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MAGCO LEGAL LESSONS NO. 37

LEGAL TOPIC: ALTERNATIVE DISPUTE RESOLUTION

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What is Alternative Dispute Resolution?

Conflict is, indeed, a fact and a part of everyday human life and interaction. It is sometimes unavoidable and can create disputes between two or more people, eventually leading up to legal proceedings. However, legal proceedings are often considered to entail stressful, arduous, expensive, and time-consuming processes, and many people prefer avoiding the same because of this. Further, modern-day Judicial Systems have become overloaded with many disputes that put a tremendous strain on their financial resources and time.

As such, there has been the advent of processes that serve as an alternative or a supplement to legal proceedings that enable parties to resolve their conflicts and disputes, known as Alternative Dispute Resolution (hereinafter referred to as "ADR"): **A. Fiadjo, "Alternative Dispute Resolution: A Developing World Perspective" (1st edn.), page 19**.

In this article, we will explore some of the ADR processes, namely negotiation, mediation, and arbitration, and provide information on them that may assist the parties of a dispute with resolving the same.

Negotiation

According to **R. Fisher and W. Ury, "Getting to Yes" (3rd edn.)**, negotiation is defined as, "back and forth communication designed to reach an agreement when parties have some interests that are shared and others that are opposed." The authors of this work suggested that there are three main types of negotiation approaches: soft/co-operative, hard/competitive/positional, and principled/problem-solving.

The first approach, the soft/co-operative method, is centred on trust and relationship building but can steer the parties away from reaching an agreement that accommodates their respective interests. Contrastingly, the hard/competitive/positional approach is focused on the rights of the parties, rather than their respective needs and interests. While it may allow a party to obtain a favourable substantive deal, it may prevent the parties from reaching a mutually beneficial agreement and could create misunderstandings and hurt feelings.

The third approach, being the principled/problem-solving method is often viewed as the most ideal. By this approach, the parties separate themselves personally from their problems and focus on their underlying concerns and interests to reach a mutually acceptable "win-win" or *pareto optimal* outcome. It also aids the parties in developing their relationship.

In order to successfully apply this method, parties are encouraged to adopt various communication skills to help them understand each other and their respective interests. Some of these skills include, but are not limited to:

1. Active Listening – This is applied where one party listens to another in order to learn about their respective interests and concerns;
2. Validating – This occurs when one party labels how another feels, which makes them feel like there are being listened to;
3. Reframing – This is utilised when one party re-states what the other is saying in a positive way, which enables them to feel as though they are being listened to;
4. Effective Questioning – This is employed when one party, through their observations of the other's concerns and interests, asks questions that are relevant to their situation to better understand the same; and

5. The use of "I" Statements – Where there is an argument between the parties, they may make accusations against one another by using "you" statements, which could make them feel attacked. However, if the parties focus their attention away from accusing one another and express how they feel and what their interests are, they may be able to come to a mutually acceptable agreement. They may do this by using "I" statements, that is they describe what the other party did to create an issue, communicate how it affected them, and suggest a solution to the problem, without blaming the other party.

The above learnings were obtained from ***R. Fisher and W. Ury, "Getting to Yes" (3rd edn.), supra.***

Mediation

Mediation is defined in **s.2 of the Mediation Act No. 8 of 2004 of the Laws of Trinidad and Tobago** (hereinafter referred to as "the Mediation Act") as, "a process in which a mediator facilitates and encourages communication and negotiation between the mediation parties and seeks to assist the mediation parties in arriving at a voluntary agreement." It is also described as a method of dispute resolution whereby the disputing parties are guided by a neutral third party to reach an amicable solution via face-to-face meetings: **The Law Society of New South Wales, "Alternative Dispute Resolution" (The Law Society of New South Wales 2009)**.

There are many advantages to mediation, namely that a mediator can assist the parties in their communication which may result in the settlement of their dispute. The mediation process is also confidential and focuses on the parties' interests and concerns, rather than solely on their rights. It is also considered to be a proper adjunct to legal proceedings, especially for commercial disputes: **Egan v. Motor Services (Bath) Limited [2007] EWCA CIV 1002**.

However, there are a few shortcomings of mediation, in that the decisions made by mediators are non-binding and mediators may be subject to predispositions and biases. Further, since the mediation process is consensual, the parties may walk away from the same at any time without having their dispute resolved.

In Trinidad and Tobago, the Mediation Board, as established by **the Mediation Act**, is the local body that encourages and regulates mediation in Trinidad and Tobago. The functions of the Mediation Board are outlined in **s.5(1) of the Mediation Act** and are summarised as follows:

(a) To formulate standards for the accreditation of mediation training programmes and to accredit such programmes;
(b) To formulate standards for the certification of mediators and mediation trainers and to certify such mediators and mediation trainers;
(c) To prescribe requirements to be complied with by an approved mediation agency and to approve such mediation agencies; and
(d) To monitor accredited mediation training programmes and approved mediation agencies to ensure that the standards set under subsection (1)(a) and the requirements set under subsection (1)(c) hereinabove are maintained.

An important power of the Mediation Board is the enforcement of the observance of the **Code of Ethics** for certified mediators, per **s.5(2)(a) of the Mediation Act**. The said **Code of Ethics** is contained in the **First Schedule of the Mediation Act** and is meant to assist and guide certified mediators in their conduct and to provide a framework within which a mediation is to be conducted and regulated. Some of the crucial obligations of a certified mediator, as set out in the **Code of Ethics**, are as follows:

1. To facilitate the voluntary resolution of a dispute, per **s.4(1) of the Code of Ethics**;
2. To acquire and maintain professional competence in mediation, per **s.5(2) of the Code of Ethics**;
3. To be impartial, per **s.6(1) of the Code of Ethics**;
4. To keep the mediation proceedings confidential, per **s.7 of the Code of Ethics**; and
5. To withdraw themselves from mediation if there are any conflicts of interest, per **s.9 of the Code of Ethics**.

The judicial attitude towards mediation is growing increasingly strong. This is demonstrated by the speech of the Honourable Mr. Justice Kokaram titled **"Humanizing Institutions in the Financial Services – Why Mediate?"** which was delivered on 25th May 2017. The Learned Judge indicated that our **Civil Proceedings Rules** would soon be amended to make it mandatory for the parties to a claim to attend mediation after a defence has been filed. The Learned Judge further expressed that about seventy per cent (70%) of cases can settle in mediation, which emphasizes how crucial of a role it can play in Trinidad and Tobago to facilitate the resolution of disputes.

Court Annexed Mediation

Further, **the Mediation Act** provides a mechanism by which ADR processes are made supplemental and conjoint with legal proceedings. This is done via Court-Annexed Mediation per **s.14 of the Mediation Act**. This permits the Court to refer the parties of any matter, save and except criminal matters, to mediation before a certified mediator who is a public officer, in the employment of the Judiciary, or on the Judiciary's roster of mediators.

Industrial Relations Proceedings

The elements of the mediation process can be found in Industrial Relations Proceedings, in the form of the conciliation. This is enshrined by **s.55(1) of the Industrial Relations Act Chap. 88:01 of the Laws of Trinidad and Tobago** (hereinafter referred to as "the Industrial Relations Act"). Pursuant to this section, the Minister of Labour must, after a trade dispute has been reported to them, take steps to secure within fourteen (14) days of the date of the report a settlement of the dispute by means of a conciliation. During the conciliation, the parties would meet with a neutral third party whose role is to assist them in settling their trade dispute.

Should a trade dispute not be resolved and reach the Industrial Court of Trinidad and Tobago, it may be referred to conciliation before one or more members of the said Court for settlement, per **s.12 of the Industrial Relations Act**. The success rate of conciliations at the Industrial Court of Trinidad of Trinidad and Tobago was reported by the website of the same. It is stated on the said website as follows: seventeen thousand, nine hundred and sixty-three (17,963) matters were filed from 1973 to 2015, and four thousand, one hundred and ninety-eight (4,198) of these matters were settled by conciliation.

Arbitration

Arbitration refers to a process of dispute settlement where the parties are afforded a fair and private hearing by a neutral third party, an arbitrator, who can issue a binding agreement that is enforceable by law: **Marriott and Tackaberry, "Bernstein's Handbook of Arbitration and Dispute Resolution Practice", (4th edn. Sweet & Maxwell, 1988) page 13**. Arbitration differs from mediation in that the decision rendered by the neutral third party in the former is binding whereas the decision rendered by the neutral third party in the latter is non-binding.

According to **Fiadjo, supra, on pages 72 to 74**, some of the basic features of arbitration are as follows:

1. The arbitral process is consensual, based on an agreement between the parties;
2. The parties are free to choose a tribunal that fits the nature of their dispute and as such, they may select an expert on the subject matter of their dispute as an arbitrator;
3. The parties have procedural freedom, that is, they may organise their proceedings as they like;
4. The arbitrator must be independent and impartial in accordance with codes of ethics and conduct;
5. The arbitrator must act within the rules of natural justice; and
6. An arbitral award is binding upon the parties.

However, there are some disadvantages to the arbitration process including its potential to be costly and that the parties thereto may use the process to gain an unfair advantage in legal proceedings by previewing their opponents' cases (**Fiadjo, supra, page 27**).

It is now common for parties in commercial relationships to have arbitration agreements stipulating that if there happens to be a dispute between them, the same must be referred to arbitration. This may also be achieved by the inclusion of arbitration clauses in commercial contracts.

This is propagated by the Laws of Trinidad and Tobago via **the Arbitration Act Chap. 5:01** (hereinafter referred to as "the Arbitration Act"), wherein **s.3** thereof provides that, "an arbitration agreement, unless a contrary intention is expressed therein, shall be irrevocable by leave of the Court and shall have the same effect in all respects as if it had been made by Order of the Court." Further, the propagation of arbitration by the Court is also carried out by **s.7 of the Arbitration Act**, which allows the Court to stay proceedings should a party thereof desire that the matter be referred to arbitration. Additionally, the **First Schedule of the Arbitration Act** contains provisions that can be implied in an arbitration agreement to make it stronger. For example, **s.9** thereof permits an arbitrator to have the same power as the Court to order specific performance of any contract other than a contract relating to land or any interest in land.

Conclusion

ADR is indeed an essential modern-day tool for the settlement of conflict and disputes between two or more parties. The Judicial System has been burdened by many matters, and one of the solutions to this is ADR. Through ADR, parties may be enabled to settle their disputes and much weight can be taken off the Judicial System. The above ADR processes are some of many options that are available to parties and they ought to be encouraged to exercise the same.