ALTERNATIVE DISPUTE RESOLUTION:
A NEW DIRECTION FOR THE LEGAL PROFESSION?

Introduction.

In many developed, industrialized countries, parties embroiled in civil disputes are increasingly turning to Alternative Dispute Resolution ("ADR") processes rather than the traditional court-based procedures in an effort to resolve their disputes. ADR aims to decrease the expense, time, and hostility of litigation in a setting that allows the parties to play a larger role in resolving their disputes. ADR is particularly appropriate where the disputants have an ongoing business relationship that is likely to be jeopardized by protracted litigation. In Jamaica, lawyers and business people alike are examining ADR to see whether some of these processes may be used to provide appropriate alternatives to litigation.

It may be useful at the outset to point out that not all types of disputes are suitable for ADR processes. Because the processes are essentially voluntary and privately ordered and crafted, disputes that have a large number of parties or that have wide community implications may be unsuitable for ADR, partly because of the difficulty of effective representation of all the interests and partly because of the publicity that attends these sessions. It will be interesting to see whether the recent squatting disputes are amenable to the extra-judicial processes of negotiation and conciliation that are being used to settle them. Other types of disputes requiring the establishment of precedent, such as political or constitutional issues, are usually unsuitable to these processes; where the government is a party to the dispute it is

("CLI") to introduce a new Caribbean Arbitration Act, based on the Hong Kong Act of 1989 and the Bermudian Act of 1986, have dragged along, with no immediate chance of implementation, hampered by the lack of responses to the 1991 questionnaire that sought to get information on Arbitration in the region. The CLI proposed legislation has both a domestic and an international Act. Jamaica does not have an International Arbitration Act and has not ratified the New York Convention on Enforcement of Foreign Arbitral Awards. We still operate under the outdated provisions of the Geneva Convention of 1923 on the Enforcement of Foreign Awards. Our Construction Industry, which prescribes Arbitration as the standard form of dispute resolution, has no procedural rules for their local arbitrations and are tied to the procedural rules of the International Chamber of Commerce, instead of the more up-to-date UNCITRAL Model Rules, for their international contracts.

Med-Arb is a hybrid process of Mediation and Arbitration whereby the Arbitrator first acts as a Mediator and if there is no agreement by the parties, the same person then acts as Arbitrator and makes a final, binding award. A major drawback to this process is the fear of the parties to disclose information that may prove prejudicial to them in the arbitration. This lack of candour distorts the mediation process and may contribute to its failure. Use of the same person as mediator and later as judge goes against the basic principles of mediator neutrality and confidentiality and puts at risk the integrity of both arbitration and mediation. The use of another person as arbitrator later on merely adds another layer to the expense and time of settlement as yet another person has to be educated on the issues. However, sometimes the threat of

a binding decision if the mediation ends without a resolution has been known to spur parties on to agreement in the mediation. Another advantage of Med-Arb is the opportunity to reduce the scope and time of arbitration by settling some claims in mediation. A variant of Med-Arb is the use of the neutral first as a mediator, and failing agreement, as an advisory arbitrator. If both mediation and arbitration fail, the parties must go to another neutral for binding arbitration.

Final Offer Arbitration is a variant of the arbitral process in which the arbitrator is prohibited from compromising the claims. Instead, he/she must choose the final offer of either party. This process is likely to advance the prospects for successful bargaining since each party, assuming that the arbitrator will select the more reasonable offer, strives to make its last offer more reasonable than the other party's final offer.

NON-ADJUDICATIVE ADR PROCESSES.

The **non-adjudicative ADR processes** have been found, in appropriate cases, to provide an alternative to litigation without depriving the disputants of their right to their day in court should the process fail to provide a satisfactory resolution. These have evolved, in much the same way that arbitration did, to meet the need for speedier and less adversarial ways of resolving commercial and domestic disputes. Some of these processes are already used by parties and their attorneys in trying to settle disputes before they rise to the level of a lawsuit. Early negotiations, pre-trial settlement discussions, and conciliation conferences, are some of the traditional techniques familiar to attorneys and their clients.

In addition, some innovative processes have been created to provide more form and structure to dispute resolution and to give the disputants more autonomy in settling the dispute. All of these involve the use of a Third-pary Neutral ("Neutral") to facilitate the resolution process. Some of these innovations that could be readily used effectively in Jamaica are the **Mini Trial, Neutral Fact Finding Experts, and Neutral Evaluation.** These processes do not require much additional training on the part of the Neutral. There is minimal interaction between the parties and the Neutral. The addition of full-scale **Mediation** to the range of ADR processes now appears to be a real possibility but can only be added to the repertoire to the extent that there are suitably trained Mediators to conduct the Mediation.

The essence of the non-adjudicatory ADR processes is the ultimate resolution of the dispute by the parties themselves. They are essentially non-binding processes in which the parties are encouraged to negotiate a settlement. They all require, however, structured rules of procedure in order to be used effectively.

The Mini Trial involves the use of a summary trial procedure, preferably before an experienced litigator or retired judge in an out-of-court setting. Each party is given a limited time (not more than 2 hours) to present its best case. The parties present should include, along with the persons responsible for the disputed issues, persons with authority to negotiate a settlement where the disputants are a corporation or the government. As in a real trial, the lawyers play a pivotal role by presenting the case. The "judge" makes what he consider to be the likely ruling of a court of law, giving appropriate reasons, orally, for his ruling. The

entire process should take no more than 4 - 6 hours. It goes without saying, that the Rules of Evidence are either suspended or materially relaxed and few if any witnesses are called, although the disputants may be heard and questioned by the "judge". The main advantage of this process is its summary nature and the opportunity for each party to get a realistic look at the other side's best case. The main disadvantage is that the process will be used, not as a basis for negotiation, but really as a means of discovering the weaknesses and strengths of the other side's case with a view to exploiting and overcoming these at a real trial.

The Mini Trial is most suitable for high-risk disputes where the outcome is uncertain and the parties need to assess their chances at court adjudication. Two practical difficulties of using this process in Jamaica now is finding the right person to act as "judge", and overcoming the tendency of parties and their lawyers to treat it as a dress rehearsal for the real thing. A Mini-Trial should never be engaged in without a "Protocol" or Procedural Agreement that spells out the steps and timing of the process, including a party's right to terminate the process, the confidentiality of the proceedings and its effects on any pending or future litigation.

Neutral Fact Finding Expert is the ADR equivalent of a Special Master who, in United States Civil Procedure, makes Findings of Fact to be submitted to the trial judge. This functionary appears to be unknown in Jamaican Civil Procedure although the Arbitration Act provides for the appointment of such a person as a Special Referee in some cases. The process calls for the parties to jointly appoint a neutral expert to investigate the facts and to

form a legal or technical view either about certain specified issues, or on all issues generally. The neutral then makes a non-binding report to the parties which forms the basis for settlement discussions between the parties or their lawyers. The use of a neutral fact-finder can be a useful adjunct to a settlement conference. His/her findings can clarify and verify disputed issues and provide information on which the final settlement may be based. As with other ADR processes, the candour of the parties in giving information to the Neutral, is directly related to the Neutral's effectiveness. The Neutral needs to be adept at Discovery and cross-checking information to ensure that Discovery responses are accurate. Like litigation, this process can also be drawn out and prolonged by a party's failure to respond promptly to discovery requests.

Neutral Evaluation is similar to the Mini-Trial except that the Neutral does not give a verdict but an evaluation of each side's case using other factors, such as publicity, the relationship of the parties, the cost and time of litigation and the claims of each side, to form the basis of a non-binding submission. He is available for suggestions, should the parties agree on settlement. In this process, the parties rather than the lawyers, may make the presentation. After the Neutral discusses both sides of the case, the parties are left alone to negotiate. The Neutral remains on the scene to be consulted at intervals or at an impasse, or at the final agreement.

It is crucial to all these process that the parties present have settlement authority. Lawyers play a diminished role in some of them although they should be consulted before final agreement

and will, of course, draft the final agreement. However, the negotiation process is conducted mainly by the parties with occasional reference to the Neutral.

Mediation. Party autonomy is at the heart of the Mediation process where the parties are encouraged to speak directly to each other as well as privately (and confidentially) with the Mediator in caucus. Mediation has been described as "guided negotiation" and here, the experience and training of the Mediator as guide, may be the difference between success and failure of the process. The Mediator must promote candour in the communications and confidence in the process without usurping the authority of the parties to craft their own agreement. He/she must balance power inequities, dissolve impasse, and suggest creative solutions that serve the interests of both sides.

Mediation is essentially a structured process with a clear beginning, middle, and end. The Mediator controls the process, describing and explaining it at the outset to the parties, as well as enforcing the rules, previously agreed upon, that moves the process along. Mediation should proceed only after a Mediation Agreement has been signed by both sides setting out, among other things, (a) the remuneration (by both sides) of the Mediator; (b) approximate time for the process after which continuation should only be with the consent of the parties; (c) a Schedule for the submission of documents, if any; (d) provision for on-site inspection, if necessary; (e) and a Confidentiality Agreement forbidding the use of information disclosed in the mediation or the calling of the Mediator as a witness in any litigation of the issues.

The Mediator requires certain skills, particularly communication skills, which allow him/her to articulate issues, redirect the conversation to more positive issues, ask open-ended questions to draw out the parties, reframe or rephrase the conversation to remove negative, value-laden language and restate the real issues and interests in neutral, positive terms. He/she must be an active listener and be able to use silence effectively - for control, for reflection by both sides. The Mediator must have a clear picture of the process and move from one stage to another by using bridging and directive statements.

The use of the Caucus (or private meeting with each side) is crucial to the process. But parties must have confidence in the Mediator's neutrality if the caucus is to result in the sort of candour that the process requires. An important skill of the Mediator, particularly for use in the caucus, is the ability of the Mediator to suggest creative options, based on the real interests of the parties and stimulated by their own disclosures. This creativity of the Mediator is aided by proper understanding and knowledge of the conflict area. But the Mediator need not be an expert in the field since, ideally, the parties should come up with their own solutions. The Mediator puts in suggestions only where there is impasse and it appears that agreement is going to be forestalled by a detail. Finally, the Mediator must be able to recognise when the process is deadlocked and agreement unlikely and call off the process before additional costs are incurred.

What is the role of the lawyer in ADR?

ADR is unlikely to succeed in resolving civil, commercial disputes

without the cooperation and committment of the legal profession to its use. Lawyers, for the most part, are relied on by parties in dispute for advice on strategy, predictions of outcome, and emotional support of their cause. The Lawyer tends to be an authority figure whose advice is ignored at the party's peril. Lawyers, by their training and acculteration, are inclined to enjoy being in control of a matter and although apparently deferring to the instructions of their clients, have subtle and not so subtle ways of influencing their clients' decisions. It is unlikely that a client will pursue ADR in the face of his lawyer's opposition, but many a lawyer can persuade a client to try ADR even in the face of the client's outright hostility to the process.

What is in it for the lawyer? Is he likely not only to lose fees but also lose control in an unfamiliar process where his client may be persuaded by some smooth-talking Mediator to make damaging admissions and unwise compromises?

First of all, the lawyer's presence, particularly at all stages of Mediation, assures the parties that he is still getting legal representation and decreases a party's vulnerability to pressure.

Secondly, the fact that we are here today examining these processes is evidence that the legal profession recognises its interest in speedy resolutions of disputes in a less hostile environment. Clients are eager to get on with their businesses and are examining closely the amount of money they spend on legal fees for dispute resolution. ADR processes that result in settlement or even in a more pro-settlement posture of the parties, enables the lawyer to collect his fee more quickly and move on to other

matters. The client is happier and likely to give the credit to the lawyer for the speedy resolution of the matter.

The number of lawyers now appearing in arbitration, and interested in acting as arbitrators, is an indication of the greater acceptability of ADR processes. So far, the use of such processes has been hampered by the lack of an administrative institution, like the American Arbitration Association or the International Chamber of Commerce, capable of administering these processes from beginning to end. Jamaica now has 2 such agencies and likely to get more. Insertion, in contracts, of Pre-Dispute Resolution ("PDR") clauses that mandate the use of ADR strategies before the dispute arises, will help greatly in educating parties about these alternatives and increasing their use.

I have deliberately omitted any consideration of court-annexed ADR programmes here because time does not allow for adequate coverage of this subject and, although the Bar should join the lobby for their introduction, until the appropriate legislation is in place, they are not available to us. I commend this topic to our Association for future consideration.