

# Award in Civil Procedure

Lecture Title:       Alternative Dispute Resolution (ADR)

- Arbitration (part 2)
- Mediation

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Diploma in Law (Malta)



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# Arbitration: International Commercial Arbitration

International Commercial Arbitration is regulated by Part V of the Arbitration Act (Chapter 387 of the Laws of Malta):

- Makes reference to the 'Model Law', which forms part of the Laws of Malta and is enforceable as part of Maltese law
- The Model Law means the *Model Law on International Commercial Arbitration* adopted on June 21, 1985 by the United Nations Commission on International Trade Law (UNCITRAL) reproduced in the First Schedule to the Act
- International Commercial Arbitration regulated by the Model Law
- Part V in essence contains provisions on interpretation, applicability or otherwise of certain provisions of the Act, (optional) registration of awards and other general matters of procedure



# Arbitration: International Commercial Arbitration

What is International Commercial Arbitration?

- An arbitration containing a cross-border element
- Therefore, a dispute which has an international nature



# Arbitration: International Commercial Arbitration

- An arbitration is international if:
  - The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States;
  - One of the following places is situated outside the State in which the parties have their places of business:
    - The place of arbitration if determined in, or pursuant to, the arbitration agreement;
    - Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected;
  - The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country



# Arbitration: International Commercial Arbitration

## Rules of procedure

- Procedure in the case of International Commercial Arbitration is essentially similar to that applicable to Domestic Arbitrations in terms of the Act –
  - Notice of arbitration
  - Appointment of Arbitrator/s
  - Statement of Claim
  - Statement of Defence
  - Hearing of Proceedings
  - The Award



# Arbitration: International Commercial Arbitration

## Recourse against an Award

- Recourse to Court of Appeal
- Limited instances of recourse
- May be set aside by the court ONLY if:
  - (a) The party appealing proves that –
    - (i) a party was under some incapacity , or agreement is not valid under applicable law; or
    - (ii) the party appealing was not given proper notice of appointment of arbitrator or proceedings or was otherwise unable to present his case; or
    - (iii) award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions beyond the scope of submission to arbitration; or
    - (iv) composition of tribunal or the procedure was not in accordance with the agreement, unless agreement was in conflict with the law from which the parties cannot derogate



# Arbitration: International Commercial Arbitration

## Recourse against an Award (cont.)

- May be set aside by the court ONLY if:
  - (b) The court finds that –
    - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malta; or
    - (ii) the award is in conflict with the public policy of Malta

[An award is in conflict with the public policy of Malta if – (a) the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award]
- Application for setting aside may not be made after 3 months from date on which party making application received the award.

# Arbitration: International Commercial Arbitration

## Recognition & Enforcement of Awards

- Recognised as binding, irrespective of the country in which it was made
- Can be enforced by application to the competent court
- Must supply authenticated / certified copy of award and original arbitration agreement or certified copy thereof, together with a certified translation where necessary



# Arbitration: International Commercial Arbitration

## Recognition & Enforcement of Awards (cont.)

- Can be refused only for the following grounds:
  - The party seeking recognition & enforcement proves that –
    - (i) a party was under some incapacity, or agreement is not valid under applicable law; or
    - (ii) such party was not given proper notice of appointment of arbitrator or of proceedings or was otherwise unable to present his case; or
    - (iii) award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions beyond the scope of the submission to arbitration; or
    - (iv) composition of tribunal or the procedure was not in accordance with the agreement or with the law of country where arbitration took place (if there is no agreement)
  - The court finds that –
    - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malta; or
    - (ii) the award is in conflict with the public policy of Malta
- Decision on recognition & enforcement may be adjourned if a request for the setting aside or suspension of an award was filed



# Arbitration: Other general provisions

## Powers of the Court with respect to Arbitration

- No court shall intervene or have jurisdiction in any matter except where so provided by the Act
- Upon registration with the Centre, an award constitutes an executive title
- Appeals / recourse against a domestic arbitral award by application to Court of Appeal either:
  - Praying to set aside the award; or
  - Appealing on a point of law (except in case of mandatory arbitrations); or
  - Appealing both on points of fact and on points of law in case of mandatory arbitrations.



# Arbitration: Other general provisions

## Powers of the Court with respect to Arbitration (cont.)

- Setting aside the award if-
  - Applicant proves that –
    - (i) a party was under some incapacity, or agreement is not valid under applicable law; or
    - (ii) such party was not given proper notice of appointment of arbitrator or of proceedings or was otherwise unable to present his case; or
    - (iii) award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions beyond the scope of the submission to arbitration; or
    - (iv) composition of tribunal or the procedure was not in accordance with the agreement;
  - The court finds that –
    - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malta; or
    - (ii) the award is in conflict with the public policy of Malta
- Application for setting aside to be filed within 15 days from notification of the award
- Proceedings held *in camera* & judgement shall preserve confidentiality of the arbitration



# Arbitration: Other general provisions

## Powers of the Court with respect to Arbitration (cont.)

- Appeal on a point of law –
  - A party may appeal on a point of law unless –
    - (a) such a right is expressly excluded in the agreement; or
    - (b) the parties have expressly agreed that no reasons are to be given in the award.
  - Appeal is considered only if Court is satisfied that –
    - (a) determination of the point of law will substantially affect the rights of a party;
    - (b) the point of law is one which the tribunal was asked to determine or otherwise relied upon it in award;
    - (c) on the basis of the findings of fact, the award on the point of law is *prima facie* open to serious doubt;
    - (d) on review of application, response and award, the appeal does not appear dilatory and vexatious.
- In all other cases, appeal shall be dismissed

# Arbitration: Other general provisions

## Powers of the Court with respect to Arbitration (cont.)

- Appeal in mandatory arbitrations –
  - A party may appeal on both points of fact and on points of law arising out of the final award
  - No limited grounds of appeal



# Arbitration: Other general provisions

## Powers of the Court with respect to Arbitration (cont.)

- Appeals / recourse against an international commercial arbitral –
  - By application in the court of appeal
  - On a point of law
  - Only if parties expressly agreed that such right of appeal is available to them
  - Same provisions as applicable to appeals on a point of law from domestic arbitration awards apply
  - Also, parties may expressly agree on the procedure of appeal in the arbitration agreement



# Arbitration: Other general provisions

## Recognition & Enforcement of Foreign Awards

- Foreign arbitration awards shall upon registration by the Centre be enforced by the courts of Malta
- Applicant for registration shall present the following documents to the Registrar of the Centre:
  - Authenticated original award or a certified copy thereof;
  - A certified translation (where not in English);
  - Original arbitration agreement or a certified copy thereof;
  - A sworn declaration that no recourse has been taken against the award and that it is final;
  - Respondent details
- Copy of application and documents served on Respondent, with 10 working days to reply
- Curators may be appointed, but in that case, Respondent may assume his own representation at any time
- Response to contain all relevant information and documents necessary to sustain the objection to registration



# Arbitration: Other general provisions

## Recognition & Enforcement of Foreign Awards (cont.)

- Matter is determined by the Chairman of the Centre & may only be refused if it is proved that:
  - (i) parties were under some incapacity, or agreement is not valid under applicable law; or
  - (ii) such party was not given proper notice of appointment of arbitrator or of proceedings or was otherwise unable to present his case; or
  - (iii) award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions beyond the scope of the submission to arbitration; or
  - (iv) composition of tribunal or the procedure was not in accordance with the agreement or with the law of country where arbitration took place (if there is no agreement)
  - (v) award has not yet become binding or has been set aside or suspended
- Recognition & enforcement may also be refused if the competent authority finds that –
  - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malta; or
  - (ii) the award is in conflict with the public policy of Malta
- Appeal against Chairman's decision available to the Court of Appeal within 20 days





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# MEDIATION

## Mediation in Commercial and Civil Disputes



# Mediation: Development of Mediation in Malta

- Informal settlement negotiations by legal practitioners
- Prior to 2003, mediation was not part of our legal system
- 2003: Mediation as an ADR was first introduced in family law disputes
- 2004: Establishment of Mediation Centre & possibility of referring pending litigation to mediation
- 2010: Mediation agreements given executive title status
- 2017: court to analyse whether there are grounds to refer issue before it to mediation



# Mediation: Legislative Framework

- LN 397 of 2003: mediation in family law disputes
- Mediation Act, Chapter 474 [Act XVI of 2004]
- COCP: Art. 173(2)(c) [Act XVI of 2004]
- COCP: Art. 253(f) [Act IX of 2010]
- COCP: Art. 171A [Act VIII of 2017]



# Mediation: Legislative Framework

## The Mediation Act

- Establishment of the Mediation Centre
- Establishment of the parameters of mediation and the mediation process



# Mediation: Definition

What is Mediation?

- The Act defines mediation as:

*“a process in which a mediator facilitates negotiations between parties to assist them in reaching a voluntary agreement regarding their dispute”.*



# Mediation: Definition

## Elements of the definition

- Facilitates negotiations
- Assist
- Voluntary agreement



# Mediation: Voluntary vs Obligatory

## Voluntary Mediation

- At its embryonic stage
- By agreement between the parties
- Mediation centre (accredited and recognised mediators)
- Reaching an agreement
- Executive title
- Private mediation?

## Obligatory Mediation

- At its infancy
- Obligatory by law (example family law matters)
- Ordered by the court (dispute of any nature)



# Mediation: Conceptual Aspects

What is the conceptual background behind mediation?

- Culture of conflict
- Basis of Mediation: consensus, which leads to an agreement
- Is a balance possible? Mediation reminiscent of idea / principle of 'soft justice'



# Mediation: process

## The mediation process:

- Agreement to mediate
- Preliminary / Administrative matters
- Mediation sessions –
  - Hearing of both participants
  - Breakout rooms
  - Negotiation
  - closure
- Drafting of settlement agreement
- Registration



# Mediation: role of the Mediator

What role does the mediator play in the process?

- Guide the participants through the process
- Ease communication
- Neutral and impartial
- To identify common ground between participants
- Encourage and facilitate agreement



# Mediation: role of the Mediator

## Misconceptions

- The mediator is an arbitrator, judge or a technical expert
- The mediator must be a lawyer
- The mediator advises the participants
- The mediator persuades the participants
- The mediator imposes a settlement



# Mediation: vs litigation & arbitration

## Mediation

Private & Confidential

Cost effective

Time efficient

Power remains with the participants

Less formal

Agreement is voluntary

Certainty in the outcome

## Litigation

Public & open to 3<sup>rd</sup> parties

Expensive

Time consuming

Power divested in favour of the Judge

Formal

Judgement is imposed

Outcome is uncertain

## Arbitration

Private & Confidential

Can be expensive

Can be time consuming

Power is divested in favour of the Arbitrator

Less formal

Award is imposed

Outcome is uncertain



# Mediation: applicability

In which fields can mediation be utilised? In any field, including:

- Employment
- Corporate
- Maritime
- Aviation
- Insurance
- Gaming
- Intellectual Property
- Banking



# Mediation: concluding remarks

- Resistance to change
- Alternative or complementary to other ADR mechanisms?
- The future of Mediation





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