Albert Fiadjoe

Alternative Dispute Resolution: A Developing World Perspective

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This book is dedicated to my brothers and sisters
who taught me through practical living the
very important virtues of conciliation,
negotiation and mediation
and
my students, both past and present

FOREWORD

In the last 25 years, throughout the common law world, traditional arrangements for the delivery of civil justice have come under scrutiny, challenge and change. The search for alternative processes to litigation in the resolution of disputes gained momentum and a great debate has ensued.

There is now a veritable mountain of literature and learning on ADR, the acronym for Alternative Dispute Resolution. More and more, universities and law schools have recognised the need to teach ADR as a separate and discrete course of study. This book will undoubtedly find a place of eminence in the libraries of law students at the Faculty of Law of the University of the West Indies.

With his customary scholarship, skill in handling legal materials and a felicitous writing style, Professor Fiadjoe has produced a work of exceptional merit. It is a timely and relevant publication, for it locates much of its learning and discussion in the realities of the contemporary Caribbean and the wider global environment.

Caribbean people, lawyers and non-lawyers alike, must become conversant with the dispute settlement Articles of the Revised Treaty of Chaguaramas which provides for the establishment of the CARICOM Single Market and Economy. Equally, they must understand the dispute settlement mechanisms of the World Trade Organization. On these matters this book is a storehouse of necessary information.

The timeliness and relevance of *Alternative Dispute Resolution: A Developing World Perspective* are well exemplified by the efforts of several States of the Commonwealth Caribbean to reform their rules of civil procedure to conform to a more judge-driven paradigm, at the heart of which will be ADR and its companion case management. In addition to treating of those techniques, Professor Fiadjoe examines attempts in the region to incorporate processes of mediation in the area of criminal law. This is a novel departure from traditional works on ADR.

In commending this book to the widest possible readership, I feel a sense of profound satisfaction that, once again, my expectations of the Faculty of Law of the UWI have been fulfilled. One dared to hope in 1970, on inauguration of the Faculty, that it would have been a catalyst for the publication of first class legal literature. That hope has been realised beyond measure in the last 30 years.

Professor Albert Fiadjoe has been an indefatigable author and a prolific contributor to legal learning in the Commonwealth Caribbean. His vast knowledge and intellectual agility have enabled him, apparently seamlessly, to make the transition from expert in Public Law to expert in an exciting, developing area of the law. I have every confidence that the same large measure of acclaim that attended his highly successful *Commonwealth Caribbean Public Law* will be accorded *Alternative Dispute Resolution: A Developing World Perspective*.

All lawyers in the Commonwealth Caribbean are advised to read this book and digest the contents of its pages. The monopoly of lawyers in the management and settlement of disputes is under threat from a new class of professional mediators and others offering services in ADR in the common law world. It is a counsel of prudence to be forewarned and forearmed. Professor Fiadjoe amply provides the intellectual armour to meet the competition.

David Simmons
Chief Justice
Supreme Court of Barbados

PREFACE

I pioneered the introduction of a course in Alternative Dispute Resolution (ADR) in the curriculum of the Faculty of Law of the University of the West Indies, Cave Hill Campus, in 1998. Little did I then realise that the level of student interest in the subject would be so overwhelming, and that this interest would, as in 1995 when my students' commitment led me to write *Commonwealth Caribbean Public Law*, result in the creation of this book.

When the Faculty of Law at the University of the West Indies decided to make ADR a part of its curriculum offering, I had the undeserved honour of being asked to teach the course. This text owes a great deal to those students who put their faith in me blindly, by enthusiastically enrolling for the course, far in excess of the cut-off numbers. That show of enthusiasm also revealed to me that our students were forward-looking in their vision and thinking as to where the jurisprudence in the Caribbean region ought to be heading. Despite limitations in student numbers, the Faculty has been forced to accommodate unusually large student numbers. This phenomenal growth in student interest also attests to the importance of ADR worldwide.

I dedicate this book to my brothers and sisters and also to all my students who have embraced this subject in the full knowledge that lawyering in this millennium has to take into account processes of dispute resolution other than litigation through the courts. The discerning client of today is asking a simple but very fundamental question: has my attorney delivered results for me which are quick, effective and creative to my needs?

Never in the history of litigation has there been more focus and purpose in the area of client services and results. The attorney without legal wisdom and business vision is out of step with the ethos of our times. The attorney of today has to focus on the client's short-term and long-term objectives and interests. That requires forward-thinking, uncompromising quality and exceptional client service. That is why all respectable law schools now carry a course in ADR.

This book has two equally important objectives. The first goal is to examine ADR techniques from a societal perspective. In spite of the impression that one gets from examining law schools' curricula, the vast majority of disputes are not filed in court. Even those few disputes that are filed as lawsuits are generally resolved before trial, primarily through settlement or some dispositive motion. Increasingly, disputes are being resolved by litigants using private agreements to bind themselves to such alternatives to litigation. In addition, sometimes the state itself requires parties to resolve their disputes using methods other than litigation. The underlying question which we need to address is whether this rushing tide toward ADR is a good thing. The second goal is to provide readers with some of the knowledge and skills required to function in a legal system that resolves many disputes through negotiation, mediation and arbitration, as well as through litigation.

Today's practice of the law does not provide a simple 'yes' or 'no' answer to dispute resolution. In both large and small jurisdictions, it is, indeed, a verifiable truism that the lawyer of today requires a marriage of both litigation and dispute resolution skills. There is now no option for the attorney to choose to work primarily in either a litigation context or, instead, in an ADR setting. In fact, virtually all attorneys will need to be well-versed in both styles of dispute resolution. For example, the attorney will need to know how to interview clients and witnesses and how to negotiate agreements, but even in that role, he will also need to know how to represent

clients in mediations, arbitrations, mini-trials, etc, and how to advise them on which technique would be preferable.

In this book, I have included an ample discussion of arbitration. There is some disputation as to whether arbitration properly falls within ADR. This is because arbitration is a hybrid system which closely approximates to litigation. Brown and Marriott in *ADR Principles and Practice* justify some discussion of arbitration in their book on the grounds that the history of arbitration forms a 'part of ADR and because its practices and procedures have influenced some hybrid ADR processes. An understanding of its operation is essential to an application of dispute resolution generally'.[1] In the case of this book, the justification for discussing arbitration as a part of ADR is far easily explained.

It is a strategic part of the Faculty's mandate to promote regional development. International commercial arbitration has become a critical tool for the promotion of international trade. All the global treaties of modern times mandate the use of arbitration as one of the modes for the settlement of international disputes. Reference is easily made to the Caribbean Community and Common Market (CARICOM) Protocol 9 where arbitration may be invoked in addition to the original jurisdiction of the Caribbean Court of Justice, the WTO and, soon to come, the Free Trade Area of the Americas (FTAA). In the Law of the Sea Convention, arbitration is the default system for contentious proceedings. All these impact directly on the Commonwealth Caribbean region and influence the legal system in a significant way. In the WTO, arbitration is a subsidiary appendage to the institutionalised processes of dispute resolution.

I have sought to discuss in some detail the dispute resolution processes within the WTO and CARICOM, principally because of the impact of those treaties on Caribbean trade, commerce and economies.

The rapid adoption of case management techniques in the Commonwealth Caribbean has also given added impetus to ADR. As the region moves to modernise its civil court procedures to simplify and expedite the resolution of disputes, thus providing greater access to justice, questions remain as to whether case management should be practised in conjunction with mandatory ADR systems, which many would regard as essential to an effective civil justice system. The developing need for the resolution of conflicts and disputes not hitherto taken seriously drives the motivation to include some discussion, albeit briefly, on the Ombudsman and the Small Claims Court.

In sum, I have tried to address the 'why', 'what' and 'how' of ADR, while also dealing also with some policy issues and considerations.

In putting together this text, I have tried to provide the required Caribbean, and sometimes developing world, perspective and flavour, thus making the book refreshingly current, topical and relevant to the needs of developing countries.

I have also provided opportunities for role plays and de-brief exercises, because a skills training course will not be complete without some opportunity to practice some skills.

---

1 *ADR Principles and Practices*, 1999, Sweet & Maxwell, p 12.

All the role play materials used in the book have been graciously supplied by Donna Parchment of the Dispute Resolution Foundation in Jamaica. Her contribution is gratefully acknowledged as well as that of the Jamaica/Capital Project 1991.

My thanks also go to Sir David Simmons, KA, BCH, QC, Chief Justice of Barbados for readily agreeing to write the Foreword to this book. I wish to thank him also for his constant encouragement to me over the years. My grateful thanks also go to my colleagues, Professor AR Carnegie, Executive Director of the Caribbean Law Institute Centre, and Mr Endell Thomas, both of whom read the manuscript and made several constructive suggestions and comments.

Miss Pat Worrell continues to exhibit extraordinary skills in deciphering my awful calligraphy. I am indeed eternally grateful to her for secretarial assistance.

I thank my family for their patience and forbearance during the preparation of this book. Cavendish Publishing continues to support my efforts. I thank them for the confidence.

I have tried to illustrate the breadth and depth of conflict resolution as an academic field as well as the many levels of experience and analysis that practitioners of the subject and theorists bring to the dialogue.

I hope that this book will help to stimulate greater interest, awareness and discussion of issues related to the prevention and resolution of conflict peacefully. May our societies continue to drink deep from the wells of conflict resolution and management.

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August 2004

CONTENTS

Foreword *vii*
Preface *ix*

1 ADR: ORIGINS, CONTEXTUAL BACKGROUND AND PURPOSE 1

2 THE ADR SPECTRUM 19

3 PRINCIPLES OF NEGOTIATION 37

4 MEDIATION PROCESSES AND SKILLS ACQUISITION 57

5 PRINCIPLES OF ARBITRATION – DOMESTIC AND INTERNATIONAL 71

6 DISPUTE RESOLUTION MECHANISMS IN THE WORLD TRADE ORGANIZATION 97

7 ADR AND THE CRIMINAL JUSTICE SYSTEM 109

8 CASELOAD MANAGEMENT 131

9 CONCLUSION 141

APPENDIX: ROLE PLAYS 153

Index **159**

CHAPTER 1

ADR: ORIGINS, CONTEXTUAL BACKGROUND AND PURPOSE

INTRODUCTION

There is no question but that conflict resolution, through the processes of negotiation, mediation and arbitration, has become an acceptable and, indeed, inevitable part of creative lawyering in the 21st century. That explains why all self-respecting law schools now provide for skills training in the field of Alternative Dispute Resolution (ADR) as part of their core offerings. Today, ADR processes are being applied worldwide to a universality of situations hitherto governed by either litigation or, in extreme cases, by warfare between nations. Obvious examples of such situations are in the areas of international peace and world order, environmental and public policy, science and technology, sports, social development and community-related issues, crime control and prevention, schooling, restorative justice and the family. To this list may be added the more traditional areas such as commercial contracts, employment, labour relations and insurance.

Indeed, there is now increasing recognition of the fact that every type of dispute can be the subject of a dispute resolution process. From business controversies to labour management disputes, ADR is becoming the preferred choice for the resolution of conflict and disagreement, and the reasons are not hard to find. Litigation is a stressful undertaking. It is a costly, lengthy, public exhibition of differences, leading to a great deal of ill-will between litigants. In contrast, ADR processes are usually faster, less expensive, less time-consuming and more conclusive than litigation. Some of the perceived advantages of ADR can be summarised as follows:

(a) speed;
(b) choice and expertise of impartial neutrals;
(c) informality and flexibility;
(d) privacy;
(e) economy;
(f) finality;
(g) diversity and adaptability of ADR;
(h) recognition of the needs of the parties;
(i) win-win situation;
(j) involvement of the parties in creating imaginative solutions;
(k) savings in public expenditure;
(l) private savings in time and energy;
(m) retention of beneficial business and personal relationships;
(n) shortening of court dockets;
(o) more efficient legal systems;
(p) qualitative improvement in the delivery of justice; and
(q) increased participation and access to justice.

ORIGINS

What then is ADR? In its pristine form, ADR originally referred to a variety of techniques for resolving disputes without litigation. But, having regard to the evolution of modern techniques, such as caseload management and the ever-growing prevalence of ADR within the litigation context, it might be more accurate now to describe ADR not as an alternative to litigation but one technique which is appropriate in the context of dispute resolution generally. Following that way of thinking, litigation is considered as just one of a variety of methods of dispute resolution.

Reading through the vast literature on ADR, one is left with the impression that ADR is of recent vintage and that its genesis traces to the USA. Without in any way detracting from the enormous, innovative and creative contribution of American scholars to this discipline, the point has to be made that both these propositions are false. Until now, western writers have assumed or given the impression that the traffic in ADR travelled in one direction, across the Atlantic from west to east. That is a fallacy.

The origins of ADR trace to traditional societies. Traditional societies, without the trappings and paraphernalia of the modern state, had no coercive means of resolving disputes. So, consensus building was an inevitable and necessary part of the dispute resolution process. The court system only developed as a necessary by-product of the modern state. Societies in Africa, Asia and the Far East were practising non-litigious means of dispute resolution long before the advent of the nation state, for the building of long-term relationships was the bedrock on which those societies rested.

Kaplan, Spruce and Moser chronicle early examples of dispute settlements by means of arbitration.[1] They write:

> In respect of arbitration, its history may be linked to the genesis of human society itself, parents are normally arbiters in disputes between their children. Mythological references to arbitration have been chronicled thus:
>
>> There are mentions of disputes between two gods being submitted to a third for decision in the earliest myths. Stories from Ancient Egypt tell of disputes between Osiris and Seth, and Horus and Seth, being decided in that way ... The earliest Greek arbitration myth is of a mortal arbiter, Paris, deciding between immortal parties, Hera, Athene and Aphrodite ...

References to arbitration were made around 350 BC by Plato, in *The Laws*, stating, *inter alia*, as follows:

> Whenever someone makes a contract and fails to carry it out ... an action may be brought in the tribal courts if the parties have been unable to resolve it before arbitrators or neighbours.

Another renowned historian, Plutarch, wrote of an arbitration anecdote:

1 *Hong Kong and China Arbitration Cases and Materials*, 1994, Butterworths (Asia), p xxxiii, quoted in a speech by VP Pradhan entitled 'Mediation and Alternative Dispute Resolution: Developments in the Various Jurisdictions: Have the Lawyers Caught On?'.

> Plutarch tells of two men appointing the King, Archidamus II, to resolve their dispute. He took them into a remote temple and made them swear they would abide by his award. He then gave it: 'Stay here till you have made up your quarrel.'

Similarly in Rome, it is said that:

> ... there was a well-established practice of arbitration separate from the procedures of litigation. Cicero, writing before 50 BC, knew arbitration as part of the highly developed legal system of which he was the master:
>
> > A court hearing is one thing, the award of an arbitrator quite another. The trial concerns a definite sum, an arbitrator's award an indefinite. When we go to court we know that we are going to win all or lose all. But we go to arbitration with different expectations – that we may not get all we want but we will not lose everything. The very words of the arbitration contract are proof of that. What is a trial like? Exact, clear cut, explicit. And arbitration? Mild, moderate.[2]

In respect of commercial arbitration, the following has been said:

> Commercial arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force. From the start, it must have involved a neutral determination, and an agreement, tacit or otherwise, to abide by the result, backed by some kind of sanction. It must have taken many forms, with mediation no doubt merging into adjudication. The story is now lost forever. Even for historical times it is impossible to piece together the details, as will readily be understood by anyone who nowadays attempts to obtain reliable statistics on the current incidence and varieties of arbitrations. Private dispute resolution has always been resolutely private.[3]

In the Malaysian context, RH Hickling, in his book on Malaysian law,[4] points out that conciliation and mediation are the traditional dispute resolution processes of the different races in Malaysia, with the emphasis upon *adat* and Confucian values of yielding and compromise. Traditionally, mediation is the key to reconciliation, with the mediator taking a broader view of the issues involved than any common law judge, whose area of investigation is limited by narrow concepts of what is relevant or irrelevant.

Early advocates of ADR include Abraham Lincoln, to whom is attributed the following exhortation: 'Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the loser in fees, expenses and cost of time.' While advocating compromise may not be the same as advocating ADR, it represents a path away from litigation which is in line with the traditional thrust of ADR. Mahatma Ghandhi is quoted as saying of his practice:

> I realized that the true function of a lawyer was to unite parties ... A large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.

---

2 *Ibid* at p xl.

3 Mustill, 'Arbitration: History and Background' (1989) 6 Journal of International Arbitration, p 43.

4 *Malaysian Law*, 1987, Professional (Law) Books Publishers, pp 136–41.