

Diploma in Law

Lecture 14: Alternative Dispute Resolution

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**Diploma in Law
(Malta)**

Today's lecture:

- General Principles of ADR
- Advantages & Disadvantages of ADR
- Forms of ADR (Part 1)



General Principles of ADR



General Principles of ADR

A process whereby a third neutral party (e.g. mediator) helps guide parties in a dispute to come to an agreement without entering into litigation before the courts.

ADR can include any system which acts as an alternative to litigation to resolve disputes between parties.

Litigation is not always the best option and does not always lead to the best outcome - disputes can be lengthy and expensive. ADR seeks to offer mechanisms that are reasonably quick and accessible to a wider group.

The process can be formal or flexible, voluntary or involuntary, and may result in a binding decision made by a third party, or by the parties themselves (adjudicative / non-adjudicative).

General Principles of ADR

The main goals of ADR, in whatever form, should be:

A just process - *Consistent in process and result, with procedural fairness throughout and where a decision is to be given, that decision is open to review and abides by the principles of natural justice*

Accessibility - *Reducing barriers in terms of cost and complexity / bureaucracy, ensuring it is understood by all involved*

Efficiency - *The process should not be burdensome, should not waste time / funds*

Timeliness - *Unreasonable delays are to be avoided*

Effectiveness - *Ensuring compliance with the outcome, without requiring another process to ensure enforceability*



Advantages & Disadvantages of ADR



Advantages of ADR

Cost

- The cost of any ADR process will always be minimal compared to a lawsuit. In the latter case, costs can soar and are not always recoverable, and include lawyer fees, court fees, expert fees, etc.
- The financial burden of litigation can create a power imbalance between parties (e.g. in cases of financial abuse, or cases against big corporations)
- Some ADR is free (e.g. when it is compulsory at law). In other cases, costs are divided equally upfront, allowing parties to enter ADR on an equal footing.

Advantages of ADR

Delays

- Litigation can take years, requiring a hefty time commitment from the parties. Many people simply cannot afford this.
- ADR has the potential to resolve disputes in a fraction of the time it would have taken to take the matter to court.
- ADR processes are much faster, smoother, and with little to no time in between sessions.



Advantages of ADR

Risk

- In litigation, while a court is bound by the law, there are plenty of other factors which may impact the eventual judgment (e.g. loss of evidence, lawyer's litigation style, etc).
- Even if you have a strong case, success is never guaranteed.
- Generally speaking, you are allowing the third party to decide on your issue and you have little personal input.
- In non-adjudicative ADR, the parties retain power as the process is more participative and self-determining, as they are the ones to reach the final agreement.
- The agreement is driven by the parties, their goals, and sense of compromise.



Advantages of ADR

Contention vs Amicability

- In litigation, the process is always adversarial. Communication between parties without legal representation is discouraged and the tone is always tense.
- ADR on the other hand encourages open communication in a conciliatory tone. This not only creates a greater likelihood of dispute resolution but also avoids future legal intervention.
- The assistance of a neutral third party also tempers expectations - through dialogue and informed guidance, parties may come to realise that their demand is unwarranted or not realistic considering the letter of the law.
- Likewise, ADR is better suited to target more human elements of disputes - parties do not simply seek money or compensation, but also closure, respect, and healing (e.g. in family law).

Advantages of ADR

Flexibility

- In litigation, procedure is fixed and at times archaic. Court decisions are supreme and final.
- In ADR, the process but also the school of thought to reach a solution is fresher and much more flexible. ADR allows for experimentation as long as the parties are both pleased.
- ADR allows the option to make offers and proposals to the other side, through which parties may find common ground.



Advantages of ADR

Convenience

- In court, parties are at the mercy of the court's schedule and structure.
- In most ADR processes, scheduling is easier and allows for greater consideration of the parties' time. E.g. ADR is not necessarily limited to mornings and there are less procedural rules.



Advantages of ADR

Confidentiality

- A key element of ADR is that anything discussed or proposed during ADR is confidential - i.e. cannot be used in trial if negotiations fail.
- Likewise third parties will not have access to said discussions.
- This allows the parties to communicate openly with no fear of repercussions.
- On the other hand, court hearings are public and halls are usually full of persons waiting their turn to be heard. There is no privacy and whatever is said is duly recorded and can be used.



Disadvantages of ADR

Informality can act as a threat

- While in most cases, the informality of ADR is greatly beneficial for communication, facing the other party in such close quarters (usually around the same table) can be threatening for some.
- The Court layout can give a greater sense of safety to parties who feel intimidated by the other party, and who may not necessarily be able to express their demands as openly in such a barebones layout.

Disadvantages of ADR

Relies on good faith of all parties

- Traditional litigation has, over centuries of jurisprudence and procedure, established strong methods of ensuring all evidence presented is trustworthy.
- In ADR, while checks and balances exist, the neutral third party has to generally rely on the good faith of the parties involved.
- Skilled mediators, arbiters, etc. will obtain the skills to identify who is genuine and who is abusing of the process.

Disadvantages of ADR

No public scrutiny

- A notable criticism of ADR is that it is mostly done behind closed doors, with no possibility of public scrutiny, both in terms of procedure and outcome.
- Litigation and a court judgment are both public and enforce social values as enshrined in the laws of the state.

Disadvantages of ADR

Power imbalance

- While it is true that ADR frameworks create a more level playing field, it is also true that parties will usually be aware of each other's resources.
- Some settlements can be acceded to out of fear that eventual litigation would be unaffordable for that party, or too lengthy, and it would be better to simply accept the settlement, even if it is not necessarily the fairest outcome.



Disadvantages of ADR

Does not create precedent

- Court rulings create legal precedent for both the parties and society in general, which can be beneficial for similar disputes between third parties.
- When parties enter ADR, they always start from square one. The process is not informed from prior negotiations / agreements.



Disadvantages of ADR

Cannot be applied to all disputes

- Some cases simply require the court's ruling.
- For instances, cases on points of law, cases concerning a breach of fundamental rights, cases requiring the issue of warrants or penal sanctions can only be concluded through litigation.



Disadvantages of ADR

Less relevant court judgments

- Greater use of ADR will inevitably lead to less litigation, and less judgments.
- While this works for the parties, court judgments serve to shape jurisprudence and the rule of law. A decrease in new thought from court may slow down social progress and legal and academic thought.



Forms of ADR - *Negotiation*



Negotiation

The most informal and flexible ADR process

- Almost always the first step in any dispute
- Completely voluntary - maintains relationships
- Parties attempt to reach an agreement on matters through direct communication, with or without legal assistance
- No third party involved
- No strict formal procedures
- Parties retain full control of the outcome
- Fully confidential - without prejudice



Negotiation

Stages of negotiation:

- Preparation - *understanding the dispute and diverging interests. Setting objectives and hard lines*
- Opening - *starting a channel of communication, setting the tone, exchanging initial positions and clarifying preliminary issues*
- Bargaining - *exchanging offers and counter-offers. Attempt to find common ground*
- Closing - *Reaching an agreement, confirming the terms, and formalising that agreement*

Negotiation

- Requires good faith from both sides
- Requires willingness to enter into communication
- No guaranteed resolution
- No enforcement unless the agreement is formalised into a binding contract



Forms of ADR - *Early Neutral Evaluation*



Early Neutral Evaluation

An advisory and evaluative form of ADR.

Case study

ABC Ltd believes DEF & Sons provided substandard construction works, and is refusing to pay the full sum as agreed. DEF & Sons is adamant that the works are up to standard and the rate agreed upon is a fair one.

Eager to resolve the issue, both parties agree to hire an architect that is trusted by both to examine the works and give her neutral opinion.

On the basis of this opinion, the parties will then have a more informed position to either reach an agreement, or move to litigation.



Early Neutral Evaluation

Stages of ENE:

- Evaluator is appointed - *parties confident in the evaluator's expertise and neutrality*
- Parties give evaluator their facts and perspectives - *enabling the evaluator to understand both*
- Evaluator convenes parties - *explaining to both how they intend to proceed*
- Presentations and evaluations - *information is collected by the evaluator*
- Opinion - *the evaluator provides their opinion on the dispute, identifying common ground, an estimate of potential damages, an assessment of the strengths and weaknesses of each party's case, with suggestions on possible future steps, and potential outcomes of litigation.*

Early Neutral Evaluation

- The Evaluation is never binding on the parties
- With ENE, parties have an informed opinion on the matter and on potential litigation outcomes
- Voluntary
- Provides a reality-check for parties
- Facilitates discussion
- Evaluation is confidential and without prejudice



Forms of ADR - *Conciliation*



Conciliation

- A neutral third party (conciliator) is appointed to assist the parties to identify the issues, consider all variables, and reach a settlement.
- Preventative approach, non-adjudicative.
- Conciliator offers expert opinions on the position of each party and suggests non-binding proposals for settlement.
- Conciliator takes on an active interventionist role but is not a decision maker.
- Flexible: Conciliator may meet parties together or separately (acting as a 'messenger').
- Both parties must be willing to enter into conciliation.
- No binding outcome unless formalised.



Forms of ADR - *Ombudsmen*



Ombudsmen

Ombudsmen are independent offices tasked with investigating and ruling on complaints by the public on Government maladministration / unfairness. Importantly, they are usually tasked with monitoring and improving standards in the sectors under their jurisdiction through their opinions, rulings, and recommendations.

As such Ombudsmen are also considered ADR providers.



Ombudsmen

In Malta the **Parliamentary Ombudsman** is an independent officer of Parliament with the facility to receive complaints on maladministration in the public sector.

The process is:

- expedient
- confidential
- accessible (free of charge & online)



Ombudsmen

The **Parliamentary Ombudsman** can investigate Government departments, Ministries, Public officers, statutory public bodies, companies in which the Government has a controlling interest, and Local councils.

Once a complaint is filed, the Ombudsman determines if it falls under their remit, and facilitates direct dialogue and mediation with the public entity concerned.

If investigation is required, the investigating officer reviews information, gathers evidence and if necessary seeks expert advice.

Finally, an opinion is issued and sent to all parties involved. This is not executive and not enforceable but it carries **political weight**.





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ADVOCATES

Forms of ADR - *Arbitration*



Arbitration

- A simplified version of a trial, with limited discovery and simple rules of evidence.
- Parties agree to let an arbitrator (neutral third party) decide and make an award on the dispute - adjudicative.
- This award is legally binding and enforceable through the courts.
- Regulated by the Arbitration Act, Cap. 387 of the Laws of Malta.
- The body responsible for arbitration is the **Malta Arbitration Centre**.
- In Malta an arbitration court is a private forum where parties attempt to solve disputes in a less formal arena.
- Awards are not subject to appeal but parties may proceed to court.



Arbitration

Matters subject to arbitration:

- generally, anything that can be the subject of a civil action, barring personal civil status (e.g. marriage)
- Arbitration can be domestic or international
- Can be short-form
- The following disputes are subject to mandatory arbitration:
 - Condominium disputes
 - Motor traffic disputes
 - Electricity and water services
 - Paying Agency disputes



Arbitration

Arbitration fees:

- Filing = minimum €116.47, equivalent to 25% of the registry fees which would be due to the Superior Courts
- Filing for short-form arbitration = minimum €88.52, equivalent to 25% of the registry fees
- Addition of a third party = €11.65 for each additional party beyond 2
- Mandatory arbitrations = €69.88
- Registration of awards = €50% of filing fee



Arbitration

The Arbitral Process

1. The Arbitration Clause / Arbitration Agreement

Parties must have agreed to submit to arbitration prior or during the dispute. E.g. a contract containing an arbitration clause

2. Filing of Notice of Arbitration

The Notice indicates the demand to refer the dispute to arbitration, the details of the parties, reference to the arbitration clause, reference to the dispute, the remedy sought, proposal as to the number of arbitrators (1 or 3).

3. Statement of Claim

Includes the details of the parties, statement of facts to support the claim, the points at issue, and the relief sought.

A copy of the relevant contract & documents are also to be attached.

Arbitration

The Arbitral Process

4. Statement of Defence and/or counter-claim

The respondent replies to the statement of claim and annexes their statement of facts and any relevant documents. Counter-claims may also be filed.

5. Appointment of Arbitral Tribunal by the Parties / Arbitration Centre

An arbitrator or arbitral tribunal is appointed, depending on the choice of the parties and the sum of the claim.

6. Sitzings

During arbitration sittings evidence is presented by both parties within a fixed period of time (no more than 45 days). Experts may also be appointed.

Arbitration

The Arbitral Process

7. Award delivered

Once evidence and submissions are closed, the award is delivered by majority. The award may affect the entire claim or several awards may consider different parts of the claim / counter-claim. Award shall be in writing and shall be reasoned (unless otherwise agreed). Awards are made public only with the consent of both parties.

8. Registration of award = executive title

Once the award is registered in Court by the Centre, it shall constitute an executive title.



Arbitration

There is generally no appeal from an arbitral award, unless:

- both parties have expressly agreed to such right of appeal
- it is on a point of law
- there is a specific right of appeal at law
- there is a defect in the formalities of the arbitral process
- the award is *ultra vires*
- arbitration is mandatory



Forms of ADR - *Arbiter for Financial Services*



Arbiter for Financial Services

- A free, autonomous body empowered to mediate, investigate, and adjudicate complaints by consumers against financial service providers in Malta.
- Established by Cap. 555 of the Laws of Malta.
- It is a designated ADR entity with different processes according to each case.
- The Arbiter is empowered to make awards of up to €250,000 + interest & costs.



Arbiter for Financial Services

Minor cases

- An informal service for queries or minor issues.
- The Arbiter intervenes to facilitate communication where there is a misunderstanding / breakdown in dialogue.
- Accessed via an online form, in person, or by phone.
- Issue is resolved by the consumer & FSP reaching an agreement (unenforceable, non-binding).



Arbiter for Financial Services

Complaints with the Arbiter

May be filed by customers, i.e.:

- natural persons
- micro-enterprises
- consumer associations
- voluntary organisations
- any person re. suspicious fraudulent payment transactions

Against a financial services provider licensed by the MFSA, i.e.:

- Banks
- Financial institutions
- Insurance companies & intermediaries
- Investment service providers
- Trustees
- Pension providers

Arbiter for Financial Services

The Complaint:

- submission of a complaint is free.
- Legal advice is optional.
- Submission can be done online
- Complaint is to be made in Maltese or English, and should include the details of the parties and the dispute, as well as the remedy being sought, together with confirmation that the dispute is not the subject of litigation or is already before another ADR provider.



Arbiter for Financial Services

- The Arbiter reviews the complaint to ensure compliance & competence.
- The FSP is notified of the complaint and given 20 days to reply.
- Mediation is first recommended to both parties.
- The mediator is appointed by the Arbiter and attempts to resolve the dispute through discussion. This is voluntary and both parties must agree to it.
- If successful, an agreement is reached, written, and communicated to the Arbiter for their acceptance. Then it becomes legally binding, but is confidential.

Arbiter for Financial Services

- If mediation fails, the Arbiter will review the complaint.
- The Arbiter may request oral or written submissions, summon witnesses, and order documents.
- A decision is then made.
- The decision is made in writing, and is binding on the parties, subject to appeal before the Court of Appeal.





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