | \$52,500  | \$70,000  | \$87,500  | \$105,000 | \$122,500 | \$140,000 | \$157,500 | \$175,000 |
| 40%           | \$20,000 | \$40,000                            | \$60,000  | \$80,000  | \$100,000 | \$120,000 | \$140,000 | \$160,000 | \$180,000 | \$200,000 |
| 45%           | \$22,000 | \$45,000                            | \$67,500  | \$90,000  | \$112,500 | \$135,000 | \$157,500 | \$180,000 | \$202,500 | \$225,000 |
| 50%           | \$25,000 | \$50,000                            | \$75,000  | \$100,000 | \$125,000 | \$150,000 | \$175,000 | \$200,000 | \$225,000 | \$250,000 |
| 75%           | \$37,500 | \$75,000                            | \$112,500 | \$150,000 | \$187,500 | \$225,000 | \$262,500 | \$300,000 | \$337,500 | \$375,000 |
| 100           | \$50,000 | \$100,000                           | \$150,000 | \$200,000 | \$250,000 | \$300,000 | \$350,000 | \$400,000 | \$450,000 | \$500,000 |

In turn, centers could develop an online "calculator" (or cliché forms) for businessmen to calculate the economic cost of a dispute themselves. This "calculator" should request the data already described throughout the present report, but which is briefly detailed below:

- Amount in dispute
- Company's profitability
- Monthly salaries of the people in charge of the dispute

The information on the cost of using a judicial recourse, arbitration, and mediation would already be loaded into the calculator. In turn, it could incorporate estimates on the average time a conflict takes for the different people in the company. In other words, predetermined values with respect to the time invested by the company's owner, manager, and attorney on disputes having different characteristics (again, differentiated according to the company's size).





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