



Using Alternative Dispute Resolution Techniques to Enhance Justice - The Caribbean Experience

The Honourable Mme Justice Maureen
Rajnauth-Lee, Judge of the Caribbean
Court of Justice

**International Seminar of Latin America and Caribbean Women
Judges and Women Human Rights of the IAWJ**

São Paulo, Brazil
21-22 October 2015

The International Association of Women Judges (IAWJ) was started nearly thirty years ago by a core group of 50 dynamic and visionary women judges from around the world. The founders began with a vision of increasing the number of women judges and promoting equal justice for women and girls throughout the world. Today, the IAWJ has grown into a highly respected organization with over 6,500 judges in more than 100 countries and territories and continue to expand its membership.

Distibguished Lecture

By

The Honourable Mme Justice Maureen Rajnauth-Lee, Judge of the Caribbean Court of Justice,

on the occasion of

The International Seminar of Latin America and Caribbean Women Judges and Women Human Rights of the International Association of Women Judges (IAWJ)

21-22 October 2015

Acknowledgement

I wish to begin by acknowledging Justice Maria Cristina Zucchi of the Brazilian Chapter of the International Association of Women Judges and her team for their hard work in planning and executing this excellent conference. I wish to thank them for affording me this opportunity to share some of our Caribbean experiences.

Access to justice and the changing role of the Judge – the role of Alternative Dispute Resolution

I believe that as judges, we have all experienced the frustrations of an overburdened judicial system with the resultant systemic delays.

Thankfully, judges have begun to understand that the judicial role is changing. No longer is it simply the role of a judge to conduct a trial and to hand down a judgment. Judges all over the world are grappling with the public's need for increasing access to justice. There is a recognition that you can never pay enough judges to resolve all the disputes in the societies in which we live.¹ Litigants need to have their disputes resolved quickly, efficiently, cost effectively, fairly and justly in a system that is understandable, responsive and effective. This is where the various techniques and practices of ADR are most welcome.

¹Professor H W Arthurs, *Alternatives to the Formal Justice System: Reminiscing about the Future*

It should be noted that ADR mechanisms are not static; their categories are not closed; they are expanding to meet the needs of litigants/disputants. Modes of ADR include negotiation, conciliation, arbitration, mediation, early neutral evaluations, mini-trials; judicial settlement conferences and other hybrid processes. Of course, in several countries, there is also an indigenous system of dispute settlement. For example, in Trinidad and Tobago, some East Indian villages still have regard to the *panchayat*, a meeting of the village elders and the disputants where conflicts are resolved.

The Caribbean Court of Justice

The Caribbean Court of Justice (the CCJ) was established by the Agreement Establishing the Caribbean Court of Justice, which was signed by 12 Caribbean countries: Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago. The CCJ was inaugurated in 2005 and the seat of the Court is located in Port of Spain, Trinidad. The CCJ is a unique judicial institution, best described as being two courts in one. The CCJ serves the people of the Caribbean in its appellate jurisdiction and its original jurisdiction.

In its appellate jurisdiction, the Court is intended to function as the final court of appeal for the Caribbean region, thereby replacing the Judicial Committee of the Privy Council. To date, four countries have acceded to the appellate jurisdiction of the Court: Barbados, Guyana, Belize and Dominica. Others have signalled their intention to accede to the appellate jurisdiction of the Court: Jamaica, Grenada, Antigua and Barbuda, St. Lucia and Trinidad and Tobago. The appellate jurisdiction of the Court has generated heated public debate both globally and in the Caribbean region, with various commentators outlining the pros and cons of breaking ties with the Privy Council. However this debate is outside the scope of my presentation.

A brief history of the Caribbean Community

The Caribbean Community - CARICOM - is a regional grouping of fifteen Caribbean countries: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago; with Anguilla, Bermuda, British Virgin Islands, Cayman Islands and Turks and Caicos serving as Associate Members.

On July 5, 2001, the Heads of Government of CARICOM adopted the Revised Treaty of Chaguaramas (the Revised Treaty) which created the Caribbean Single Market and Economy (the CSME). The CSME is intended to create a single economic space founded on four (4) pillars: free movement of persons,² free movement of capital,³ free movement of services,⁴ and the right of establishment.⁵

The Revised Treaty and Dispute Resolution Mechanisms

The Revised Treaty expressly authorises the use of alternative dispute resolution to resolve disputes that may arise under it. In that vein, the Revised Treaty prescribes the following six modes of dispute settlement:⁶

(1) Good offices: The parties may agree to employ the good offices of a third party to settle the dispute.⁷

(2) Mediation: The parties may agree on a mediator or may request the Secretary-General to appoint a mediator from the List of Conciliators maintained by the Secretary-General. Mediation may begin or be terminated at any time and may continue during the course of arbitration or adjudication.⁸

(3) Consultations: A Member State shall enter into consultations upon the request of another Member State. The parties are brought together for direct discussions; this may involve a third party or a body. The requested Member State shall enter into consultations within 14 days of the receipt of the request or a mutually agreed period. If the consultations fail to settle the dispute within 45 days of the receipt of the request for consultations or the dates mutually agreed, the requesting Member State may resort to any mode of dispute settlement including binding third party settlement.⁹

² The Revised Treaty of Chaguaramas, Articles 45-46

³ The Revised Treaty of Chaguaramas, Articles 40-43

⁴ The Revised Treaty of Chaguaramas, Articles 36-38

⁵ The Revised Treaty of Chaguaramas, Articles 32-34

⁶ The Revised Treaty of Chaguaramas, Article 188

⁷ The Revised Treaty of Chaguaramas, Article 191

⁸ The Revised Treaty of Chaguaramas, Article 192

⁹ The Revised Treaty of Chaguaramas, Article 193

(4) Conciliation: A Conciliation Commission, an independent body agreed on by the disputing parties, examines the claims of the parties and makes non-binding recommendations with a view to reaching an amicable solution. To facilitate this process, the Secretary-General maintains a List of Conciliators from which a Conciliation Commission of three can be constituted. This Commission shall determine its own procedure. Basically, this organ hears the Member States parties to the dispute, examines their claims and objections, and makes proposals to the parties with a view to reaching an amicable settlement. The report and recommendations and decisions of the Commission regarding procedural matters shall be made by a majority vote of its members. The Conciliation Commission shall report within three months of its constitution. The conclusions or recommendations of a Conciliation Commission shall not be binding upon the parties. The conciliation proceedings shall be deemed to be terminated when a settlement has been reached, when the parties have accepted or one party has rejected the recommendations of the report by notification addressed to the Secretary-General, or when a period of one month has expired from the date of transmission of the report to the parties.¹⁰

(5) Arbitration: In arbitration the parties concerned agree to take their dispute to a legal body – an arbitral tribunal. To facilitate this process, the Secretary-General is required to maintain a List of Arbitrators from which an arbitral tribunal of three can be constituted. This tribunal shall establish its own rules of procedure. The procedures shall assure a right to a least one hearing as well as the opportunity to provide initial and rebuttal written submissions, which are confidential. Decisions of the arbitral tribunal shall be taken by a majority vote of its members and shall be final and binding on the Member States parties to the dispute. Where the parties cannot agree on the interpretation or implementation of the award, either party may apply to the arbitral tribunal for a ruling within thirty days of the award. The term of the arbitral tribunal shall come to an end unless an application for a ruling has been received, in which case it shall continue for such reasonable time, not exceeding thirty days, as may be required to make the ruling. A Member State which is not a party to a dispute, on delivery of a notification to the parties to a dispute and to the

¹⁰ The Revised Treaty of Chaguaramas, Articles 196-202

Secretary-General, shall be entitled to attend all hearings and to receive written submissions of the parties to a dispute and may be permitted to make oral or written submissions to the arbitral.¹¹

(6) Adjudication: In the adjudication process, the Caribbean Court of Justice has exclusive and compulsory jurisdiction to interpret and apply the provisions of the Revised Treaty.¹²

The provisions of the Revised Treaty encouraging the use of alternative dispute resolution are consistent with the approach of the international community to conflict resolution. There is great significance attached to the peaceful resolution of disputes in the international community, particularly within the United Nations family. As one commentator has noted:

“The principle of peaceful settlement of disputes is central to the UN system. It is enshrined in numerous conventions and is a customary law principle.”¹³

ADR at the Caribbean Court of Justice – its original jurisdiction

ADR also plays a crucial role in the settlement of disputes in the original jurisdiction of the CCJ where the use of ADR is expressly facilitated. In its original jurisdiction the CCJ has “compulsory and exclusive jurisdiction”¹⁴ to hear and determine disputes concerning the interpretation and application of the Revised Treaty. The CCJ breathes life into the Revised Treaty, ensuring that regional integration operates to improve the lives of the Caribbean people: “The CSME ... now exists essentially as a legal entity embodied in the Revised Treaty of Chaguaramas. The task ahead is that of transforming it into a lived reality.”¹⁵

It is interesting that the CCJ’s “compulsory and exclusive jurisdiction” under Article 211 is expressed as being “subject to the provisions of this treaty.” Therefore it must be construed in accordance with the dispute settlement mechanisms of the Revised Treaty outlined above. As

¹¹ The Revised Treaty of Chaguaramas, Articles 204-208

¹² The Revised Treaty of Chaguaramas, Article 211

¹³ Anne Peters, *International Dispute Settlement: A Network of Cooperational Duties*, 14 (1) Eur J Int Law 1 (2003)

¹⁴ The Revised Treaty of Chaguaramas, Article 211

¹⁵ Owen Arthur, *The Caribbean Single Market and Economy: The Way Forward*, delivered at the 30th Anniversary Distinguished Lecture of the Caribbean Community, 23 April 2004.

noted by Professor Ralph Carnegie, when the Revised Treaty is read as a whole, it becomes clear that “the choice to use one or more of the non-crucial modes (i.e., good offices, conciliation, mediation, consultation, arbitration) lies with the parties to the dispute.”¹⁶

Even where the parties resort to litigation before the CCJ, ADR mechanisms remain at their disposal. Under the Agreement Establishing the Caribbean Court of Justice, the CCJ was given the power to make its own rules of procedure¹⁷. These procedural rules make specific provision for the use of mediation and other alternative dispute resolution processes. Therefore under Rule 19.1(1) of the Original Jurisdiction Rules (the OJR) the CCJ has wide case management powers including the power to “refer any specific issue to mediation”. Furthermore Rule 20.5 of the OJR empowers the Court to adjourn a case management conference for the purpose of allowing the parties to pursue a negotiated settlement or a “form of ADR procedure.” Under Rule 1.2 of the OJR, the term “ADR” is defined as “any procedure for alternative dispute resolution, including mediation”.

The benefits of ADR

The provisions for the use of ADR at the CCJ are laudable given the current trends towards the use of ADR as a means to increase the efficiency and effectiveness of the justice system. The benefits of ADR are numerous. It is widely recognised that ADR produces a result that is superior to that produced by adjudication.

Firstly, ADR opens the lines of communication, thereby repairing the distrust in the relationship between the disputants. A settlement arrived at through mediation repairs relationships and avoids further emotional turmoil. On the other hand, adjudication fosters distrust as each party is tempted to win at all costs, further souring relationships. Our experience is that after adjudication, these parties are likely to return to the courts to resolve further disputes, until the relationships are mended. I borrow from the criminal law and refer to this as the *repeat offender phenomenon*. ADR avoids *repeat offenders*.

¹⁶ Professor A. R. Carnegie, *How Exclusive is the ‘Exclusive’ in relation to the Original Jurisdiction of the Caribbean Court of Justice? A Consideration of Recent Developments*, The University of the West Indies Faculty of Law Workshop Series 2009-2010

¹⁷ Agreement Establishing the Caribbean Court of Justice, Article XXI

Secondly, ADR enables the parties to search for creative solutions to their problems which may be far more novel than the resolution provided by a court judgment. This is because in arriving at a solution to their dispute, the disputants are not bound by precedent and legal rules in the way that our common law courts are. The ADR process is flexible and responsive to the particular needs of the parties.

Thirdly, the direct involvement of the parties makes it more likely that they will feel content with the outcome arrived at. By way of contrast, on adjudication, one party emerges as the winner and the other as the loser. Again, the *repeat offender phenomenon* comes into play further clogging the work of the court.

Fourthly, with ADR, the parties may be able to choose a neutral third party who has the specific expertise required to handle the dispute. Adjudication does not allow for this freedom of choice with respect to the decision maker.

Fifthly, ADR saves time and money. Whilst in adjudication, parties join the queue for the hearing and determination of their disputes; if dissatisfied with the decision of the court, the parties resort to the appellate process, incurring further time and expense.

Shanique Myrie v Barbados: A Case fit for Mediation?

Given the role of the CCJ in construing and applying the Revised Treaty, a treaty which is heavily geared towards fostering trade within the Caribbean region, it is hardly surprising that most of the disputes coming before the Court in its original jurisdiction have been trade disputes. However in recent times, ordinary CARICOM citizens have been utilising the CCJ as a means to enforce the provisions of the Revised Treaty. The most notable example in this regard is the case of *Shanique Myrie*. It is safe to say that this decision has become the most famous judgment delivered by the CCJ in its original jurisdiction.

Shanique Myrie, a young 22 year old Jamaican woman, travelled to Barbados on March 4, 2011 on a Caribbean Airlines flight from Jamaica. It was the first time she had ever travelled outside of her native country. Her plan was to spend a short two week vacation in Barbados. Under the Revised Treaty, CARICOM nationals have a right of free movement within the Caribbean region. Thus Ms Myrie was entitled to hassle free entry upon landing at the Grantley Adams International Airport in Barbados. Unfortunately her experience was anything but hassle free.

Ms Myrie was detained by Barbados Immigration Officials, who repeatedly questioned her as to the reason for her travel. She was questioned by the Drug Squad Office on suspicion of being a drug courier. Her passport was seized. Her luggage searched and a pair of slippers cut up. Her cell phone was seized. She was strip searched and subjected to a painful body cavity search during which she was sexually violated by a female police officer. She was told that if she refused to comply with the body search she would be sent to prison. During the search of her person, she was subjected to insensitive, insulting, and abusive comments about her nationality. Ms Myrie was then placed in a filthy, unsanitary detention cell where she was kept overnight. The next morning she was deported back to Jamaica.

Quite understandably, Ms Myrie was traumatised by her ordeal. When she arrived in Jamaica, she tearfully recounted the treatment she had received to a friend, Mr Jackson, who had come to pick her up at the airport. Mr Jackson took Ms Myrie to the Ministry of Foreign Affairs to lodge a written complaint about her mistreatment. Sometime after, she was taken to two medical practitioners who confirmed that she was suffering from post-traumatic stress disorder and mental and emotional stress. Moved by her written complaint, the Jamaican Ministry of Foreign Affairs sent a delegation to Barbados to investigate Ms Myrie's claim.

Ms Myrie decided to take matters into her own hands and took her case to the CCJ alleging that there was a flagrant violation of her right to free movement, that she had been discriminated against because of her Jamaican nationality and that her human rights had been violated. Her case was highly publicised, generating a fire-storm of public debate throughout the Caribbean region.

Ms Myrie's originating motion was filed with the CCJ on May 17, 2012. Pursuant to Rule 10.3 of the OJR, the Registrar of the CCJ sent out a notice to the Community and all CARICOM Member States on May 24, 2012, inviting them to intervene in the proceedings. Jamaica's request to intervene was granted on September 27, 2012, with the Court's reasons delivered shortly thereafter on October 26, 2012.¹⁸ The Court then held a series of case management conferences numbering four (4) in total¹⁹ and two pre-hearing reviews.²⁰ The court hearings began in March 2013, with

¹⁸ *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ)

¹⁹ November 22, 2012, December 12, 2012, March 4, 2013 and March 26, 2013

²⁰ February 7, 2013 and February 22, 2013

the Court holding a series of itinerant sittings in Jamaica²¹ and Barbados²² and even paying a site visit to the Grantley Adams Airport.²³ This was no ordinary case. It occupied a significant amount of judicial time.

In the end, Ms Myrie's claim relating to the breach of her right to free movement succeeded. Her discrimination claim and her claim for breach of her human rights were dismissed. The CCJ delivered their decision in September 2013. The Court clarified that all CARICOM nationals have a right to hassle free entry and a right to an automatic six month stay in any CARICOM country, based on the conjoint effect of Article 45 of the Revised Treaty as well as the 2007 Conference decision of the Heads of Government. The Court also noted that a CARICOM nationals can only be denied entry if they are undesirable persons, for example, persons whose entry would constitute a threat to national security, or if they are likely to become a charge on public funds. These exceptions are to be strictly construed; the burden of proof lies on the State.

The CCJ confirmed that in its original jurisdiction it was not a human rights court and therefore the portions of Ms Myrie's claim which related to the breach of her rights under specific international human rights treaties could not be entertained at the CCJ. However the Court did confirm that the CCJ is an international court and it is empowered under Article 217 of the Revised Treaty to apply "such rules of international law as may be applicable" to any dispute in the original jurisdiction. By way of relief, Ms Myrie was granted a declaration that her right to free movement under Article 45 of the RTC had been breached. She was also awarded compensation in the amount of Bds\$2240.00 for pecuniary damages and Bds\$75,000 in non-pecuniary damages. Barbados was also ordered to pay Ms Myrie's legal costs.

In the aftermath of the Court's decision, there was some delay in the payment of the sums owed to Ms Myrie. After an eight (8) month wait, Ms Myrie was paid the damages awarded by the Court.²⁴ To date, the issue of costs is unresolved.

From a legal perspective, the *Myrie* case is a landmark judgment which provided much needed clarity on the boundaries of the right to free movement and the importance of treaty obligations

²¹ March 4-6, 2013

²² March 18-21, 2013

²³ March 16, 2013

²⁴ Jamaica Observer, *Shanique Myrie paid by Barbados Government*

within CARICOM. On a personal level, the case represented a victory for an ordinary CARICOM citizen.

I cannot help but wonder however how the *Myrie* case would have fared had the matter had been sent to mediation, *even after judgment*. Ms Myrie suffered serious trauma at the hands of immigration officials. Imagine the cathartic effect had Ms Myrie and those officials embarked on mediation; if they were given the opportunity to sit around a table, talk to each other, hear the various explanations behind their actions and be given the opportunity to devise their own solutions to the problem. What would have been the value to Ms Myrie of a private and/or public apology? In my view, no amount of damages could match the emotional closure that such an opportunity would have provided to the parties. Mediation has proved to be a powerful tool for personal healing for victims involved in traumatic and emotionally scarring experiences.

In spite of the Court's decision in *Myrie*, there is strong anecdotal evidence to suggest that the region continues to be faced with problems concerning the free movement of CARICOM nationals. For example, in October 2014, a war of words erupted between the Jamaican Minister of Foreign Affairs and the National Security Minister of Trinidad and Tobago over the decision to deny 13 Jamaican nationals entry into Trinidad and Tobago.²⁵ Would such problems persist if the *Myrie* case had been mediated? Would such problems persist, if the parties themselves were able to devise a win-win solution to the problem? Would such problems persist, if the wider CARICOM region had been a part of such mediation and had more of a say in delineating the contours of the right to free movement as opposed to the problem being solved by a court? These are important questions which I leave for your consideration.

The Judicial Settlement Conference – its usefulness

Over the past 6 years, in Trinidad and Tobago, judges have employed an ADR tool, a type of evaluative mediation, referred to as a Judicial Settlement Conference (JSC). This is a non-adversarial, co-operative decision-making process in which a JSC judge assists the parties to resolve their disputes by facilitating the process of negotiation and giving an impartial non-binding evaluative opinion, if requested.

²⁵ Minister of National Security responds to Immigration Issues, <http://www.news.gov.tt/content/minister-national-security-responds-immigration-issues#.VeytVn1mpew>

In Trinidad and Tobago, the JSC process was initially introduced without any formal rules or processes, and at no extra cost to the Judiciary, save for the training of Judges. Of course, a judiciary can choose to formalize the JSC process and to issue practice directions setting out appropriate guidelines.

The JSC has several advantages over the old way of resolving disputes by adjudication. It is an attractive mechanism to both Attorney and Litigant. The Judiciary of Trinidad and Tobago recently conducted a pilot project utilising mediation and JSCs. Ninety-five per cent (95%) of the litigants who participated in JSCs during that pilot project expressed satisfaction with the process, even if there was not a settlement.

JSC procedures are flexible and informal, although they are conducted by a judge. JSCs are less costly and time-consuming than preparing for a trial of a matter. It results in the early resolution of a dispute on terms that are acceptable to both parties. In addition, experience has shown that it is never too late to recommend that the parties participate in a JSC.

The parties may reach an agreement outside the pleaded case but on terms important to the parties, and even to persons who are not parties to the case. The JSC judge may realise that the interests of these non-parties are crucial to a resolution of the dispute. The JSC judge will not conduct the trial of the matter. The process is confidential and no information revealed during a JSC is to be disclosed to the trial judge or to be used by the parties, if the matter is not settled and goes to trial. The JSC judge may, if requested, give a non-binding evaluative opinion on an issue of law, or simply on whether the claim or defence might succeed. This has proved to be useful to some attorneys and litigants.

Conclusion

As I close, I remain excited that the role of the judiciary is changing in such a way as to impact positively on access to justice. Judges no longer play a passive role in merely sitting to conduct trials and delivering judgements. Judges now see themselves as responsible for affording to disputants the most appropriate form of dispute resolution mechanisms in order to bring the best solution to each dispute. The Latin motto of Sao Paulo is: *non ducor, duco – I am not led, I lead*. I encourage all judges present to lead the way as we seek to improve the efficiency and effectiveness of the justice system in our countries. Thank you very much!