Council of Legal Education:
2021 Eugene Dupuch Law School Distinguished lecture
AI and ADR – The New I Frontier
Sir Dennis Byron

Protocols:

I am delighted that the Eugene Dupuch Law School invited me to give the 2021 Distinguished Lecture. This Law School has earned its reputation as one of the leading Law Schools in the Caribbean. Its distinguished Principal Mrs. Tonya Bastian Galanis has described her mission in terms that the School empowers students to become flexible thinkers and problem solvers who will thrive in the twenty-first century. That commitment fits well with my effort to describe a new Frontier created by Artificial Intelligence and ADR. As this is part of the graduation exercises of the School, I trust that your graduating class will be taking the frontier.

The Potential of AI in the Caribbean

It is already apparent that information and communications technologies have made an indelible mark on the justice landscape, around the world and in the Caribbean. From electronic filing and case management systems, to entirely virtual hearings of court proceedings, technology-enabled innovations have created opportunities and reformed entrenched traditions and practices in ways that were once unimaginable. This was accelarated by the Covid–19 pandemic which induced innovative applications of the technology to enable the conduct of judicial and arbitration proceedings without jeopardising the imperatives of social distancing.

Changing and emerging technologies have considerable relevance to the continuing evolution of ADR processes. It has been estimated that more than one billion transactions now take place online each year. The notion that our current, inefficient, human-based resolution processes can be sufficient to resolve all these disputes

indefinitely into the future strains credibility. We are already surrounded by examples of how easily faith in our ability to be fair and impartial arbiters can weaken under this strain, and it is undermined even further by what science and research continues to reveal about how our brains work. Meanwhile, computers continue to become more powerful and more deeply integrated into our everyday lives. It stands to reason, then, that if current trends continue, computers will one day be better at fairly resolving our disputes than we are.

Herein lies the opportunity for the Caribbean, and in the context of empowering flexible thinkers and problem solvers who will thrive in the twenty-first century, I pose the question: will we in the Caribbean make Artificial Intelligence our Frontier, or will we be content to receive and consume its benefits from non-Caribbean Sources?

ADR is already benefitting from databases gathering and classifying precedents in arbitration awards, using very sophisticated search engines; the possibility of virtual hearings with 360 degrees scan of the room where witness may testify; and various certification soft wares.

These developments have become necessary to maintain the advertised advantages of ADR as an efficient, cost effective and timely dispute resolution service. As time elapsed, like court systems, ADR became susceptible to increased procedural and substantive complexity, and the costs and time for resolution have been escalating. This new frontier of Artificial Intelligence promises more rapid and efficient resolution of disputes and hence improvement of access to justice. In this regard, one of the tools that it provides is the increased likelihood of settlement by the use of algorithms with the capacity for sophisticated synthesis of relevant precedents which make predictions and recommendations on the possible outcome of any given ADR proceedings. The "Harvard project" in the field of investment arbitration, has been identified as a leader in this research and which is projected as potential "game changer" with significant impact on the "economy" of legal services, and timeliness of dispute resolution in this field. A leading online publication – Global Arbitration Review –reported that the

dollar value of pending cases of their top 30 ranked firms is over $2trillion. This emphasizes the value and importance of systems that could help to resolve these cases at the commencement of the resolution process rather than the current best practice estimates for resolution of 12 – 18 months.

So again, I posit the question, whose frontier is this? Why shouldn't the Caribbean flexible thinkers and problem solvers who will thrive in the twenty-first century advance to and take possession of that frontier? We can assume that dedicated application Artificial Intelligence will help to produce higher quality Judicial and Arbitral decisions and improve the decision making process as well as enhance the development of a more coherent body of case law.

The Revised Treaty of Chaguaramas, with its vision for the Caribbean Community, included in its preamble a consciousness of the need to promote in the Community, the highest level of efficiency in the production of goods and services with a view to maximizing foreign exchange earnings on the basis of international competitiveness, and a recognition of the potential of enterprises to contribute to the expansion and viability of national economies in the Community. That should at least encourage and stimulate support for the development of technology, and I dare say Artificial Intelligence, systems using expertise and enterprises from the Caribbean region for the social advancement and economic development of our societies. That idea prompted the Caribbean Court of Justice [CCJ] to sponsor the establishment of a unique non-profit corporation under the name of APEX to develop and support technologies for the improvement of the quality of justice delivery in the Caribbean. I enjoyed the good fortune to address the 2020 graduation of that "other Caribbean Law School" and was pleased to be able to announce that the agency is headed by technology pioneer Mr. Bevil Wooding, a relative of the legal pioneer Sir Hugh Wooding after whom the school was named.

APEX created and installed the high-quality technology employed at the CCJ, using a platform named Curia, and has also deployed a platform called RESOLVE to support

mediation and arbitration proceedings and is currently working on rolling out a tool call PRACTIS to support the legal practitioners. These are solutions that reflect the CARICOM vision as they are created in the region, by Caribbean talent to a world-class standard. They are a tangible demonstration, and reminder of our capacity to shift from being mere consumers of externally developed technology products, to serious producers of intellectual property tailored to the needs of our region. The drive of your flexible thinkers and problem solvers to thrive in the twenty-first Century should find some illumination from their predecessors.

The technology employed at the CCJ includes the digital recording of its proceedings and making the digital record the official court transcript. The digital record contains the whole of the proceedings and is put on the court's website almost contemporaneously. They have remained accessible to the extent that one can review any case heard by the CCJ from its inception, free of cost. The judgments of the court are as accessible on the same website.

We must remember that technicity and substantial issues are interconnected, and the development of Caribbean Jurisprudence includes increasing our efficiency, effectiveness and transparency as well expanding access to our courts and their jurisprudence. I singled this out because, we continue to read and hear reports of inordinate delays in judicial processes, judgment delivery, and the timeliness of appellate proceedings, which are frequently excused by allegations of sloth in the preparation of transcripts. The adoption of this and similar practices have been included in the somewhat unheeded advocacy of the CCJ to improve the quality of justice delivery in judiciaries in the region. In this particular instance, it would take away some excuses for delay, and improve timeliness, transparency, efficiency and effectiveness in the judicial process. I suggest that the existence of the CCJ combined with its systematic recourse to technologies and Artificial Intelligence (no matter how basic) made possible the development of a Caribbean jurisprudence that has increased international visibility.

The vision of integrated social and economic development, supported by complex tariff and other treaty obligations, which has been implemented by the Governments of the Caribbean Community includes the preference of Caribbean products and services. I suggest that in this context the opportunity for growth and leadership in the area of information and communications technology, including the development of Artificial Intelligence should be aggressively supported throughout our region, particularly as relevant technical expertise and experience can be found in the region. I must reflect my sorrow that the court technology, which was developed by Caribbean Expertise and deployed with success in the Caribbean Court of Justice, revealing access to a new frontier, has not been adopted by some Caribbean Judiciaries who still find refuge in relying on foreign court technologies, reflecting – I suppose – that old belief that they must be better than anything locally developed, often regrettably funded by international donors who profess interest in Caribbean development while undermining it by leveraging their superior financial resources to ensure that regional beneficiaries are compelled to use foreign technologies rather than support the development of Caribbean technology and entry into the field of artificial intelligence. So, there is another frontier for our flexible thinkers and problem solvers if you wish to thrive in the twenty-first century.

The frontiers in ADR to which I would like to direct your attention should be built on the expansion of our Caribbean Community project. There are several International Arbitration Centres at the local level within our region. These are all small centers supported by a small population and resource base which inevitably reduces the prospects of development. This, too, is a reality which the visionary founders of the Caribbean Community, rationalized in the Revised Treaty of Chaguaramas to encourage the development of economies of scale which would at least reduce inequalities as we compete in the global arena. As of today, they are four main international arbitration centers in the region. The **British Virgin Islands** were the first to establish an Arbitration Center in the region in **2013** (with moderate results) with their BVI International Arbitration Centre (BVI IAC). In **2015 Jamaica** launched the Mona International Centre for Arbitration and Mediation (MICAM) rebranded later as

Jamaica International Arbitration Centre. **Barbados** established the Arbitration and Mediation Court of the Caribbean (AMCC) in **2018**. **The Cayman Islands**, with its Cayman International Arbitration Centre (CIAC) in **2019**, is the latest addition to the region. Bermuda and The Bahamas have both announced their plans to establish their own center. The population base for all is in the region of five to six million people. When one looks at the global picture and the ability of these centers to compete with major established centers for example those in New York, Paris and London, the temptation is to reinvent the Davie and Goliath story, but with the added complexity of so many David's in such a small arena, competing with each other, rather than combining forces to deal with the big world out there. Is there to be a new frontier based on a regional approach?

The multiplication of these local arbitration centers may have overlooked fundamental obstacles to a coherent development of ADR culture in the region. The overburdened domestic judicial calendars require increased use of ADR to improve the percentage of litigious disputes that are resolved in a timely fashion, not to mention those that do not reach the court calendars. In most States, the domestic use of ADR tends to be completely *ad hoc* and does not benefit from any institutional control, administrative management, or monitoring. This also means that there are no readily available statistical or other information on domestic arbitrations to determine the extent to which they already have or could be developed to make a satisfactory contribution to the needs for dispute resolution.

I would also suggest that the failure to harmonize the commercial law and dispute resolution processes, handicaps the expansion of economic advances in the field of international trade and commerce. Even more significant is the fact that there is only partial regional compatibility of our arbitration legislations with international standards, and more specifically the UNCITRAL model laws, which have become accepted as the benchmark. UNCITRAL is the acronym for the United Nations Commission on International Trade Law. It has been fulfilling a much-needed role in creating certainty in dispute resolution in international commercial matters. I also

make specific reference to the other globally accepted benchmark for the enforcement of arbitral awards, the New York Convention. In the Caribbean region over time, many countries were, and some still are plagued by outdated and incoherent British based arbitration laws, which incidentally have, in the meantime, been updated and modernized in Britain. It has been recognized by Caribbean scholars that the UNCITRAL model laws and the New York Convention are the key tools for legal reform in this area. So what has happened? Most Caribbean countries had chosen to ratify the New York Convention, out of 156 parties, 16 are Caribbean countries: Suriname (1964); Trinidad and Tobago (1966); Cuba (1974); Bermuda (1979); Belize (1980); the Cayman Islands (1980); Haiti (1983); Dominica (1988); Antigua and Barbuda (1989); Barbados (1993); St Vincent and the Grenadines (2000); Jamaica (2002); the Dominican Republic (2002); Bahamas (2006); the British Virgin Islands (2014); and Guyana (2014).

There is a similar picture with regard to the adoption of the UNCITRAL model laws. The arbitration laws of countries such as Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, Saint Lucia and St. Vincent and the Grenadines, are based on the English Arbitration Act of 1950. These countries have yet to adopt the UNCITRAL Model Law 1985 as amended in 2006. I think that Jamaica only removed itself from this list in 2017 with the passage of the new revised Jamaican Arbitration Act 2017 based on the UNCITRAL Model Law. Before 2017, arbitration law in Jamaica included parts of the outdated 1889 and 1950 English Arbitration Acts.

Certainly, the harmonization and modernization of Arbitration Laws within the Caribbean and adoption of the New York Convention, and the implementation of the UNCTIRAL model law regime, must be seen as a new frontier until the entire CARICOM Community is fully compliant.

As I mentioned earlier, another frontier is the development of regional structures for the control, management and monitoring of ADR on a Caribbean wide basis. An example was intended to be set by the Revised Treaty of Chaguaramas for the

resolutions of inter state treaty disputes within CARICOM. These structures only deal with disputes relating to the interpretation and application of the Treaty to States and Community Organs. Other disputes between Member States are to be resolved by other means, although it is possible to see the Treaty structure as an example which could be more generally applied. It is not that there have been no inter state disputes. There are two which are well known and resulted in arbitration procedures between Suriname and Guyana relating to the delimitation of maritime boundaries between them, and between Trinidad and Tobago and Barbados relating to their competing claims to the exclusive economic zone and the continental shelf between them.

The CARICOM structures to which I had referred, envisaged that inter state community disputes should be resolved by ADR, before resorting to the litigation. It provided for statistical monitoring through the requirement to provide notice of the existence and settlement of such disputes to the Secretary General. It established a formal structure for various ADR mechanisms including Arbitration which was to be facilitated by the maintenance of a roster of arbitrators by the Secretary General for the selection of panels according to prescribed rules, with provisions for the consequential administrative and related structures. But this has not yet been put in place. Meanwhile there is currently pending the first inter state community case before the CCJ. Belize brought proceedings against Trinidad and Tobago, St. Kitts-Nevis and CARICOM, claiming relief for their respective non-compliance with the preferential trade agreements in relation to Belizian brown sugar exports. The relevant point for our discussion is that the court ordered discontinuance of the case between Belize and St. Kitts-Nevis on the filing of documentation revealing that those parties resorted to ADR, on their own accord, and reached a settlement of the dispute, without resort to the Treaty structures. The establishment of the structures prescribed by the revised Treaty Chaguaramas with regard to ADR, and other or related mechanisms for non-treaty based ADR matters is an important frontier.

Frankly, the institution of this litigation marked another highly significant frontier. This was the first time a CARICOM Member State took formal steps to hold other

Member States and the CARICOM Secretariat accountable for alleged failures to honour Treaty obligations. I hope that this example will be followed to ensure that the multiple benefits conferred through the Revised Treaty of Chaguaramas are realized.

The lack of coordinated approach at the regional level is replicated at the international level which threatens the visibility of the Caribbean region in the international fora related to ADR. Only this week I experienced an example of the disturbing fact that Caribbean States are underrepresented in global fora in the field of ADR. Take for example the **United Nations Commission on International Trade Law** (**UNCITRAL**). This is a subsidiary body of the U.N. General Assembly responsible for helping to facilitate international trade and investment, with a mandate which includes the promotion of the progressive harmonization and unification of international trade law through conventions, model laws, and other instruments that address key areas of commerce including dispute resolution. UNCITRAL set up a working group in the field of investment arbitration to redefine aspects of the procedural framework of investment arbitration. I am attending the 8th to 12th February working group meeting in Vienna virtually which will end tomorrow. I noticed that not one Caribbean State is on the Commission, and none was represented at the meeting which received participation from non-commission member states and organizations. My attendance was not on behalf of a state but on behalf of an NGO, OHADAC. It should seem obvious that the practitioners in the region who are so actively engaged in developing themselves and preparing for participation in the exiting new world of international and commercial and investment arbitration and becoming included in the international arbitration community would be handicapped when our states are not represented at regulatory fora. Participation is not difficult. I discovered that the most important requirement is the desire to participate. When I commented on the lack of Caribbean representation, there was an immediate reaction from Dr. Didacus Jules, Director General of the OECS. With the help of OHADAC the OECS gained admission to this forum as an observer with speaking rights for the last three days of the session, ably represented by OECS citizen Dr. Jan Yves Remy the Deputy Director at Shridath Ramphal Centre for International Trade Law, Policy and Services (SRC) in Barbados

It is also a fact that Caribbean arbitrators are under-represented in panels of arbitrators of global institutions; thus, the challenges faced by the region are insufficiently understood; and if not addressed could negatively impact on the attractiveness of the region to foreign investors.

Having said that, I must immediately recognise that the region has made a significant breakthrough with the election of the distinguished Jamaican Attorney, John Bassie as the incoming Global President for the Chartered Institute of Arbitrators. That is the attainment of a frontier which I am sure he will leverage to raise the visibility of the Caribbean in ADR service delivery as he fulfils his promised mandate to expand ADR in jurisdictions, where it is currently an underdeveloped option, and to enhance the appeal of ADR in jurisdictions where it is already developed.

Thus, another frontier for our flexible thinkers and problem solvers seeking to conquer the twenty-first century includes the integration of our efforts, creating and developing a regional Centre, increasing our participation in global Arbitration thereby creating greater bargaining power internationally, and using Artificial intelligence to bolster the emergence of a coherent ADR culture in the region.

An important option which will be shortly available is the OHADAC project for legal integration in the Caribbean region to promote a harmonized legal framework for the activities of Caribbean businesses. It involves 33 States, extending to all of the Caribbean Island States but also coastal regions of the Americas bordering on the Caribbean. Its goals include (i) promoting legislative harmonisation by proposing to States model legislation in the field of business law and (ii) promoting arbitration and mediation in the Caribbean region, through the opening of a regional arbitration and mediation centre. It will have the opportunity to gather Caribbean expertise and contribute to sharing best practices and coordinating expertise at the regional level, with ensuing economies of scale. Its work should promote more transparency in ADR processes with attendant attractiveness of the Caribbean business environment for

non-Caribbean investors. It should also foster the emergence of a more visible group of highly qualified ADR professionals in the region.

As we close in on these frontiers, it is well to meditate on how much things have changed. It was not so long ago that technology was perceived as cold, impersonal or dehumanizing. Arbitrators and Mediators once resisted the idea that computer algorithms had any useful role to play in helping disputants find solutions to their disagreements. How times have changed!

Technology is now much more accessible and integrated into our lives, and we now use technology in ways we never would have considered a short decade ago. People take to the internet to find their love, to select a church, to choose the best school, and even to seek out a lawyer, dentist, physician or Arbitrator. The modern generation is even more comfortable: they share seemingly all of their life happenings – the good, the bad and the ugly - on Social Media. In short, individuals have come to trust information presented to them by an algorithm more than they trust information presented by a human. How times have changed!!

Flexible thinkers and problem solvers in the Caribbean who want to thrive in the twenty-first century must play a leading role in the development, exploration and exploitation of these new frontiers !!!

And so, Madam Principal – I hope that I have sufficiently challenged your graduants that there are new frontiers for the flexible thinkers and problem solvers you are releasing to thrive in the twenty-first century.