

Launch of the ADRA Association of the University of the West Indies, St. Augustine*

Remarks presented by

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PRESIDENT
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**Noor Hassanali Auditorium
The University of the West Indies, St. Augustine
Trinidad, WI**

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* Opening Remarks presented by The Right Honourable Sir Dennis Byron, President of the Caribbean Court of Justice at the Launch of the ADRA Club on Thursday, 23rd May 2013 at the Noor Hassanali Auditorium, UWI, St. Augustine, Trinidad.

Opening Remarks

Introduction

I was invited to make brief opening remarks at this event, the launch of the St. Augustine chapter of the ADR Association of the University of the West Indies, and gladly accepted, not only because I believe in the positive symbiosis between formal adjudication and alternative dispute resolution, but also because I welcomed the opportunity to review the role that ADR has played in Trinidad and Tobago's judicial system and across the Caribbean region more broadly. In the short time permitted to me, then, I hope to convey to you my support of current efforts to expand ADR in the region – such as this Club – as well as some of the statistics and data I have collected about the outcome and outlook for these efforts. I have no doubt that many of you here are already familiar with much of what I have to say, but given the nature of this event, it is hopefully unobjectionable that I vocalize what might already be common knowledge to this particular group of people.

The Revised Treaty of Chaguaramas

It seems sensible and safest to lodge my support of ADR in the provisions of the Revised Treaty of Chaguaramas (Revised Treaty), the same document that called for the creation of the Caribbean Court of Justice (CCJ). It is a document, in other words, on which I rely in more ways than one. For my purposes here, I rely on the Revised Treaty because it leaves little space for misunderstanding when it comes to its steadfast promotion of ADR within the region. Allow me to explain.

Chapter 9 of the Revised Treaty of Chaguaramas is entitled “Disputes Settlements.” It applies, as the opening lines of the Chapter state, “*to the settlement of disputes concerning the interpretation and application of the Treaty...*”. It is noteworthy that Chapter 9 contains a total of thirty-eight articles of which no fewer than twenty-four address what can be called alternative dispute resolution mechanisms. In comparison, twelve articles discuss the creation and

organization of the Caribbean Court of Justice and the remaining two are introductory and conclusory in their tenor.

And, if the number of articles itself is not enough to convince the signatories to the Revised Treaty of the envisioned role of ADR in the Caribbean Community, Article 188 attempts to make the point even more clearly. It states that disputes concerning the interpretation and application of the Treaty, “*shall be settled only by recourse to any one of the following modes for the settlement of disputes, namely, good offices, mediation, consultations, conciliation, arbitration and adjudication*”. That is to say: ADR, ADR, ADR, ADR, ADR and, finally, adjudication.

And, still, if Article 188 does not drive home the importance and imperative of ADR to the Community, Article 223 – entitled “Alternative Disputes Settlement” – makes the point as forcefully as possible. It reads in part:

- 1. The Member States shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other modes of alternative disputes settlement for the settlement of private commercial disputes among Community nationals as well as among Community nationals and nationals of third States.*
- 2. Each Member State shall provide appropriate procedures in its legislation to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.*

Based on these articles and the sheer amount of space dedicated to ADR in the Revised Treaty, it is evident that the Revised Treaty of Chaguaramas takes alternative dispute resolution very seriously and intends to build and support such mechanisms across the region. From my personal perspective, it may sting just a little bit to recognize that the CCJ garners the attention of only twelve substantive articles in the Treaty, while ADR deserves twenty-four, and that adjudication is listed last after a long string of ADR options. Yet, at the same time, I cannot shake from my memory my years as Chief Justice of the Eastern Caribbean Supreme Court and the hefty caseload that we managed there, and I cannot ignore the backlogs and delays experienced in many courts around the region today. When I consider this totality of circumstances, I must acknowledge that ADR is essential for the provision of efficient and

effective justice that meets the diverse needs of varied parties engaged in a wide range of disputes and disagreements.

Beyond the Revised Treaty of Chaguaramas

The Revised Treaty, though, should really be considered as a codification of what is or should already be known and accepted arguments in favor of ADR and what it can do to enhance the administration of justice. These are arguments, I should note, that have certainly persuaded me, and while they are well-rehearsed, it is important to be reminded of the benefits of ADR. I'll mention a few here.

Particularly in light of the heavy caseloads borne by Caribbean courts, ADR can offer a speedier and more efficient avenue to justice. Faster resolution of disputes frequently equates to lower costs, and lower costs often mean greater access to justice, a goal, I should point out, that rests at the heart of the CCJ. Indeed, when compared to a full trial, alternative dispute mechanisms generally cause less pain to the pocketbook.

While the purpose and overall structure of ADR remains unchanged whether litigants enter the program voluntarily or by court mandate, there are some additional qualities of court-annexed ADR that I would like to draw our attention to. These go directly to the enhancement of the administration of justice. Specifically, court-annexed ADR – most commonly in the form of mediation – supports and complements court reform and assists in alleviating backlogs, reducing delays, managing case loads and streamlining procedures to accelerate case disposition.

While speedy and less-costly justice is a notable benefit of ADR, the emotional and psychological improvements for litigants should not be discounted. Both court-annexed mediation and other non-court-annexed ADR mechanisms have the potential to serve the parties better. Parties are often given a voice in deciding who serves as the mediator or arbitrator in their matter. They might be able to work more closely with this person or persons and be permitted the flexibility to find a more creative and satisfactory resolution to the dispute; a resolution that can be tailored to preserve relationships, balance the needs of the parties or address longer-standing issues that undergird that issue at hand. By providing litigants with

greater control and involvement in the strategy and decision-making in their matter, litigants can come away with a greater sense that they are the masters of their own destiny, that they have been heard and are being understood. These are feelings that lead to a more profound satisfaction in both the process and the resolution. Moreover, ADR, particularly mediation, can also offer what many parties feel to be an attractive level of confidentiality, affording litigants an opportunity to express their interests without compromising their legal rights or risking their personal relationships. Indeed, the prospect of confidentiality may entice more people to pursue justice or to be more forthright in their testimony.

These benefits help to bolster the reputation of our system of justice in general, lending to it an increased ability for empathy and building a greater sense of trust and confidence within the regional community. Even more broadly, by introducing a less confrontational and adversarial process, ADR can help shift the psychology of the greater public by fostering an environment that is more conducive to regional trade and region building in general.

Regional Alternative Dispute Resolution Efforts

Regrettably, despite the benefits I described a moment ago, the use of ADR across the region remains in a largely developmental stage. Jamaica, it seems, has the most developed ADR program with a focus on mediation. Indeed, Part 74 of the Jamaica Civil Procedure Rules requires parties in most disputes to attempt mediation before a matter can be heard in court. It does not appear that other countries in the region have gone quite this far yet, though Guyana, the OECS, and Trinidad and Tobago have shown some level of commitment. Guyana's Mediation Act requires parties to certain types of disputes to use court-annexed mediation. St. Lucia's Civil Procedure Rules states that the court may "*encourag[e] the parties to use any appropriate form of dispute resolution including, in particular, mediation, if the court considers it appropriate and facilitating the use of such procedures*". And, Trinidad's Mediation Act gives the court discretion to refer parties to a certified mediator for any matters other than criminal matters. Trinidad has also launched two notable pilot programs for court-annexed mediation – in 2010 and, very recently, in 2013. All of these efforts should be applauded and encouraged.

Unfortunately, statistics on the successes of Jamaica's court-annexed mediation program are difficult to come by. However, I did come across some of the numbers associated with Trinidad's 2010 pilot program. The numbers are impressive and bear mentioning. Sixty percent of the cases were settled through court-annexed mediation during the 2010 program. Of these cases, eighty percent were settled within the initial five-hour scheduled mediation, which amounted to a significant cost and time savings for these parties. Moreover, and arguably more importantly, there was a reported ninety-five percent customer satisfaction rate amongst those who were referred to court-annexed mediation.

These encouraging findings are not unusual. The United States Department of Justice reports that for litigation in which the Department was involved in 2012, voluntary ADR proceedings resulted in a sixty-nine percent settlement rate, while court-ordered proceedings led to a forty-nine percent settlement rate. Beyond the successful settlements, the Department of Justice further reports that those cases that were not settled through mediation still experienced other benefits, namely the narrowing of trial issues, resolution of discovery disputes or progress towards settlement. And, more quantifiably, amongst those cases that did result in a settlement, there was a reported cost savings of a staggering \$12.6 million, a time savings of 9,047 days of attorney and staff labor and over 1,500 months of litigation avoided in 2012 alone.

In the face of numbers like those generated by Trinidad's first pilot program and those experienced in the United States, it is difficult to dispute that ADR can lead to substantial and measurable changes in the way cases are resolved and, critically, how disputants experience the justice system. It is similarly increasingly difficult to refrain from predicting great successes for Trinidad's 2013 pilot program.

Addressing the Critics

Indeed, given the Revised Treaty's not-so-subtle support of ADR, the theoretical benefits of ADR and the actually measured successes of ADR, it is hard to explain the still-underdeveloped nature of ADR in the region. The opinion of some judges, I realize, might have something to do with this. There are those who continue to view ADR with some hesitation. Arbitration of major commercial disputes, for instance, can be seen as competition for clients who might

otherwise utilize the courts. While the sixty percent settlement rate and the ninety-five percent satisfaction rate of Trinidad's 2010 pilot program might sound like music to our ears, those same numbers could stir-up deep-seated concerns for some of Trinidad's judges, who might begin worry over the security of their jobs. However, I do not see it this way, particularly when it comes to court-annexed ADR.

I refer to a recent talk I gave at the Society for Trust and Estate Practitioners (STEP) Conference in Nevis. There I noted that in several small jurisdictions in the Caribbean there is only one Resident Judge assigned to deal with all matters that reach the court – criminal, civil, constitutional, matrimonial, and commercial. I asked rhetorically whether these small jurisdictions where a single judge must cope with general litigation are handicapped with specialist or massive commercial litigation? I suggest here that court-annexed ADR might be a viable way to address this concern, not just in smaller Caribbean jurisdictions, but also in the larger ones that also inevitably experience the stress and burdens that massive, complex commercial cases put on their court's time and resources. Court-annexed ADR is a means that can keep the matter within the jurisdiction – and under the court's own purview – but permit these complex issues to be heard by an experienced and trained arbitrator or mediator who has both the expertise and time to fully vent the issues involved in the case.

The willingness to use this type of case management can only reflect well on the judicial system, and, as I said in Nevis and I repeat here, a highly functioning and efficient judicial institution will attract investment and undoubtedly encourage consumer trust and confidence. ADR, in other words, can be both a complement to and complimentary of the court system.

Conclusion

And it is for these reasons that I want to restate my support of the efforts of the ADR Association and celebrate the launching of the St. Augustine Club. I wish you every success in your continued and noble goal of introducing alternative dispute resolution opportunities to Trinidad and Tobago and beyond.

Sources:

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