



Address to the Institute of Chartered Accountant of the Trinidad and Tobago Chamber of Industry and Commerce

The Honourable Mr Justice Adrian
Saunders, Judge of the Caribbean Court of

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The Trinidad and Tobago Chambers of Commerce was established since 14 March 1879 and has been engaged in distinguished service to the Trinidad and Tobago business community. We create opportunities for our Membership to leverage shared resources and knowledge and establish key contacts to foster a competitive advantage in the global marketplace. Founded upon the vision and hard work of generations of entrepreneurs and innovators, we are the recognised 'Voice of Business' in Trinidad and Tobago, delivering value to business and the wider national community. With a membership totalling approximately 600 companies and 1,800 representatives spanning the services, import, export, manufacturing and distribution sectors.

Remarks

By

The Honourable Mr Justice Adrian Saunders, Judge of the Caribbean Court of Justice,

on the occasion of

The Anniversary of the Trinidad and Tobago Industry of Chamber of Commerce

14 March 2012

It is a distinct honour and pleasure to have been invited to address such an impressive gathering of business persons in Trinidad and Tobago. At the CCJ we consider that our role as Judges goes beyond merely adjudicating the cases that come up to us and that it extends also to meaningful interactions with the Caribbean public and in particular with the court's stakeholders. For my part, judges of all stripes have an obligation to engage in public education and far from compromising judicial integrity or impartiality, I believe that long gone are the days when judges should regard themselves as being aloof from society.

This morning I am going to speak about mediation and I wish to begin by giving you two experiences of mine. Although I didn't recognize and label it as such at the time, my first experience in ADR was as far back as the early 80s. I was in private practice at the time and one morning two good friends of mine came to my Chambers. They were both young businessmen. Let's call them William and Peter. They explained to me that they had a difference of opinion in relation to a contract they were both engaged in. I can't recall now the precise details of the difference. But I remember that money was at stake. Depending on what the ultimate interpretation of the contract was, one of them was going to have a much more favourable result

than the other. Before they had come to my Chambers they had discussed the matter at some length and had arrived at a stalemate. And then William had a brainwave.

Why don't we go ask the opinion of our lawyer friend, Adrian. Peter readily agreed. And so here they were in my office explaining to me why each side's view of the agreement should be the preferred interpretation. The Agreement was a short one extending to about two pages, I think. I read it slowly and then I listened carefully as each side gave his point of view on the disputed clause which was inelegantly worded. I asked a few questions to make sure I understood the underlying facts clearly and then, with my legal training, I gently but carefully explained why I thought Peter's viewpoint was to be preferred. Throughout my explanation I saw William slowly nodding his head as if to indicate that he understood and accepted my point of view and hence, how and why his initial view was wrong. When I was done they shook hands, Peter with a triumphant grin, William with a sheepish smile. We briefly chatted about cricket before I chased them out of my office so that I could get back to work. The whole thing took about 15 to 20 minutes.

The other story I wish to tell you occurred only a few months ago at the CCJ. We had a case from Barbados. It was a civil case; a dispute between vendor and purchaser. The case was filed in 1998. It was before us in the CCJ for final determination in 2011. It saddened me to read the file. This was a case that could and, I am certain, would easily have been settled by mediation if the same had been available to the parties before the case first went to trial. Yet, for thirteen years, this dispute had languished in the courts slowly wending its way through the formal justice system. I was the presiding judge when the matter came before the CCJ for a case management conference. Now, there are a few points that must be made in relation to mediation and proceedings before the CCJ. A hearing before a final appellate court is of course not the most appropriate forum for

it to be suggested or expected that parties may wish to engage in a mediated resolution of their dispute. Final courts of appeal usually address matters of law that have a legal significance that goes beyond the parties at hand. Final courts engage in what one jurist calls system-wide correction. Their focus extends to protecting democracy, clarifying and unifying the law and setting overall binding precedent. And so mediation is not a particularly apt alternative when a matter is before a final appellate court.

Moreover, by the time a case reaches up to the final court it has already spent such a long time in the system that, because it is now nearing a final resolution, the parties are not likely to be in the mood for the kind of compromises that are inherent in a mediated solution. Each party is more or less confident that they can deliver a knockout blow to the other.

As I contemplated the case, I understood full well all of these points. But at the outset of that case management conference, given the essential nature of the dispute, I felt impelled to ask the lawyers whether they had considered mediation and, if they had not, whether they would be prepared to do so. I was not optimistic that they would accept this offer but I deliberately went out of my way to make the suggestion to them because I wanted to send out a clear message: That mediation is a valid option; that it is not only a valid option but, in a case like that one, certainly in 1998, it was the superior option.

The lawyers in the case were taken aback by my suggestion. One side agreed. The other declined. And so it was, as I anticipated, a No Go. But at least, I thought I had made the point that, notwithstanding what I have said about final courts, mediation was an option that could yet be embraced at any step of the way.

There actually is in Trinidad and Tobago a solid legislative basis for mediation. The Rules that govern the conduct of civil litigation make specific reference to mediation as an appropriate method of dispute resolution. Part 1 of the Civil Procedure Rules states that *the overriding objective* of those rules is to enable the court to deal with cases justly. Part 1 goes on to indicate that, among other things, dealing with a case justly means saving expense and ensuring that the case is dealt with expeditiously and fairly. Another part of those same rules, Part 25, states that the court must *encourage* (note the verb!) the parties to engage in mediation, if the court considers that appropriate.

Trinidad and Tobago is one of the few States in the CARICOM region that boasts of a Mediation Act that specifically provides for mediation. This Act of Parliament, passed in February 2004, establishes a Mediation Board that is appointed by the President. The Mediation Board performs and exercises various regulatory functions and powers. These include accrediting and formulating standards for the accreditation of mediators and mediation trainers, enforcing observance of the Code of Ethics for certified mediators and revoking any registration where the requirements for registration are no longer met. The Board has its own website (which I encourage you to visit) and that site currently contains the names and areas of specialty of approximately 200 certified mediators in this country. The Board's remit includes the creation of a vibrant culture in which disputes and conflicts at every level of this society can be resolved peacefully through mediation.

What is required now is for us to dispel existing prejudices and foster the enabling culture.

The need for a new culture

Mediation is often resisted by the uninformed; by those who tend to oppose change generally and even by some who hold the justice system in the highest esteem. The truth of the matter is that our traditional approach towards the justice sector tends to be very conservative. It is probably a value we inherited from Britain. Just last week I saw a video clip that reinforced in my mind how different we are from Americans in this regard. The video clip was taken from the popular children's programme "Sesame Street". It showed US Supreme Court Judge, Sonia Sotomayor, in her robes, among the puppets, trying a case brought by Baby Bear who had brought an action against Goldilocks for trespass to his chair. As you recall, Goldilocks had sat in it and broke it. And there was Justice Sotomayor presiding over the case. Can you imagine Lord Phillips in England or Chief Justice Archie here in Trinidad on national TV trying a case between two puppets? I think sections of the public would be outraged even though the whole goal is the noble one of getting young kids in a direct and effective manner to understand and appreciate the role of courts and of judges. I think when it comes to the justice system, we're not anxious to experiment, to go beyond the solemn and the formal. And so, we are reluctant to embrace radically new ideas and methods. Of course, this means that court processes become frozen in time and, as everything around us rapidly evolves, court users begin to see the courts and the administration of justice as inefficient, obsolete, slow.

Over 40 years ago, in his Address at the Opening of the new Law term in 1969, your then Chief Justice, Sir Arthur Mc Shine, stated, "...Without reform, without revision, we cannot wholly rid ourselves of the backlog of cases gathered partly as a result of the cumbersome, dilatory and

sometimes archaic rules of practice and procedure”¹. Those words are as true now as they were then. But it must be said that over the last ten to fifteen years, throughout the Caribbean region, there has been a determined effort to modernize courts; to render them more efficient and effective; to adopt measures that satisfy their customers and to win back the people’s trust and confidence. The promulgation in 2006 of the new Civil Procedure Rules by Chief Justice Sharma forms part of this process. Those rules are designed to introduce a fresh, forward looking culture of dispute resolution.

Commercial disputes in particular – like our vendor and purchaser dispute in Barbados that spent a dozen years in the system - should be settled quickly. Business professionals like yourselves appreciate that time is money. When a commercial dispute stretches on for umpteen years before it is finally resolved by the courts, no one wins. Not the eventual victor, who cannot be compensated for the lost opportunities, the uncertainty and the emotional and psychological stress endured over the years; not the losing litigant who could be ruined financially by having to pay enormous legal fees in addition to the judgment ultimately given against him; not the reputation and credibility of the civil justice system which suffer immeasurably when there is such delay; and not least of all the national economy which loses out on investment and business activity.

You know better than I do that one of the most critical matters a businessman takes into account in determining whether to invest in a country is the reputation and the level of efficiency and effectiveness of that country’s justice system. If the wheels of the justice system are well oiled the country automatically becomes much more investor friendly and competitive!

¹ Quotation taken from Annual Report of Trinidad and Tobago Judiciary 2010-2011, page 6

Your letter of invitation to me referred to the fact that the business associations in this country are all affected by the current lengthy tax litigation process. That is unfortunate. I have no doubt that wherever you see a backlog of files awaiting trial, each of which represents some fractured human relationship, there are invariably, many disputes which, with good will on both sides can be settled quickly and without stress; just like my two friends settled their dispute in my Chambers.

The truth is that adversarial litigation often does not lend itself to an expeditious or amicable resolution of disputes. Courts are naturally inefficient at mending fractured relationships. Such repair work can hardly be accomplished by ordering the deployment of the coercive power of the State or by constraining the mending process by procedural rules that are often poorly understood.

Compare this with mediation in which a neutral third party assists the disputants in reaching an agreement! Mediation has a restorative, cathartic quality to it. Such a process can actually heal the fracture because it provides greater flexibility in fashioning a resolution of the dispute. A mediated settlement can be tailored to suit the peculiar needs of the parties as compared with the strictly defined and unyielding forms of resolution which must be adopted by a court. A mediated outcome is capable of shifting the spotlight away from rights and instead the mediator and the parties can concentrate on satisfying interests. Consider this rather trite hypothetical: Here is a man rearing pigs and a woman selling lemonade. They have a dispute over the ownership of a bag of oranges. Each wants the oranges for their respective business. A court must determine who has a right to the bag of oranges. A mediator can say, Look guys, you can settle this easily. Why doesn't the man peel the oranges and go off with the orange peel that he wants for his pigs and then the woman can get the oranges for her juice business. That is what you call a win-win result. Each side is fully satisfied.

Moreover, the enforceability of decisions or judgments arrived at through mediation is always less problematic than the enforcement of judgments given by a court. Winning a court case after a bruising trial is one thing. Recovering the fruits of your judgment is quite another. The losing side after a trial often complies very reluctantly with the judgment, thus forcing the successful party to go back to court to seek enforcement orders. On the contrary, the consent orders arrived at through mediation are invariably complied with in a relatively prompt manner. Why? Because the paying party has been involved in the decision-making process and the obligation he incurs is one that has been entered into voluntarily by him.

Mediation enhances the efficiency and effectiveness of the justice system by expediting case flow; by taking out of the system those cases that can be resolved extra judicially thus leaving judges and court staff with more time to concentrate on those matters that absolutely require judicial input.

The point I wish to make is this: even beyond the benefit to the parties themselves, mediation has an intrinsic value to it which should impel the State, the administration of justice, the business sector and the legal profession to invest heavily in it.

The introduction of Mediation in the Eastern Caribbean

I count myself as being extremely fortunate to have been involved in the establishment of court-connected mediation in Saint Lucia and by extension, the Eastern Caribbean. We started literally from scratch. First, we engaged in several rounds of public awareness. We organized programs designed to educate the judicial officers, some of whom were initially skeptical, of the benefits of mediation. This educational work among the judiciary was important because ultimately, it was

the judges who were required to refer parties to mediation. They therefore needed to be knowledgeable about the mediation process.

Some enterprising judges were initially somewhat dismissive of structured mediation. They felt that it yielded no added value because, as they were proud to state, already they practised mediation at case management conferences. They felt, therefore, that if they could not get parties to settle, a professional mediator, who may well have no legal training, didn't stand a chance of doing so either. We had to explain patiently to such judges that in our court system a sitting judicial officer does not and cannot properly *mediate* a dispute; that fundamentally, a mediator's role is different from that of a judge; that you cannot properly equate the two roles. A judge in court or at case management or settlement conference might use *some* mediation techniques to encourage a settlement, and that is fine, but mediation is a whole lot more than the employment of such techniques. A judge, for example, cannot caucus with one side of the dispute behind the back of the other side.

Trinidad and Tobago is much more fortunate now than we were in Saint Lucia back then. We had no legislative Mediation infrastructure as you now have here. Our Judicial Education Institute had to train all our mediators. And they were trained by Trinidadian mediators – Mrs Deborah Mendez-Bowen and Ms Sandra Paul.

The system, which was commenced in November 2002, worked like this: When a civil matter came before a judge for case management, the judge would determine whether it should be referred to mediation. If the judge decided to refer the case to mediation that decision became an order of the court which the litigants were obliged to obey.

We tended to refer cases that we thought were eminently suitable for mediation and only those matters where each side was willing to mediate. When we evaluated the project several months after it had commenced we noticed, inter alia, that of the completed mediations held, approximately 70% of them had resulted in a full settlement of the dispute. That's a very high proportion. It was that high because of the overly cautious approach we had adopted in referring cases. We decided that we needed to be bolder. After all, if the prime benefit of mediation is expedited case flow then, if over a four month span 100 cases are referred and a settlement rate of 70% is achieved (i.e. 70 cases are settled), less cases are actually being disposed of than if 200 cases were referred over the same period and the settlement rate was only 50% (in which case 100 matters would be disposed of).

A few months into our pilot we therefore began to urge the Judges to be more aggressive in making mediation referral orders. The consent of the parties was to be regarded only as *a factor* to be taken into account but the judge should not consider it to be the sole or even the determining factor.

From these early beginnings, mediation has truly taken off in the OECS. In Grenada now, for example, almost 20% of the cases disposed of in the High Court are settled by mediation.

The attitude of the legal profession

I wish to turn now to the attitude of the legal profession to court connected mediation. If lawyers are ignorant of and hence distrust the mediation process; if lawyers convince themselves that mediation is not in their interests because they consider that it poses a significant threat to their

incomes, if lawyers do not support mediation, they can undermine the success of this important adjunct to court trials. In the Eastern Caribbean, Court connected mediation has been in operation for almost ten years. What do the lawyers there think of it? A few months ago I took the trouble to solicit the views of four senior lawyers from that jurisdiction. The consensus that emerged was that the lawyers were overwhelmingly in favour of mediation. One of them said to me that in fact, what was needed was *more* mediation because he had become impatient with the delays that seemed endemic in court litigation.

Last week I spoke with my friend and professional colleague, Justice Vashiest Kokaram. Justice Kokaram is the Chairman of the Trinidad and Tobago Mediation Board and he has been doing an exceptional job in promoting mediation as an appropriate dispute resolution mechanism throughout the courts of this country. He has recently spearheaded a High Court annexed mediation Pilot Project that saw scores of cases filed in the High Court Registry being sent to mediation on a voluntary basis. The pilot lasted for approximately six months. The cases referred were of a commercial and non-family nature comprising such matters as landlord and tenant issues, land disputes, negligence and debt collection cases. I was not surprised when he indicated to me that the success rate was 60%. And even more significantly, the satisfaction rate was 90%. In other words, 6 out of every 10 matters referred were resolved. And of the lawyers and litigants who participated in the pilot, 9 out of every 10 expressed satisfaction with the process. This mirrors the results that have been achieved in the OECS and it betrays a myth about the interest lawyers have in mediation. Contrary to what some people may think, a good lawyer really has little interest in dragging out a single matter so that he can mercilessly milk the client for more and more fees. Instead, as with any reputable service provider, fundamentally, lawyers want

satisfied clients and they want turnover. An efficient and effective justice system is just as much in their interests as it is in everyone else's.

It would appear that, internationally, there was a view at one time that because of its peculiar nature tax matters were not amenable to mediation. It is understandable why such a view should have emerged. Each taxpayer should be obligated to pay no more and no less than precisely what the taxpayer is by law required to pay to the revenue. And so, if the applicable legislative provisions are unambiguous; if the underlying facts are not in dispute; if the outcome of the dispute is clear; if there are no existing conflicting decisions or judgments, then it is easy to understand why mediating tax matters may not be wise or indeed possible.

Nevertheless, the notion that tax matters cannot or should not be mediated has come under serious challenge lately and has actually undergone a change in recent times. In the USA, Australia and in the UK mediation is increasingly being used to resolve tax disputes. I recently came across an article on the internet where the distinguished US tax Attorney, Michael I. Saltzman states that:

“In more than 30 years of trying tax cases, mediation is the most constructive procedure I have encountered to resolve tax disputes. It is a cost-effective and time-efficient procedure for settling factual issues, such as valuation issues, including those involving transfer pricing. For these reasons, mediation is an ADR procedure that we should not merely know about. Mediation should be seriously considered when factual issues cannot be resolved in the normal course of administrative processing and Tax Court litigation.”²

² Tax Court Mediation: A Case Study by Michael Saltzman; Accessed on 12th march 2012 at

http://findarticles.com/p/articles/mi_m6552/is_n6_48/ai_19030649/

The Australian Associate Professor Richard Fayle has noted other examples of tax issues where a mediation procedure is helpful. He cites instances where the dispute relates to whether expenditure qualifies as research and development expenditure or whether accounting principles are appropriate in deciding when an outgoing has been incurred in a taxation dispute. He lists the following other matters which he thought might be resolved by mediation: a) where the Revenue Commissioner's discretion has been exercised (for example in relation to penalties); b) where apportionment is appropriate; c) where the calculation of taxable income involves estimates; or d) instances where the taxpayer considers that he has been dealt with unfairly or rudely or subjected to abuse³. In the last mentioned circumstance mediation may have no impact on the revenue but it might at least affect reputations or mend broken relationships.

Just last month an article in the International Tax Review confirmed that the UK too have been using mediation as a new way of settling tax disputes. The motivating factor is similar to that which has fuelled an interest in mediation generally – court backlogs and high litigation costs. The UK authorities have therefore become interested in ways of avoiding cases going through the whole appeals process. In 2011 Her Majesty's Revenue and Customs published an update of its Litigation and Settlement Strategy. The document sets out the principles covering the circumstances in which tax authorities settle disputes and, without ruling out litigation, it expressly sanctions the use of alternative dispute resolution⁴.

³ See: MEDIATION IN TAX DISPUTE MATTERS By Associate Professor Richard Fayle accessed 12th March 2012 at <http://www.buseco.monash.edu.au/blt/jat/1999-issue2-fayle.pdf>

⁴ "Mediation Makes Ground in Resolving Disputes"; International Tax Review; February 2012

I know for a fact that the Chairman of the Tax Appeal Board His Honour Anthony Gafoor is in full support of the use of mediation as a vehicle for resolving tax disputes in Trinidad and Tobago, provided of course it is undertaken voluntarily by the parties in dispute. When I spoke with him recently he reminded me that by section 9 of the Mediation Act the Tax Appeal Board is designated as an Approved Mediation Agency. What does this mean? It means that the Board is required to establish and keep up-to-date a register containing the names of mediators registered under the Mediation Act. It also means that the Board is authorized to permit or to facilitate mediation in cases coming before it. Given these circumstances, I can hardly see any obstacles in the way of shortcircuiting lengthy tax litigation by resorting to mediation in those instances where there is scope for a mediated outcome.

Of course, mediation is not some magic process that instantly resolves all intractable disputes. For a start, mediation will only be productive if the parties approach the process in good faith. Both sides must respect the process and be genuinely interested in frankly discussing their differences with a view to settlement. If mediation is approached in good faith, even if the process fails to settle the dispute, the ensuing litigation will be more efficient and concentrated. The issues in dispute will be narrowed and each side will have a better understanding of them.

Conclusion

The reality is that court-connected mediation is an idea whose time is long overdue and I expect that in Trinidad and Tobago we shall see more and more courts and tribunals embracing alternative methods of dispute resolution. While it is true that substantive knowledge is helpful, a good mediator need not have any in-depth knowledge of tax law to facilitate mediation of a tax

dispute. It is certainly in your interest to keep pressing for the adoption of ADR as a viable means of resolving those disputes that are susceptible to a mediated solution. Discussion forums like this one, where you educate your membership on the benefits of mediation and the circumstances in which the process can pay dividends will naturally play a helpful role in fostering the new culture that must be embraced. Trinidad and Tobago has several outstanding experts in mediation; persons who have been trained several years ago and who are anxious to make use of their skills. Providing them with work will not only assure you quicker outcomes for your disputes but will also help to reduce the pressures on the formal court system.

Having enjoyed your gracious hospitality I cannot possibly close without extending an invitation to you all at your convenience, whether individually or as a group to visit the CCJ at 134 Henry Street. The Court facilitates guided tours of individuals and groups of no more than 20 persons. The tour lasts approximately 45 minutes and includes a courtroom demonstration and an opportunity to meet the judges. I can't promise you that we will put on a breakfast such as this one but we shall certainly extend to you a hearty welcome and answer all your questions about an institution that I am convinced is destined to play a fundamental role in developing our Caribbean jurisprudence.

Once again, let me say that it has been a great pleasure for me to address you this morning and I thank you for affording me the privilege. I also wish to thank Mr Brian Jones in particular for his role in facilitating this exchange.