

# Award in Civil Procedure

**Lecture Title:**      **Alternative Dispute Resolution (ADR)**  
                                 - **General Principles**  
                                 - **Arbitration (part 1)**

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**Diploma in Law (Malta)**



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# Introduction: general principles of ADR

## What is ADR?

- Alternative Dispute Resolution refers to:
  - any means of resolving & settling disputes outside of the Courts;
  - various processes intended to help and assist the parties to resolve disputes without resorting to judicial proceedings



# Introduction: general principles of ADR

## What is the scope of ADR?

- Through ADR processes, disputes are resolved and settled amicably without the intervention of a judicial institution or authority;
- ADR processes can be resorted to for resolution of all type of matters & disputes, including civil, commercial, corporate, industrial, family, etc.;
- ADR processes are resorted to where the parties involved are unable to start negotiations and reach a settlement themselves;
- Generally, ADR uses a neutral, independent and impartial third party who engages with the parties and helps them to communicate, discuss the differences and resolve the dispute;
- ADR methods enable the parties to maintain co-operation, order and reduce hostility.



# Introduction: general principles of ADR

## ADR mechanisms:

- ADR is a mechanism of dispute resolution that is non adversarial;
- A process whereby the parties work cooperatively with the neutral third party to reach the best resolution for everyone;
- Can be instrumental in reducing the burden of litigation on the courts of justice, while delivering a well-rounded and satisfying experience for the parties involved;
- Intended to expand on the creativity of the parties, collaborative bargaining and fulfilment of the interests upon which the parties bases their demands.



# Introduction: general principles of ADR

Which are the main and most common ADR methods?

- Arbitration;
- Mediation;
- Conciliation;
- Negotiation.



# Introduction: general principles of ADR

- A brief introduction to each ADR method – Arbitration:
  - Dispute submitted to an arbitral tribunal which issues a decision (“award”) on the dispute;
  - Arbitral award is normally binding on the parties;
  - Generally, there is no right of appeal from an arbitral award;
  - Arbitration is less formal than judicial proceedings;
  - Rules of evidence and procedure are normally relaxed;
  - Scope for judicial intervention in the arbitration process is minimal, with the exception of some interim measures when these are required;
  - Arbitral award constitutes an executive title under *Maltese law*.



# Introduction: general principles of ADR

- A brief introduction to each ADR method – Mediation:
  - An impartial third party – the Mediator – is engaged to help the participants in trying to reach a mutually acceptable resolution of their dispute;
  - The mediator does not issue a decision on the dispute;
  - The mediator helps the participants to communicate in order for them to try to settle the dispute themselves;
  - Mediation is less formal than judicial proceedings and than arbitration;
  - In the mediation process control of the outcome remains with the participants;
  - Mediation agreement constitutes an executive title under Maltese law.



# Introduction: general principles of ADR

- A brief introduction to each ADR method – Conciliation:
  - A non-binding procedure in which an impartial third party – the Conciliator – assists the parties to a dispute in reaching a mutually satisfactory agreed settlement;
  - A less formal form of arbitration;
  - Parties are free to accept or reject the recommendations of the conciliator;
  - If the settlement document drawn up by the conciliator is accepted by the parties, it shall be final and binding on the parties;
  - Settlement / conciliation agreement does not constitute an executive title under Maltese law.





# Introduction: general principles of ADR

- A brief introduction to each ADR method – Negotiation:
  - A non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the aim of reaching a negotiated settlement;
  - Normally the parties engage in negotiations through the intervention of their respective lawyers prior to resorting to judicial proceedings;
  - It is the most common method of ADR;
  - If a settlement is reached, a compromise agreement must be drawn up;
  - A compromise agreement does not constitute an executive title under *Maltese law*.



# Introduction: general principles of ADR

## Advantages of ADR:

- Less time consuming;
- Cost effective;
- Less formal – free from technicalities;
- Parties are free to express themselves;
- Efficient process – provides a better chance of restoring or maintaining good relationships and preventing further conflict;
- Preserves the best interests of the parties.



# ARBITRATION

- Regulated by Chapter 387 of the Laws of Malta, the Arbitration Act ('the Act')



# Arbitration: the Malta Arbitration Centre

## The Malta Arbitration Centre ('the Centre')

- Established by the Act;
- The Act also establishes a Board – responsible for the policy and general administration of the affairs and business of the Centre;



# Arbitration: the Malta Arbitration Centre

- Functions of the Centre:
  - To promote Malta as a centre for international commercial arbitration;
  - To provide for the conduct of international arbitration in Malta;
  - To encourage domestic arbitration as a means of settling disputes;
  - To provide the necessary facilities for the conduct of arbitration;
  - To advise the Government on any of the matters mentioned above;
  - To perform such other functions assigned to it by the Act or any other law; and
  - To perform any other function supplementary or ancillary to the above.



# Arbitration: the Malta Arbitration Centre

- Powers of the Centre to make rules providing for:
  - Procedure for arbitrations;
  - The manner and requirements (including applicable fees) for registration of any document with the Centre;
  - Guidelines and optional methods or specimens for the drawing up of arbitration clauses and agreements;
  - Any other matters in connection with which rules may be made under any provision of the Act;
  - With the agreement of the parties to a dispute, the Centre may employ mediation, conciliation or other ADR methods at any time before or during arbitration proceedings, for the purpose of encouraging settlement.



# Arbitration: the Malta Arbitration Centre

- The Centre deals with two main types of arbitration proceedings:
  - Domestic Arbitration;
  - International Commercial Arbitration.



# Arbitration: Domestic Arbitration

## What is Domestic Arbitration?

- Domestic arbitration agreements are defined by law as being an arbitration agreement not falling under international commercial arbitration.
- Do not involve cross-border elements.
- A dispute shall include any controversy or claim arising out of or relating to the agreement, or the breach, termination or invalidity thereof or failure to comply therewith.





# Arbitration: Domestic Arbitration

- Typical (standard) arbitration agreement / clause:

*Any disputes arising under or in connection with this Agreement shall be referred to arbitration before the Malta Arbitration Centre by three arbitrators. The three arbitrators shall be selected one by [Party A], one by [Party B] and the third by the two arbitrators selected by the parties or otherwise in accordance with the provisions of the Maltese Arbitration Act as well as the Malta Arbitration Centre Rules. The arbitration shall take place in Malta and the language of the arbitration shall be Maltese or English.*



# Arbitration: Domestic Arbitration

Judicial Proceedings in the context of an arbitration agreement – is it possible to institute proceedings in Court notwithstanding an arbitration clause?

- The Act provides that:
  - Notwithstanding any provision of the COCP,
  - if any party to an arbitration agreement commences judicial proceedings against any other party to the arbitration agreement,
  - in respect of any matter agreed to be referred to arbitration,
  - any party to such judicial proceedings may file an application in court demanding the court to stay the judicial proceedings.
  - Such application may be filed at any time before delivering any pleadings or taking other steps in the court proceedings.
  - The Court / Judge shall make an order staying the proceedings, unless satisfied that the arbitration agreement has become inoperative or cannot proceed.
  - Such application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
  - Nevertheless, this provision has been subject to varying interpretation and application by the Courts on the grounds of retention of residual jurisdiction.



# Arbitration: Domestic Arbitration

- In these circumstances where judicial proceedings are filed, arbitral proceedings may still be commenced or continued.
- Nevertheless, until the Court decides on the application for stay of judicial proceedings, the arbitral tribunal shall not take any steps in the arbitration, and any time limit is interrupted and commences to run again from date when applicant is served with the Court's decision to dismiss the application.
- Only exception to the above – cases where failure to provide a remedy will result in irreparable harm to any party to the arbitral proceedings.
- Upon the Court's decision on the application, the arbitral tribunal shall be bound by such decision and shall act accordingly.
- However, settlement through arbitration remains possible if all parties to the dispute so agree.



# Arbitration: Domestic Arbitration

## Inapplicability of / limitations to Arbitration:

- Disputes concerning questions of personal civil status, including those relating to personal separation, divorce or annulment of marriage, cannot be settled by arbitration.
- Questions relating to the division of property between spouses may be referred to arbitration subject to court approval of the arbitration agreement and arbitrator.
- Submission to arbitration by an administrator, agent or attorney requires such person to be so authorised and that the submission refers to an issue falling within the powers of such person.



# Arbitration: Domestic Arbitration

## Mandatory / Compulsory Domestic Arbitration

- Disputes on the following matters shall be referred to Arbitration:
  - Condominium Disputes;
  - Motor Traffic Disputes;
  - Disputes connected with electricity and water services; and
  - Paying Agency Disputes.



# Arbitration: Domestic Arbitration

- Condominium Disputes
  - All disputes regarding a condominium which are to be submitted to arbitration according to the Condominium Act.
- Motor Traffic Disputes
  - Any civil or commercial dispute arising from:
    - (a) any collision between vehicles; or
    - (b) any involuntary damage to property involving vehicles; or
    - (c) any such claim against an authorised insurer, an assurance company, an approved underwriter or other person who may be liable therefor in accordance with the Motor Vehicles Insurance (Third-Party Risks) Ordinance or any policy of insurance.
  - Not being a dispute in connection with a claim for damages for personal injuries
  - Value of claim under (a), (b) and (c) above must not exceed EUR11,646.87.



# Arbitration: Domestic Arbitration

- Disputes connected with electricity and water services
  - All disputes arising from the supply of electricity, electrical meter rent or any other service provided by the distribution system operator.
  - Any dispute related to water services.
  - Consumers are entitled to submit their claims against the distribution system operator or the Water Services Corporation for arbitration.
  - The Arbitral Tribunal has exclusive jurisdiction, with the exception to the provisions under the Consumer Affairs Act insofar as these relate to resolution of any consumer disputes.
- Paying Agency Disputes
  - All disputes arising from claims made to the Paying Agency which are to be submitted to arbitration in accordance with the Paying Agency Regulations.



# Arbitration: Domestic Arbitration

- Specific rules applicable to *Mandatory Arbitration*
  - In the classes of disputes subject to mandatory arbitration, the parties shall be deemed to be bound by an arbitration agreement in relation to such disputes.
  - Arbitral Tribunal composed of one arbitrator. Parties may agree for three arbitrators, notifying the Centre within 30 days of receipt by respondent of the notice of arbitration.
  - Arbitrator/s appointed by the Centre from the panels, unless parties appoint arbitrator/s themselves notifying the Centre within 30 days of receipt by respondent of the notice of arbitration.
  - Proceedings in mandatory arbitration shall be conducted in public and award delivered in public. Rules on confidentiality do not apply, unless otherwise agreed.
  - There is a right of appeal to the Court of Appeal (one Judge) from the award both on points of law and on points of fact, unless the parties agree otherwise in writing.
  - General rules of procedure on curators and intervention and joinder apply to these proceedings.
  - Where an action on same subject-matter and between same parties is brought before the court, the arbitral tribunal shall suspend until such time as a judgement is given by the court.







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# Arbitration: Domestic Arbitration

## Procedure in Arbitration Proceedings

- Notice of arbitration
- Appointment of Arbitrator/s
- Statement of Claim
- Statement of Defence
- Hearing of Proceedings
- The Award



# Arbitration: Domestic Arbitration

- Notice of Arbitration
  - The Claimant shall with the Centre a notice of arbitration for registration of the proceedings
  - Notice of Arbitration is transmitted to Respondent by the Centre
  - Procedure and award shall be null and void and unenforceable if notice of arbitration shall have not been filed. Yet, this may be filed by any party at any time prior to communication of the award.



# Arbitration: Domestic Arbitration

- Notice of Arbitration (cont.)
  - The notice of arbitration shall include the following:
    - (a) A demand that the dispute be referred to arbitration;
    - (b) The names and addresses of the parties;
    - (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;
    - (d) A reference to the contract out of which, or the defined legal relationship in respect to which, the dispute arises;
    - (e) The general nature of the claim and an indication of the amount involved, if any;
    - (f) The relief or remedy sought; and
    - (g) A proposal as to the number of arbitrators if the parties have not previously agreed thereon.



# Arbitration: Domestic Arbitration

- Notice of Arbitration (cont.)
  - The notice of arbitration may also include the following:
    - (a) The proposals for the appointment of a sole arbitrator;
    - (b) The notification of the appointment of an arbitrator; and
    - (c) The statement of claim
  - The parties may be represented or assisted by persons of their choice, in which case their details must be communicated.
  - Not necessary for such person to be a qualified legal practitioner.



# Arbitration: Domestic Arbitration

- Notice of Arbitration (cont.)
  - Notice of Arbitration Form – an example



# Arbitration: Domestic Arbitration

- Appointment of Arbitrator/s
  - Parties can previously agree on the number of arbitrators
  - Parties can also agree to only appoint one arbitrator within 15 days after receipt by respondent of notice of arbitration
  - Otherwise, three arbitrators shall be appointed (default position), unless amount claimed is under EUR11,646.87
  - In case of sole arbitrator, either party may propose the names of one or more persons
  - If no agreement is reached within 30 days after receipt of proposal, sole arbitrator shall be appointed by the Chairman of the Centre
  - On request of either party, the Chairman shall appoint a sole arbitrator after calling a meeting attempting to select the arbitrator together with the parties. After such meeting, Chairman appoints the sole arbitrator – final and binding.



# Arbitration: Domestic Arbitration

- Appointment of Arbitrator/s (cont.)
  - In case of three arbitrators, each party appoints one. The two arbitrators so appointed shall choose the third arbitrator who shall act as presiding arbitrator.
  - The second arbitrator is appointed by the chairman if within 30 days after receipt of a party's notification of appointment of the first arbitrator, the other party fails to notify appointment of second arbitrator.
  - Same applies in relation to the third and presiding arbitrator.
  - In case of multiple parties, the proposal of an arbitrator shall be made jointly by claimants and/or by respondents. In the absence of a joint nomination, all arbitrators are appointed by the Chairman, designating one as presiding arbitrator. Same applies in case of a sole arbitrator.





# Arbitration: Domestic Arbitration

- Appointment of Arbitrator/s (cont.)
  - Person approached by a party to act as arbitrator, shall disclose to such party any circumstance likely to give rise to justifiable doubts as to his impartiality or independence.
  - Once appointed or chosen, arbitrator shall likewise disclose to all parties such circumstances.
  - Challenge of arbitrator – if circumstances exist that give rise to justifiable doubts as to impartiality or independence.
  - A party may challenge arbitrator appointed by him only for reasons of which he becomes aware after appointment.
  - Notice of challenge to be sent to registrar, other party and arbitrator/s within 15 days after appointment is notified or after circumstances become known. Notice in writing and must contain the reasons for the challenge. Other party or arbitrator may agree to the challenge, without implying acceptance of validity of grounds for the challenge (procedure for appointment of substitute is repeated). Otherwise, decision is taken by the chairman and decision is final and binding (substitute appointed by chairman).



# Arbitration: Domestic Arbitration

- Statement of Claim
  - May be submitted together with the Notice of Arbitration
  - Otherwise, tribunal determines a period of time within which Claimant must submit the Statement of Claim
  - Statement of claim communicated in writing to Respondent and each of the arbitrators, together with a copy of the contract and arbitration agreement (unless not contained in the contract).



# Arbitration: Domestic Arbitration

- Statement of Claim (cont.)
  - Shall include the following particulars:
    - (a) the names and addresses of the parties;
    - (b) a statement of the facts supporting the claim;
    - (c) the points at issue; and
    - (d) the relief or remedy sought.
  - Claimant may annex all relevant documents or add a reference to the documents or other evidence to be submitted.
  - In the course of proceedings, Claimant may amend or supplement the claim unless tribunal considers it inappropriate having regard to the delay or prejudice to other party or any other justifiable circumstances. In any case, amendment cannot fall outside the scope of the arbitration clause or agreement.



# Arbitration: Domestic Arbitration

- Statement of Claim (cont.)
  - Statement of Claim Form – an example



# Arbitration: Domestic Arbitration

- Statement of Defence
  - Tribunal determines a period of time within which Respondent must submit the Statement of Defence.
  - Statement of Defence communicated in writing to Claimant and each of the arbitrators.



# Arbitration: Domestic Arbitration

- Statement of Defence (cont.)
  - Shall contain a reply to:
    - (a) the statement of the facts declared by Claimant in support of the claim;
    - (b) the points at issue raised by Claimant; and
    - (c) the relief or remedy sought by Claimant.
  - Respondent may annex all relevant documents or add a reference to the documents or other evidence to be submitted.



# Arbitration: Domestic Arbitration

- Statement of Defence (cont.)
  - Together with the statement of defence Respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for claiming a set-off. Counter-claim may also be made at a later stage if Tribunal decides that the delay was justified. The same provisions on contents of a statement of claim apply to a counter-claim.
  - In the course of proceedings, Respondent may amend or supplement the defence unless tribunal considers it inappropriate having regard to the delay or prejudice to other party or any other justifiable circumstances. In any case, amendment cannot fall outside the scope of the arbitration clause or agreement.



# Arbitration: Domestic Arbitration

- Statement of Defence (cont.)
  - Statement of Defence Form – an example





# Arbitration: Domestic Arbitration

- Hearing of Proceedings
  - Pleas as to jurisdiction:
    - tribunal has power to rule on objections to its jurisdiction, including objections to existence or validity of arbitration clause or agreement.
    - Tribunal shall also have the power to determine existence of validity of contract which contains an arbitration clause. For this purpose, an arbitration clause is deemed as an independent agreement. A decision that the contract is null and void shall not entail the invalidity of the arbitration clause.
    - A plea to jurisdiction shall be raised in the statement of defence or in the reply to the counter-claim (with respect to a counter-claim).
    - Such plea shall be decided upon as a preliminary question or in the final award.
    - If jurisdiction plea is referred to the court, judicial proceedings shall be dismissed and referred for decision by the tribunal, unless court considers that any party will suffer irreparable harm if it does not decide the issue itself.



# Arbitration: Domestic Arbitration

- Hearing of Proceedings (cont.)
  - Further written statements:
    - Arbitral Tribunal decides what further written statements it requires from the parties and fixes the periods of time for such purpose
    - Such periods of time should not exceed 45 days
    - Time periods can be extended if it is considered that an extension is justified
  - Burden of proof:
    - Each party must prove the facts relied upon in support of the claim / defence
    - Tribunal may request documents / evidence within a time limit it determines



# Arbitration: Domestic Arbitration

- Hearing of Proceedings (cont.)
  - Evidence:
    - Evidence of witnesses produced either *viva voce* or by *affidavit* under same rules applicable for courts
    - Procedure regulated by the Centre or by the parties
    - Writs of summons may be issued by the Centre to call upon a person to attend and give evidence
  - Oral Hearing:
    - Hearings are agreed upon between the parties with the arbitrator/s
    - Held *in camera* unless otherwise agreed by the parties
    - Tribunal is free to determine the manner in which witnesses are examined
    - Admissibility, relevance, materiality and weight of evidence shall be determined by the tribunal

# Arbitration: Domestic Arbitration

- Hearing of Proceedings (cont.)
  - Interim measures / precautionary acts:
    - The precautionary acts listed in the COCP may be requested to the court by any party in the context of arbitration
    - Such acts, when issued, shall remain in force until they expire, are revoked in terms of the COCP or until an award is given ordering withdrawal of the act
    - Arbitral proceedings shall be issued within 20 days from filing of judicial act demanding the issue of the precautionary act, which term may be extended as stipulated in the COCP. The party issuing out the act shall file a note in the records of the precautionary act showing that arbitration proceedings were commenced.
    - In the course of arbitral proceedings, a party may request the tribunal to order the taking of interim measures of protection as the tribunal considers necessary and may require the provision of adequate security.
    - Enforcement of such interim measures may be demanded to the court, which has the power to amend or revoke such orders after hearing the parties and the tribunal as it deems necessary.



# Arbitration: Domestic Arbitration

- Hearing of Proceedings (cont.)
  - Experts:
    - Tribunal may appoint experts to report on specific issues determined by the tribunal
    - Any relevant information, documents or goods shall be provided to the expert by the parties for his inspection
    - Disputes between a party and an expert as to relevance of information requested shall be referred to the tribunal
    - Expert report is communicated to the parties, who shall be given the opportunity to express their opinion on the report in writing
    - Any party may request that the expert is heard by the tribunal at a hearing during which the parties may interrogate the expert



# Arbitration: Domestic Arbitration

- Hearing of Proceedings (cont.)
  - Default:
    - If claimant fails to communicate his statement of claim within the fixed period of time without showing sufficient cause, tribunal shall order the termination of proceedings
    - If respondent fails to communicate his statement of defence within the fixed period of time without showing sufficient cause, tribunal shall order continuation of proceedings
    - If a party fails to appear for a hearing to which he had to appear without showing sufficient cause, tribunal may proceed with the arbitration
    - If a party fails to produce documentary evidence as requested without showing sufficient cause, tribunal may give the award on the evidence before it.
  - Closure of hearings:
    - Hearings are declared closed following production of evidence and making of submissions
    - Hearings may in exceptional circumstances and if deemed necessary be reopened at any time prior to the award



# Arbitration: Domestic Arbitration

- The Award
  - Where tribunal is composed of three arbitrators, award made by a majority
  - In relation to questions of procedure, presiding arbitrator may decide on his own where there is no majority or where tribunal so authorises, subject to revision by the tribunal
  - Tribunal may give separate awards at different times on different aspects of the matters to be determined
  - Award shall be in writing, stating the reasons upon which it is based
  - Award may be made public only with consent of both parties
  - An Award is final when it settles all or part of the merits, is susceptible to immediate implementation and is not preparatory to another stage in the proceedings or otherwise has the effect of bringing the proceedings to an end.
  - Subject to recourse against an award where allowed, final awards are binding on the parties.
  - No recourse is available against interlocutory awards, which are immediately binding on their notification.



# Arbitration: Domestic Arbitration

- The Award (cont.)
  - Tribunal shall apply the law designated by the parties
  - If no such designation is made, Maltese law shall apply
  - Parties may expressly authorise the tribunal to decide *amiable compositeur* or *ex aequo et bono*
  - Proceedings may be terminated prior to the award due to settlement or if continuation becomes unnecessary or impossible for any reason.
  - Parties may request the tribunal to give an interpretation of the award within 15 days from receipt of the award. Interpretation is given in writing within 45 days after receipt of the request and shall form part of the award.
  - Likewise, parties may request a correction within 15 days from receipt of the award. Corrections must relate to errors in computation, clerical or typographical errors or errors of similar nature
  - Also within 15 days from receipt of the award, parties may request an additional award on claims presented but omitted from the award. In such case, further hearings may be required; or otherwise, if not required award shall be completed within 45 days.





# Arbitration: Domestic Arbitration

- The Award (cont.)
  - Costs are in principle borne by unsuccessful party but tribunal may apportion costs if it determines this to be reasonable.
  - Tribunal may request each party to deposit with the Centre an equal sum between them as advance payment for costs.
  - During the course of proceedings, tribunal may request parties to make supplementary deposits to cover further costs.
  - Failure to pay the required deposits may lead to the tribunal ordering suspension or termination of proceedings





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