

***REDUCING THE COST OF DISPUTES AND INCREASING COMPETITIVENESS THROUGH
ALTERNATIVE DISPUTE RESOLUTION APPROACHES***

**ADDRESS BY JUSTICE HUGH SMALL TO THE PSOJ CHAIRMAN'S CLUB FORUM
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They say that if you live long enough you will have many *déjà vu* experiences. And this morning is a *déjà vu* experience for me. In 2006, when I was on pre-retirement leave from the Supreme Court of the Commonwealth of the Bahamas, I addressed the Chairman's Club of the Private Sector Organisation of Jamaica. The subject on which I spoke is identical to the subject on which I am speaking this morning. How does it come that I am here? It is because over the last three years, despite all of the hazards, I have kept faith with my belief that one day, the Jamaican private sector, through its institutional bodies, is going to set up a structure that will provide for alternate dispute resolution of commercial disputes. And so, apart from serving as the representative of the Private Sector Organisation on the Jamaica Justice System Reform Committee which put out a report in 2007 on what is needed to reform the justice system in the country; apart from sitting and chairing the first Justice Reform Committee of the PSOJ, even after I returned to the Bahamas, I have continued to keep in touch by email and telephone with the Private Sector Organisation's efforts to get this going.

I am particularly happy to see here at the table at which I am sitting, Gerard Johnson of the IDB, because they have been encouraging us and have held our hands over the past three years. One of the things that has happened as a result of the assistance that we have gotten from the IDB is that I went to Argentina where I made contact with 19 other private sector-led ADR systems. They have a network because the IDB has promoted ADR in the hemisphere. It was there that I discovered that the English-speaking Caribbean is the only region in the Western Hemisphere and one of the few regions in the entire world that does not have the institutional framework for the resolution of commercial disputes outside the courts system. Even Haiti, which is a CARICOM member, has established an ADR system and we are lagging behind. After going to Argentina, I went to Chile, again through the courtesy of the IDB, along with Sandra Shirley and another representative of the IDB in Jamaica, and we sat down and we met with the leaders in Chile and we also interacted with Jamaica's Honorary Consul there who is one of the leading persons who had promoted ADR in Chile over the last twenty years, and who offered to attend in Jamaica to help us to promote the idea.

There is a World Bank Study on Jamaica that shows that it is relatively easy to establish a business in Jamaica; it is relatively easy to start up a business in Jamaica; that there are 6 procedures here as opposed to 5.8 in the OECD countries, but that the difficulty of enforcing contracts in Jamaica is much more onerous of a prospect that it is in many parts of the world, including the OECD, so that in Jamaica it takes 655 days to enforce a contract, as opposed to 462 in the OECD. That the percentage cost of the claim is 45.6% in Jamaica, as opposed 18.9% in the OECD countries. That may be a reflection of the cost of legal services in Jamaica. The rating is that the time between the filing of the claim to service is 45 days – that's speaking about Jamaica. The time from trial to judgment is 540 days and for enforcement, 70 days.

Attorney's costs as a percentage of the claim in Jamaica is 35%. The cost of enforcement is 10% . Now, the source of that data, according to the World Bank study, is what they describe as the "Kingston Commercial Court". I have no idea what they are talking about. If they are talking about our commercial court – the Supreme Court, I think most of us here know that it doesn't work. If they are talking about the Resident Magistrates Court, then I'm not sure where they got the data from. Whereas when Danny Williams and I were youngsters we used to have the Jamaica Handbook published every year with statistics of every type, including the number of cases filed in each court and in each parish; the numbers

that were resolved and the arrears, when the Jamaica Justice System Committee was sitting, there was no reliable data for the statistics of civil matters in the Supreme Court and the data in respect of the Resident Magistrate's Court was highly flawed.

But what we can say with some absolute certainty is that the limit of the jurisdiction of the Resident Magistrates Court in Jamaica in civil matters is \$250,000. That is to say, the civil courts in the Resident Magistrates Court which do more than 70%, probably 80% of all the litigation in the civil courts in the country - the limit to the amount of claim that you can make is \$250,000. That any modification of a house, many insurance contracts – the premiums are more than that - and particularly for the small business sector that means that they are faced with the following choices: you have a claim of \$250,000 , \$500,000 you know that in the Resident Magistrates courts your claim can be processed in somewhere between 9 months to a year from the time after filing to conclusion, notwithstanding all the problems of the Court, notwithstanding the horrible conditions in the Resident Magistrates Courts. So you have a claim for \$400,000 or \$500,000. If you bring that claim in the Supreme Court and it is contested you are likely to have to wait for 4 - 5 years and as long as 7 years. I did a study of some larger commercial claims that took 11 years. These were banking cases – in these cases, by the time the matter got to the Privy Council, the weight of the interest alone because of the long time it had taken, made the whole question of litigation in Jamaica completely ridiculous. So that someone having a claim for \$450,000, \$500,000 has to take the hard business decision - do I file the claim in the Resident Magistrates Court and abandon the excess and walk away with my \$250,000 plus costs which is much less than in the Supreme Court, or do I wait for 4 – 5 years when inflation has already savaged the claim and when lawyers' fees have mangled it? Do I wait? Those are the hard facts that people who have small claims in this country have to face, or big companies that have small claims in the country. Because it is not just small businesses people that have to make these choices. But of course you will recognise that when you deal with these factors it's squeezing the small business sector and the small business sector is not growing - the impact on the entire economy and the larger business sector is going to be multiplied many times and is part of the factor that is causing our economy to be just creeping along at this unsatisfactory rate.

So the case for establishing an institutional framework for alternative dispute resolution can be made from many perspectives. This morning I have chosen put it in these particularly graphic terms so you can understand just what is happening. Another part of the downside is of course that where you have this kind of unjust system where you have people having to make these choices, then of course enters the other aspect of our crime portfolio and our ingenuity in terms of enforcement and it is also well documented by the World Bank - and the IDB may have had their hand in it - that a part of the impact of crime on our country is that it encourages extortion and unlawful means of enforcing debts, because of the unreliability of the judicial system. So what is the response of the private sector? It is to talk, and talk and talk again. The legal profession is very much a part of that predisposition to talking problems over and not taking action. Here we are in 2009 going over what we chewed on in 2006. What we need to do is to establish an institutional framework through which commercial disputes can be resolved without having to go to court. Yes, I hear the lawyers and the Institute of Arbitrators that has set up a Jamaica Branch and the Dispute Resolution Foundation and everybody else that is part of the continuous dialogue - saying we have trained so many arbitrators and mediators over the last 10 years under the Civil Procedure Rules. What I am speaking about is to establish an institutional framework that will allow for resolution of commercial disputes without going to court. This is for businesses to write into contracts ADR procedures that oblige parties to the contract as a matter of contract to make use of the machinery before any question of a legal action is considered. Some of the insurance contracts now have these clauses in place - the extent to which it is used, I'm not sure – I don't have the figures. The point is that if the institutional frameworks were in place there could be many models of contracts that could be provided, for the insurance sector, for other sectors.

We need to have standardised rules of procedure through this institutional framework. We used to have a facility for pre-emptive action so you don't wait until the dispute has crystallised; we need to train people in mediation, adjudication – not just arbitration, because the arbitration tends to get bogged down in the same court rules.

I did an arbitration last year where the dispute was submitted in December and my award was made in February; these were particular circumstances. What we need is an institutional framework that is going to modernise the way in which we look at disputes. We need also to pay attention to how we are training our management personnel - existing managers and new managers coming in. What is happening at the Mona School of Business, what's happening at UWI? We need to train them that ADR mechanisms are a management tool, not only in respect of industrial relations disputes where you may be dealing with unions or with staff associations, but in all the other kind of contractual disputes that can be spun out by the variety of business relationships in which people find themselves. I recently have been asked to join the board of the Mona School of Business and one of the things that I said at my very first meeting is that this is an area where you can start to make a difference. It's not just lawyers that should be trained in this, but engineers, personnel officers, accountants; because they are on the floor and they see the disputes before they are crystallised, but it is not going to work if you don't have an institutional framework.

The question is does the PSOJ see itself as an organisation that just serves its members or does the PSOJ see itself as an institution that is here to serve private enterprise generally and to create that level of comfort, say, in this area that somebody who is a business person in Enfield – who has a dispute, recognises that, look, this is bigger than the Resident Magistrates Court, but I believe there is an institution in Kingston that can help me to bring resolution – or it may have an office in Montego Bay or May Pen.

In more developed countries like the UK you have several organisations that are nongovernmental creating this institutional framework. For example, there is a Centre for Effective Dispute Resolution which is probably the most respected of those institutions in the English speaking world. I'm not discounting the work of Institute of Arbitrators who focus mainly on arbitration. The Centre for Effective Arbitration trains and certifies people. I continue, even at my stage, to expose myself to training, so that in August I will be going to Malta to do a course in commercial mediation. It's an intense course but I recognise that no matter what I know or what I have experienced in the courts - I've been practicing for 46 years next month - you still have to expose yourself to new thinking.

The fact of the matter is that we do have the Dispute Resolution Foundation but they are addressing a different segment of society and they are also addressing dispute resolution referrals from the Courts. The truth of the matter is that the statistics from the World Bank and your own personal knowledge and perhaps even the fact that the lawyers on the Justice Reform Committee who were specially invited to this breakfast and are not here, by and large, is an indication of why business people, patriachs - need to understand that lots of things that can be done and must be done to lift the country out of its adjustment fatigue and its malaise of so many years will depend upon private initiative. The question is..... are we ready?

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