

This issue of the ACDS Newsletter, the first for 2010, focuses our attention on the somewhat controversial topic of accreditation for ADR practitioners. Hendrik Kotze provides an overview of the rationale behind the National Accreditation Conference hosted by the Centre. The Conference led to the birth of the **National Dispute Settlement Practitioners' Council** officially launched on 5 March 2010. The objectives of the Council mirror the international trend toward accreditation, as encouraged by the International Mediation Institute (www.imimmediation.org). All interested parties are invited to comment on the initiative. Comments can be forwarded to the Africa Centre for Dispute Settlement, care of Alex.deBeer@usb.ac.za

We are also excited to announce that accreditation is also being pursued in the field of family mediation with the formation of **National Accreditation Board for Family Mediation** 23 March under the Centre's auspices. Constituent members include SAAM, FAMAC, FAMSA Family Life Centre and the KZN Association of Family Mediators.

With the IMI's permission we also publish the article "A Perfect Storm is Gathering" which reiterates the overwhelming need for the accreditation of ADR practitioners.

An article by James Glenn not related to accreditation but well worth the read can be found at www.negotiationbeyondconflict.com/conflictreport.html.

Please note that we've had to postpone the mediators' accreditation course originally scheduled for Cape Town in early April and that the next course, run in conjunction with Conflict Dynamics, will take place in Johannesburg from 19-23 May. There will also be a 1-day mediation advocacy course on the following day, i.e. Monday 24 May. Details are available from Alex.deBeer@usb.ac.za

Enjoy the read!

Regards

Gina Barbieri
Deputy Head, Africa Centre for Dispute Settlement



NATIONAL ACCREDITATION CONFERENCE

Hendrik Kotze

A National Accreditation Conference was held on 5 March 2010 in Johannesburg which resulted in the establishment of a Dispute Settlement Practitioners Council under the auspices of the Africa Centre for Dispute Settlement. The title of the conference was 'Working towards National Accreditation Standards for the Dispute Settlement Industry in South Africa'.

The following document was tabled as a discussion document and adopted at the Conference. The document provides details about the background to, and nature of, the initiative. Members of the following organisations were present at the Conference: AASA; Tokiso: Conflict Dynamics; NADEL; Advocates for Transformation; ACDS; and the Law Reform Commission. Apologies were received from a number of interested organisations, including the Law Society of SA.

All interested parties are invited to comment on the initiative. Comments can be forwarded to the Africa Centre for Dispute Settlement, care of Alex.deBeer@usb.ac.za

Working towards National Accreditation Standards for the Dispute Settlement Industry in South Africa¹

Background

There has been considerable debate locally and internationally over accreditation standards for mediators and arbitrators (collectively referred to here as 'dispute settlement practitioners' or 'practitioners').

At its most basic level accreditation involves the formal recognition of individuals, organisations or programmes in a particular profession, in terms of specified objective standards relating to qualifications, competence and performance. Accreditation systems are often reinforced in the promotion of quality, standards and ethics by practice requirements relating to codes of conduct, service delivery, compliance mechanisms and complaints-handling systems.

In South Africa this debate has occurred in the absence of any national mandatory system of accreditation for dispute settlement practitioners.

A number of organisations (statutory ones such as the CCMA, or commercial enterprises such as Tokiso, or voluntary associations such as AASA) have formulated criteria for admitting practitioners to their 'panels'. Outside of these organisations, the actual appointment of practitioners is often based on reputation or word-of-mouth recommendation, regardless of their formally recognised competence in dispute settlement processes and techniques.

¹ In preparing this document, extensive reference was made to a number of international documents relating to similar schemes and models. The conscious intention is to align the SA initiative with such international initiatives. Documents referred to, and from which sections are quoted include:

Mediator Accreditation in Australia: Report to The 8th National Mediation Conference, Hobart, Tasmania, 3-5 May 2006; Civil Mediation Council: Registered mediation organisation scheme, 2009; Civil Mediation Council: Registered mediator scheme, 2009; International Mediation Institute Annual Review 2009

While there is a diversity of views in relation to accreditation, the weight of opinion and practice is towards the view that there should be a uniform system of practitioner accreditation. Examples of this can be found in the United Kingdom, Australia, Canada, and many other jurisdictions.²

A national uniform system of practitioner accreditation would usually have the following objectives:

- the improvement of practitioner knowledge, skills and ethical standards;
- the promotion of standards and quality in mediation practice;
- the protection of the needs of consumers of mediation services and the provision of accountability where they are not met;
- the conferring of external recognition to practitioners for their skills and expertise;
- the development of consistency and mutual recognition of practitioner training, assessment and accreditation; and
- and a broadening of the credibility and public acceptance of dispute settlement services and practitioners, here and abroad.³

In most jurisdictions the need for a uniform national standard became pressing as soon as the use of mediation or arbitration was institutionalised through a government initiative. One example of this is the National Mediation Helpline in the United Kingdom.

In this context government has prescribed that, in order to participate in the scheme, mediation organisations must be accredited by the Civil Mediation Council.

The initiative set out in this proposal is therefore based on the assumption that the above objectives are also important in the South Africa context, and that some form of uniform practitioner accreditation is also appropriate for South Africa. It is also based on the view that self-regulation of the industry is, on the whole, preferable to regulation by government.

² See, amongst others, the international accreditation standards administered by the International Mediation Institute; the European Mediation Directive (art 4), which urges the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing private mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services (see <http://www.nortonrose.com/knowledge/publications/2008/pub16352.aspx?page=all&lang=en-gb>). Other examples include the National Mediation Standards and National Practice Standards that were introduced in Australia (see <http://www.leadr.com.au/accreditation.htm#National>); the UK's Civil Mediation Council (CMC) drafted regulations and codes; the French Académie de la Médiation, a body convening the judiciary, lawyers, disputants and mediators, announced the creation of the Institut Français de Certification des Médiateurs (IFCM), an independent non-profit body designed to certify the competency of experienced mediators based on advanced skills assessments conducted by an independent entity. The CPR Institute announced that it would introduce a voluntary performance rating system for its Distinguished Panel of Neutrals (www.cpradr.org/tabid/45/articleType/ArticleView/articleId/531/Default.aspx).

³ See 'Mediator Accreditation in Australia: Report to The 8th National Mediation Conference', Hobart, Tasmania, 3-5 May 2006



The initiative

During 2009 the Africa Centre launched an initiative to gather support and momentum in the industry for a uniform system of practitioner accreditation. Individuals from a wide range of organisations were consulted.

The general view of those consulted was that:

- The time is ripe for such an initiative. It is common knowledge that serious consideration is being given by the South African Justice Department to introduce some form of compulsory mediation in the South Africa Courts. In this context it is important that the dispute settlement industry takes the initiative in setting uniform standards. In the absence of this government may soon feel the need to fill this void.
- The Africa Centre was an appropriate vehicle for hosting such an initiative. The Centre has purely public service goals and is not a service provider in any sense. It does not compete with any arbitrator or mediator or service provider (though it does provide training). Its role is to promote knowledge, excellence and thought leadership - and to inspire the use of arbitration and mediation in all forms.

Working committee

The Africa Centre therefore established a working committee to promote this project. The members of the working committee were Barney Jordaan, John Brand, Tanya Venter, Paul Pretorius, Fergus Blackie, Laurence Boule and Hendrik Kotze.

Though these persons are members of the Africa Centre, Tokiso, AFSA, Equillore, AASA, Wits University and Conflict Dynamics, they did not participate in any representative capacity. The activities of the working committee were exploratory in nature, and none of the outcomes as yet carry the official sanction of any of these organisations.

The working committee discussed and drafted a proposal (see below) which was formally presented for consideration to interested members of the industry at a national conference held at Wits on 5 March 2010, under the auspices of the Africa Centre. The formal title of the conference was 'Working towards National Accreditation Standards for the Dispute Settlement Industry in SA'.

The purpose of the conference was to -

- formally introduce this proposal to industry players;
- host further debate around the issues raised by the proposal;
- arrive at a decision regarding the implementation of the proposal.

The proposal for a national uniform system of practitioner accreditation is not mutually exclusive of other forms of accreditation. In the immediate term it would sit alongside existing systems, but it is envisaged that it would eventually become the benchmark in the industry.

This initiative will also in due course be aligned with international accreditation initiatives, such as those of the International Mediation Institute (of which the Africa Centre is already a 2nd tier accredited provider).



Conclusion

Arbitration and mediation remains under-utilised in most countries. In the view of many this is not the fault of arbitration and mediation but how it is presented - as an informal, 'alternative' system, based mainly on personal or first-hand experiences rather than as a true profession in its own right.

A uniformed national accreditation programme, supported and managed by the industry, is a definite step towards establishing a true profession.

The Proposal

The proposal contained in this document is premised on the following:

- a. There is a widely expressed desire among practitioners to ensure high standards of professionalism in dispute settlement practice, to improve the status of practitioners, to have greater mutual recognition across different industry sectors, and to promote the confidence and protection of consumers, without affecting innovative and creative practice;
- b. There is a strong preference for a national uniform system of practitioner accreditation to be based on self-regulation by the industry, operating on a devolved basis through relevant existing organisations, without direct state regulation or formal legal status;
- c. There is a desire to remain ahead, or abreast, of comparable occupations and professions, and comparable developments for practitioners abroad;
- d. There is a need for an initial national uniform accreditation system to be relatively basic, simple, inexpensive and easy to implement, and to be built on the foundations of existing organisations and practitioner experience;
- e. It is desirable that an initial national uniform accreditation system must have the in-built capacity for evaluation, review and adaptation over time in terms of changing needs and policies;
- f. There is a need for practitioner accreditation to be regarded as legitimate by interested parties and users, to cater for diversity in dispute settlement practice, for it to involve collaboration across industry sectors, and to have transparency in all aspects of the system;
- g. And there is recognition that the national conference referred to above has no legal or constitutional authority in this regard, but as a gathering of members of the industry can make recommendations and provide direction in relation to a uniform national accreditation system.⁴

⁴ These terms are very much aligned with those that underpinned the proposals presented to the 8th national mediation Conference in Australia in 2006. See "Mediator Accreditation in Australia: Report to The 8th National Mediation Conference, Hobart, Tasmania, 3-5 May 2006"

The details of the proposal are as follows:

It is proposed that:

1. A national body, to be called the 'Dispute Settlement Practitioners Council' ['DSPC' or 'Council'] should be established.
2. The objectives of the Council will be to:
 - a) Define and publish affiliation requirements for membership to the Council.
 - b) Define and publishes national accreditation standards for dispute practitioners (mediators and arbitrators), as well as trainers, courses and assessors, aimed at developing skills in these fields.
 - c) Maintain and publish a national register of affiliated service providers, accredited settlement practitioners, trainers, courses and assessors.
 - d) Actively promote transformation and racial and gender representivity in the dispute settlement industry.
 - e) Actively engage with all role players involved with or affected by the dispute settlement industry on matters of mutual interest.
 - f) Monitor adherence to the affiliation requirements by all member organisations.

Membership of the Council will be open to organisations whose principle activity is to offer dispute settlement services. 'Dispute settlement services' is in this context defined as mediation and arbitration processes (and includes variants and hybrids of these processes), and all ancillary and support services relating to such processes (including case management and training).

All organisations that affiliate with the Council will, through their membership, be required to endorse the objectives of the Council and the accreditation standards determined by the Council.

In order to accomplish the above objectives, the Council will be required to in due course consider and adopt the following:

- a) affiliation Requirements for membership of the Council;
- b) a National Minimum Accreditation Standard for mediators and arbitrators [NMAS];
- c) recommended code of conduct for mediators and arbitrators; and
- d) details of qualifying criteria for trainers and assessors, as well as minimum course content.



A number of industry organisations will be invited to attend the *'Working towards National Accreditation Standards for the Dispute Settlement Industry in SA'* conference. The purpose of the conference will be to -

- a) formally introduce this proposal to industry players;
 - b) host further debate around the issues raised by the proposal;
 - c) arrive at a decision regarding the implementation of the proposal. In this regard a Draft Operational Framework for the Council will be tabled for discussion at the conference (see more detail in the next section of this document);
3. At the conclusion of the conference the invitees will be requested to obtain a formal mandate from their organisations to -
- a) endorse the formation of the Council in accordance with the operational policy; and to
 - b) become a founder member of the Council
4. The following organisations will be invited as founder members:
- c) ACDS
 - d) Tokiso
 - e) Conflict Dynamics
 - f) Equillore
 - g) AFSA
 - h) AASA
 - i) CCR
 - j) ACCORD
 - k) Law faculty, Wits
 - l) Law faculty, UP
 - m) LEAD (LSSA)
5. The Council is to be hosted as a standing committee under the auspices of the Africa Centre for Dispute Settlement at the University of Stellenbosch Business School [the Centre]. The governance of the Council will be seated in an Executive Committee comprising industry representatives.

General principles contained in the Draft Operational Framework of the Council

This document provides the framework for the operational implementation of the Council:

1. The Council will formulate a National Minimum Accreditation Standard [NMAS]. This will allow practitioners who satisfy the specified requirements to be accredited by the Council.
2. The Council will be operated by representatives of those mediation and arbitration organisations which are affiliated to the Council. A number of organisations will be invited to be founder members of the Council, in order to launch the initiative.
3. Member organisations of the Council will be required to endorse the NMAS as a minimum requirement for practitioners affiliated with them, but will be at liberty to prescribe additional affiliation standards in respect of membership of their organisations.
4. There will be no compulsion by the Council for practitioners to obtain this accreditation in order to practice. Although the essence of the scheme is that it is voluntary, the Department of Justice and other government, judicial, and influential bodies and organisations will be encouraged to use, and to recommend that others only use, affiliated service providers and accredited practitioners.
5. There will initially be one level of accreditation in the system with advanced or specialised forms of accreditation to be considered later.
6. There will be a National Register of Practitioners for those accredited to the NMAS.
7. The Council will facilitate adherence by all its member organisations and all practitioners to professional conduct standards that meets certain recommended minimum requirements. The Council may also from time to time consider and publish minimum service delivery standards to be expected from affiliated members.
8. All member organisations shall be required to adopt a code of conduct that meets the minimum requirements of the recommended code of conduct published by the Council.
9. All practitioners who apply for accreditation shall be required to be affiliated with one or more affiliated service providers, and to confirm their commitment to the Code of Conduct and minimum service delivery standards (if any) adopted by those service providers to which they are affiliated.
10. In order to retain accreditation to the NMAS, practitioners will be required to undergo continuing professional development (CPD).
11. Member organisations will be required, as part of their recognition requirements, to provide a procedural framework for dealing with complaints and grievances against practitioners.
12. The system will be resourced through fees paid by practitioners who seek accreditation in terms of the NMAS.

Conclusion

Arbitration and mediation remains under-utilised in most countries. In the view of many this is not the fault of arbitration and mediation but how it is presented - as an informal, 'alternative' system, based mainly on personal or first-hand experiences rather than as a true profession in its own right.

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A Perfect Storm is Gathering

"The future ain't what it used to be" - Yogi Berra, Former Coach, New York Yankees

A Perfect Storm is gathering, comprising the effects of severe economic downturn, the alacrity with which corporate law departments seek greater transparency and outcome certainty, and new tools in the field of information and communication technology. This convergence provokes serious changes in attitude and approach by all dispute resolution stakeholders – especially trial lawyers, mediators and mediation provider organizations. The status quo has had its day. Good news for those nimble enough to adapt quickly. Money is a scarce commodity. Traditional litigation is a money-consumption machine. Technology can disseminate, instantly and globally, useful feedback about dispute resolvers' styles, making the mediator best suited to resolve a dispute easily identifiable. The dire economic climate and the increasing growth of mediation have made the early use of mediator not just good practice, but economic necessity. A wonderful snippet of homiletic wisdom is found in the writings of Og Mandino, author of *The Greatest Salesman in the World*. It was so obvious we were bound to ignore it. Do not allow yesterday's success to lull you into today's complacency, for this is the great foundation of failure. Never have these words rung more true, and demanded more attention and action, than in 2009.

The hurricane of an economic and financial turmoil of unprecedented proportions is roaring into every vested domain. Gone are the days when corporate leaders can feel at liberty to play Russian roulette with shareholder – now read stakeholder – interests and get their way mainly by force and bluster. The economic meltdown of the last eighteen months has left an empty theater. Enter, stage right, the eight choreographers of the New Economy – responsibility, transparency, authenticity, trustworthiness, certainty, competency, sustainability, and frugality.

These are critical factors that, in the post-meltdown world are capable of injecting confidence into markets, trust into businesses and value into stock markets.

Simultaneously a second wind of change is blowing, bringing a deepening cold front to the legal professional services industry: more demanding in-house counsel. Under corporate governance pressure to manage legal risks, General Counsel and their Corporate Law Departments (CLDs) face severe "in control" requirements.



Expected to deliver positive outcomes and therefore cut costs while enhancing (not just protecting!) the corporation's reputation, CLDs are becoming intolerant of service providers that milk their clients' predicaments for their own fee earning benefit. The days when CLDs are happy to delegate and even abandon a case to a law firm with instructions to let it follow its path, are history.

Now they want transparency and greater control. Lawyers who are reluctant to give clients a clear vision of the risk and cost consequences, or who delay proposing alternative strategies to the desired outcome, will face a reducing workload at a time when their income streams are under pressure.

And there is a third tempest, converging at the very moment the first two collide. Information and communication technology is eroding traditional legal work. An increasing proportion of legal work is now commoditized. Document assembly systems and e-Discovery are big business, creating cost-saving opportunities.

Better, quicker, simpler and less costly ways are emerging for accomplishing many traditional tasks. ODR – online dispute resolution – was one of the big growth areas in 2008. Technology is making true transparency possible, and therefore vital.

These global climatic forces, plus other market developments such as the increasing acceptance of non-litigious forms of dispute resolution and the emergence of more, and more credible, mediators, will force lawyers to change their attitude and perspective. New York Times columnist and author, Thomas Friedman, sees this as the market becoming more adaptable to market needs. In his bestseller *The World is Flat* he talked of triple convergence.

For those who read the signals, change their mindsets and prepare well, this is not Armageddon. There will always be a certain place for court action, but dictionaries will be re-written to cite litigation, not mediation, as the definition of Alternative Dispute Resolution.

Change always accelerates at times of economic stress. Almost everyone now views risk with increasing alarm. Interests consciously predominate over positions. The cast iron case never existed, but now pragmatism; reality and risk factors are weighing more heavily, emphasizing prevention, avoidance and the earliest possible resolution of disputes. Back-to-basics instincts render brash bravado outdated and unacceptable to stakeholders. This will endure long after the world emerges from economic hardship. Such 20th Century business people are a dying breed.

Replacing them is a new entrepreneurial mindset exuding glasnost, humility, reality, resolve, delivery and simplicity. Attorneys will have longer careers if they are artistic engineers with a highly adaptable toolbox of process and substantive approaches to every predicament, using those tools without being told. Aggression, force, rigidity and a win-lose mindset will no longer address client needs. Gary Hamel, a leading business strategy guru, put it unforgettably: "Those who live by the sword will be shot by those who don't".

"Resolvers" will replace "litigators". What some still call "ADR", the field once likened to homeopathy and ridiculed as Alarming Drop in Revenue, will become mainstream.



The need now is to re-focus courtroom skills and put them to better use as creative resolvers, adept at making and saving deals, resolving disputes and preserving relationships.

Unlike litigation, mediation and other forms of private dispute resolution offer versatility.

They will be used by businesses not just to resolve disputes, but to make deals. Settlement counsel and collaborative law will flourish. Neutrals will be co-funded by the parties to act as “Counsel to the Deal” and as “Dispute Boards”. Early Neutral Evaluation, Non-Binding Arbitration, Mini-Trial, Evaluative, Transformative, Facilitative Mediation, and hybrids like Arb-Med will grow as parties tailor process to their precise requirements. For CLDs, selecting the right horse for the course is the name of the game – in terms of the choice of professional and choice of process.

And here comes the rub. How do corporate counsels select the right horse for the course without the right information about the available riders? It’s difficult. Transparency comes into play.

That is why the Perfect Storm heralds change for mediators and provider bodies, accustomed to operating behind a privacy screen. Only the parties, their representatives and provider entities involved in a mediation can really tell how “good” the mediator is, but most never make public that they even took part in a particular mediation. All very secretive and whispered. So too is typically-available information about mediators’ performances.

What worked for a few mediators and providers in the past in terms of vague and general reputation will not sustain them for the future. In the past, the parties’ choice of mediator was based on perception – word of mouth, anecdotal impressions, whether someone they knew thought they were “good”. Hearsay. The world has changed. Uncertain and imprecise forms of endorsement will no longer be adequate for discerning General Counsel and their staffs.

Corporate counsel’s growing appetite for transparency and authenticity will drive demand for access to prior user feedback before making a choice of an individual mediator or a provider institution. Those wishing to maintain the status quo, who are unwilling or unable to offer credible independent feedback from prior users up front, risk being selected less often, however well-known or experienced they may be. Transparency, authenticity and trust are three of the eight choreographers of the New Economy.

Mediators and their provider institutions cannot deny or escape these changes. Their task now is to lead their colleagues by example and validate their profession. This requires stepping out from behind the privacy screen into daylight, meeting the new market expectations head on and turning them to advantage by showing the world’s users how very good they are via the credible, transparent endorsement of prior user feedback. Becoming IMI Certified (www.IMImediation.org) with a Profile and a Feedback Digest, fits the bill. That’s how to enhance credibility, gain recognition, get selected and generate growth.



AFRICA CENTRE FOR
DISPUTE SETTLEMENT

All of this is obvious to users of mediation services; the proverbial no-brainer.
Do not allow yesterday's success to lull you into today's complacency.
Act now to take advantage of The Perfect Storm.

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