# Diploma in Law

## Lecture 11: Alternative Dispute Resolution

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Diploma in Law (Malta)

# Introduction

- Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom. ADR typically includes early neutral evaluation, negotiation, conciliation, mediation, and arbitration. As court queues, rising costs of litigation, and time delays continue to plague litigants, more states have begun experimenting with ADR programs. Some of these programs are voluntary, others are mandatory.

# Negotiation

- Mediation in itself is assisted negotiation however you can have a negotiation on its own with the parties and their lawyers involved and no mediator. While the two most common forms of ADR are arbitration and mediation, negotiation is almost always attempted first to resolve a dispute. It is the preeminent mode of dispute resolution and the most flexible and information of the dispute resolution methods.
- Negotiation allows the parties to meet in order to settle a dispute without the assistance of a third party. The main advantage of this form of dispute settlement is that it allows the parties themselves to control the process and the solution, and it also saves cost and time.
- Negotiation is a private dispute resolution option, accordingly reputations and relationships can remain intact. The Chairperson does not make a binding determination unless the parties request.
- The entire process is private, confidential and without prejudice.

# Early Neutral Evaluation

- Early neutral evaluation is a process in which a neutral third party professional, commonly a lawyer, hears a summary of each party's case and gives a non-binding opinion/assessment of the merits – an early evaluation of what is to be expected in trial proceedings.
- Once armed with the opinion the parties will be able to negotiate an outcome, with or without assistance of a third party.
- Alternatively, the parties are free to settle the dispute on the basis of the evaluation provided

- Early neutral evaluation is different from mediation, since there is no problem solving and no legal principles and skills involved – unlike in mediation where a mediator is trained in helping people resolving disputes. Early Neutral Evaluation also differs from arbitration in that the opinion is non-binding and has greater informality.
- Unless the Parties agree, the opinion it is not subject to “due process”, hence, it is more flexible. In particular there is no need for a trial-type hearing. Unless the parties agree that it should be, the Evaluator may conduct investigations independently of the parties, and make the recommendation based on those investigations without reference to the parties.
- Parties should obtain legal advice when embarking on an ENE, but do not strictly need to be legally represented during the procedure.

# Mediation

- Mediation is a way of settling disputes, in which an independent third party, known as a mediator, identifies the issues in dispute, explores the options for resolution and helps both sides to come to an agreement that each considers acceptable. It is a voluntary, non-binding and private form of dispute resolution.
- When mediation is successful and an agreement is reached, it is written down and may be transformed into a legally binding contract.
- Mediation can be ‘evaluative’, where the mediator gives an assessment of the legal strength of a case, or ‘facilitative’, where the mediator concentrates on assisting the parties to define the issues.
- Mediation can also be transformative where any or all parties or their relationships may be transformed during the mediation.
- Typical mediation stages include: reaching an agreement to mediate; selection of a mediator; pre-mediation contract between parties and with mediator; preparation for mediation session; initial joint meeting; private meetings between mediator and each party and settlement or concluding phase.
- (Side note: Mediation will be covered in more detail next lecture)

# Arbitration

- Arbitration is a simplified version of a trial involving limited discovery and simplified rules of evidence. Arbitration is a private forum whereby both sides to a dispute agree to let an independent third party, the arbitrator (or a panel of arbitrators) to decide and make an award acting in a judicial fashion. The arbitrator's decision/award is legally binding and can be enforced through the courts. The arbitrator focuses on the issues (fact or law) presented by the parties. An agreement to arbitrate is usually contractual – appointed by the parties. The arbitrator cannot meet with each party in private

# Mediation-Arbitration (Med-Arb)

- Med-arbitration (med-arb) is a combination of mediation and arbitration – a hybrid process. The parties agree to mediation initially but, if that fails to achieve a settlement, the mediator takes on the role of arbitrator, with powers to make a legally binding award in relation to the remaining issues, but based solely on the evidence presented in the arbitration proceedings. The same person may act as mediator and arbitrator.
- Med-arbitration offers a continuous rather than stop/start process for dispute resolution, in which the parties may be more inclined to put effort into the initial mediation in order to reach a consensual settlement given the knowledge that a binding arbitration may follow. An agreement to the procedure must be entered into by the parties before the process begins, including acceptance of possible arbitration and waiving rights to litigation

- There is concern about the process, as the prospect of the mediator becoming an arbitrator may prevent frank discussion in private session in the mediation. A way around that issue is for parties during a mediation o refer any outstanding issues to arbitration or early natural evaluation conducted by another, independent, neutral.

# Conciliation

- Conciliation is a less formal type of arbitration and is similar to mediation. In conciliation a third party, the conciliator, takes an interventionist role in bringing the two parties together and in suggesting possible solutions to help achieve an agreed settlement. The term is widely used to describe the facilitated settlement discussions that occur in the employment arena. Conciliation is different from re-conciliation, the former is a casual form of deciding on the issue where a conciliator hears perspectives on the issue, and the latter helps the parties save their relationship.

# Ombudsmen and Organisational ombudsmen

- Ombudsmen are independent office holders who investigate and rule on complaints from members of the public about maladministration in Government and in particular services in both the public and private sectors.
- Some ombudsmen use mediation as part of their dispute resolution procedures. The powers of ombudsmen vary.
- Most ombudsmen are able to make recommendations; only a few can make decisions that are enforceable through the courts.
- Organizational Ombudsmen would be officers who give an opinion of how one can organize himself when it comes to a dispute – they would give a decision on the organization aspect of the affair.

# Two Broad Categories

- The above processes can be divided into two broad categories. First is alternative adjudication, which comprises those processes whereby a neutral third party makes a decision, such as arbitration and ombudsmen.
- Second is assisted settlement, which comprises those processes whereby a neutral third party offers an opinion and/or seeks to bring the parties to an agreement, such as mediation, conciliation, negotiation and early neutral evaluation.
- Med-arbitration is a hybrid of these two categories.

# Selection of technique

- How do you think that they rank in terms of giving participants a good service?

- According to Davis Gwym (1984) Mediation would rank very high in terms of giving participants a good service, because basically you have some control, you know where you are, there isn't a whole number of complications and it is a more straightforward method. Gwym said "one of the things that strikes me in mediation is that it comes much higher on that scale than many of our institutions and I think that is why it works.
- Whether or not a particular form of ADR is suitable depends upon a number of factors including the nature and value of the dispute, the attitude and financial resources of the parties, the desired outcome, and the balance of representation

- Both (or all) parties must be willing to submit their dispute to a form of alternative adjudication, or willing to try a form of assisted settlement as clearly, if both parties are not willing, there can be problems in enforcing an apparently contractual agreement to try mediation or conciliation. Where there is a significant imbalance of power, mediation might not be appropriate.
- Litigation is, of course, the only option where one party needs to set a legal precedent or obtain an injunction, or where one party is refusing to acknowledge the problem or engage in negotiations.
- Any form of ADR will be worth considering where the cost of court proceedings is likely to equal or exceed the amount of money at issue.

- Where parties wish to preserve an existing relationship, mediation or conciliation may be helpful.
- A great advantage of mediation is that the mediator is not bound merely to consider the obvious disputes between the parties but can bring in other matters, perhaps unrelated to the particular dispute, provided they may help the parties towards settlement.
- Where there is a technical dispute with a great deal of factual evidence, mediation might be best. Mediation is also now the preferred method of settlement of family disputes, such as divorce. Arbitration may be suitable in cases where there is no relationship to preserve and a rapid decision is needed. Ombudsmen can provide a cheaper alternative for an individual seeking redress against a company or large organization, but they may be limited in the redress they can provide.
- Early neutral evaluation might be applicable in cases where there is a dispute over a point of law, or where one party appears to have an unrealistic view of their chances of success at trial.
- In addition, parties involved in a commercial dispute may prefer to use a form of ADR to keep sensitive commercial information private.

# Quote by Jerold S Auerbach 1983

"The verities of dispute settlement and the socially sanctioned choices in any culture, communicate the ideals people cherish, their perceptions of themselves and the quality of their relationships with others. They indicate whether people wish to avoid/encourage conflict, suppress it or resolve it amicably. Ultimately, the most basic values of society are revealed in its dispute settlement procedures."

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# What is an Arbitration Court?

- An arbitration court in Malta is a private institution where parties can resolve arguments and misunderstandings with the help of an impartial third party.
- The main difference between this form and the traditional one is that the final decisions are not subject to appeal. It is important to note that this decision does not stop the parties involved from further going to a court as well if they are not content with the result.
- In addition to this, solving an issue in an Arbitration Court in Malta is in a less formal frame.

Class discussion: What are the benefits to such a Court?

The main benefit of this problem solving solution is:

- the fact that it can be more efficient and cost saving.
- The parties involved have freedom of choice over the following elements:
- the arbitrator;
- they can set together the rules of the arbitration;
- and decide before if the decision is binding legally and final.

# What are the main steps for initiating an arbitration procedure in Malta?

- The first step in initiating an arbitration procedure in Malta is for the parties to agree to use arbitration to resolve their misunderstanding.It can be in a verbal or written form as a part of a binding understanding.
- The next step refers to the selection of the arbitrator or arbitrators from an official list of professional conflict mediators. There is also an option that permits the parties to choose a representative from the outside of the official list offered by the Malta Arbitration Centre.
- The arbitration proceedings are conducted in private and it is organised in a very efficient and fast manner with a strict time limit for presenting evidence.

# The Malta Arbitration Centre

- The Malta Arbitration Centre is the main dispute settlement instrument in litigation cases when parties agree to submit their claims to it. The Arbitration Centre is also involved in promoting arbitration as a method of resolving issues without appealing to court proceedings.

# Functions of the Arbitration Centre - Article 10(1) Chapter 387

- 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 in the foregoing sub-paragraphs of this paragraph;
- to perform such other functions assigned to it by this or any other law;
- to perform any other function supplementary or ancillary to the above.

# Article 20(1) Arbitration Act: Appointment of the Arbitrators

- If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom may serve as the sole arbitrator.
- If within thirty days after receipt by a party of a proposal the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the chairman.
- The chairman shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible and for this purpose he shall call a meeting between the parties for the purpose of attempting to select the arbitrator together with the parties and after he has called the said meeting the chairman shall proceed to appoint the sole arbitrator and his decision shall be final and binding.
- In making the appointment, the chairman shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and to the members of the Domestic Arbitration Panels established under article 10(2).
- An arbitrator shall not be liable in damages for negligence in anything done or omitted to be done by him as arbitrator:
- Provided that an arbitrator shall be liable in respect of anything wilfully done or omitted to be done by him as arbitrator where his action or omission is attributable to malice or fraud on his pa

# Langauge

- The language to be used in the proceedings shall, unless the parties agree otherwise, be Maltese.
- The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, shall be delivered in their original language or languages agreed on by the parties or determined by the arbitral tribunal.

# Arbitration Procedure

- An arbitration procedure in Malta can start after one of the parties, named claimant, files an arbitration notice with the Arbitration Centre. MAC will register the notice and send it to the other party known as the respondent.
- The respondent will send a statement of defence to the claimant, but also to the Malta Arbitration Centre or the arbitral tribunal. If the dispute will be settled by an arbitral tribunal, the panel can be formed of one arbitrator or more depending on the sum of the claim.
- Both parties are allowed to present the evidence they gathered.
- The decision taken by the arbitration must be written and once it is registered by the MAC it will be definitive.

# Statement of Claim

- Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators.
- A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

# What shall be included?

The statement of claim shall include the following particulars:

- the names and addresses of the parties;
- a statement of the facts supporting the claim;
- the points at issue; and
- the relief or remedy sought

# Statement of defence

- The respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal
- The statement of defence shall contain a reply to the particulars of the statement of claim referred to in article 29(2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.
- In his statement of defence, or at a later stage in the arbitral proceedings, if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off

# Can the claim or defence be amended?

- Yes
- During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other justifiable circumstances.
- However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the clause or of the separate arbitration agreement.

There are several reasons why parties may choose arbitration over other legal proceedings in Malta:

- **Efficiency:** Arbitration proceedings in Malta are efficient and take up less time than the traditional version.  The parties can receive the final decision quite easily.
- **Flexibility:** Arbitration In Malta is less formal. The parties involved can choose the location, the arbitrator and the rules of the debate. This is particularly important when the subject of the situation is related to a very specific or technical matter and it would require the opinion of an expert in the field.
- **Confidentiality:** The final decision is not made public.
- **Cost:** The cost of arbitration can be lower than traditional court proceedings
- **Finality:** May only be appealed as per the arbitration act (refer to Article 70A and others).

# Class Activity

- Whilst making reference to Chapter 387 of the Laws of Malta - If you were a legislator and you were given the task to amend such an Act - which provisions would you amend and why?
- Choose at least 2 provisions and present your reasons

# Class Discussion:

- Do you think that clients consider Alternative Dispute Resolutions as ‘a waste of time’? Why so?
- Do you think that Maltese legislators will ever rule out Alternative Dispute Resolutions from Maltese legislation?
- If you were a lawyer and your client was against opting for such a route, what would be your advice?

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