Sunday, August 16,

General

Internet Express

1998

Talk is cheaper

Bypassing the courts with win-win mediation

By KIM JOHNSON

"THE John John situation doesn't need to be so inimical and charged," says Herbert Alleyne. "Somebody could get the parties together to arrive at a solution."

Alleyne, a former Royal Bank executive director who now works at the Chamber of Commerce's Dispute Resolution Centre, was explaining the myriad uses of Alternative Dispute Resolution (ADR).

Take any kind of conflict between two or more parties. It could be neighbours squabbling over the noise from a party, two companies at loggerheads over a contract, or a worker dissatisfied with his boss's attitude. Parents might disapprove of their teenager's choice of boy or girlfriend.

Any of these could simmer down as easily as it could boil over until one party takes the other to court or, worse, resorts to violence. Or, now, the conflict could be defused through ADR.

This system, which has recently been legally recognised in the Community Mediation Act 1998, provides a new-and some think better-way to resolve conflict than going before a judge. Certainly it's gaining popularity in the US and throughout Europe, and even Jamaica has got into the act.

ADR is based on a concept of mediation by someone who is independent of the parties and who assists them to negotiate and explore solutions. Whereas a judge (or an arbitrator) decides who wins and who loses, a mediator has no such authority to impose any solution; instead, his (or rather her, because most mediators are in fact women) role is to facilitate the parties' negotiations.

As its practitioners claim, mediation doesn't aim for a win-lose situation but rather a win-win conclusion. "We look at the parties interests, not their rights," says Marva DeFreitas, Director of the Dispute Resolution Centre. This is possible because both parties explore, negotiate and finally agree on a resolution with which they feel most comfortable.

"Mediated solutions can be better because the court is constrained by legal requirements," says attorney Stephanie Daly, who is also trained in mediation. "In ADR you can include things-such as an apology-which go a long way. Sometimes all a person wants is vindication. Or the parties can agree on a new item which a court couldn't order as a remedy."

Mediated resolutions are not only more varied. They're faster and cheaper. "When you look at the costs of going to court, even if you don't lose, mediation is a lot cheaper," says Alleyne. "Then matters take years in the court, people have disappeared, money's lost, interest is adding up-business can't operate so, you can't take years to resolve commercial and trade disputes, it has to be resolved in weeks and days. If you're in an accident, you can't do without a car for two years."

And what's at least as important is that mediated solutions are less likely to result in complete termination of relations, as court decisions often do.

"You're not in the public's eye, the setting is peaceful and quiet and nobody knows we're here," says Alleyne, indicating the Chamber of Commerce's relaxed air-conditioned mediation rooms. "Often in family disputes there's a breakdown in communication, which a courtroom situation only makes worse."

The need to maintain relations between disputing parties is especially important in industrial relations and family matters. When the dust is cleared, workers and bosses must still work together; fathers and mothers must still bring up the child. Consequently, in those areas mediation and out-of-court settlements have always played an important role.

Such informal mediation differs from ADR which attempts to make the process systematic. The Mediator Handbook from Capital University, Ohio, US-which is used by the Dispute Resolution Foundation in Jamaica as well as the Chamber of Commerce facility-lists seven stages. It starts with the first formal contact between the parties and the mediator who explains the process and the rules.

Next, each party tells his or her story. "A lot of people let off steam at the beginning," says Daly.
Here, the setting is deliberately designed to encourage negotiation rather than confrontation. Parties might sit around a round table. The mediator isn't on a raised dias, like a judge.

The mediator summarises the two positions, as accurately as possible but without the insults and invective. This allows the parties to identify the issues that need to be mediated. With the contentious issues clear, the parties can propose and discuss different solutions.

At any time of the process the mediator can meet separately with the parties. This might occur if there's too much animosity, but during negotiation parties could also discuss how far they're willing to compromise. A party demanding $5,000 might be willing to accept

$3,000-and so informs the mediator. The other side might offer $1,000 but be willing to go to $3,000.

Either way the absolute neutrality and confidentiality of the mediator's role is central to the process. On it is based the parties' trust and good faith.

When an agreement is arrived at-and it could also pre-empt possible future conflicts-the mediator restates the issues and clarifies the terms of the resolution, and has the parties sign it.

"We'd like to see the wider community get into mediation," concludes Alleyne. "For instance contracts should specify that in the case of a breakdown the parties should try mediation. In my 35 years at Royal Bank we've found that avoiding the courts saves money, time and the relationships."

Mediation laws

"Although there are some litigious people, as a rule poor people don't go willingly before the courts," says calypso historian Gordon Rohlehr. "But they threatened each other: I go put you in court!"

Only upper class really dragged people to court, usually over some scandal. And yet the magistrates courts and the assizes have historically been important in a general cultural sense to all Trinidadians.

"People participated through the almost verbatim printing of cases, they followed it like an OJ Simpson trial or a soap opera," continues Rohlehr. "For calypsonians it was earlier in the century the most dramatic thing happening in society, and the special rhetoric was thrilling: I deem you a rogue and a vagabond!"

Practically, however, the court system has become less and less efficient in resolving disputes, slowing to an almost dead halt because of the backlog. It's in this context that ADR has been introduced by the Community Mediation Act.

The Act focusses mainly on mediation in criminal cases, with the civil tacked on as an afterthought, perhaps because crime and prison overcrowding is considered a larger problem. "It's a large paradigm shift from retribution to restorative justice," says Catherine Ali, from the organisation Alternatives to Custody.

First time offenders can opt for mediation if they have been charged with certain summary offences: assault and battery, aggravated assault, damaging property, trespass on cultivated lands, being in an enclosed place for an unlawful purpose, using obscene language or disturbing the peace. The complainant must agree as must be a probation officer. In any

civil dispute the parties can opt for mediation without the court's sanction, so there's no real need for it to be legislatively provided for.

Still, the Act sorely lacks general provisions, such as definitions of mediation and the role and qualifications of a mediator.

The confidentiality of the process is protected, and the mediator cannot be subpoenaed, but the ethics of the role should also be spelt out.

"A family could have a dispute and want a solution before a crime is committed," says Ali. "Perhaps they should have set up mediation centres to which people could go