INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION (ADR) AND MEDIATION

LEGISLATIVE AND INSTITUTIONAL FRAMEWORKS

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UNIVERSITY OF MILANO

Objectives

By the end of the workshop, the participants will be able to:

- Define ADR;
- Distinguish the different types of ADR;
- Explain the benefits of using mediation;
- Explain the mediation process;
- Explore the role and skills of a mediator;
- Describe IDLO's experience in the field of ADR.

Perception of conflicts

Definition of a conflict

- A clash of interests, which cannot tolerate or handle differences.
- Misunderstanding, based on multiple realities.
- Failure to be compassionate.
- Strong attachment - inability to let-go.

3 types of conflict

1. Intrapersonal conflict – conflict with oneself.
2. Interpersonal conflict – conflict between people.
3. Organisational conflict – conflict caused by unsuitable systems.

How we deal with/solve conflict

- Go to war
- Get a lawyer
- Go to court
- Deny it
- Walk away from it and hope it will solve itself

- Talk to each other
- Ask a friend to help us get a new perspective
- Seek assistance/ADR

ADR - Intro

Definitions

- **Alternative Dispute Resolution** - (ADR) typically refers to processes and techniques of resolving disputes that fall outside of the judicial process (formal litigation – court).

- **ADR is generally classified into at least** 4 types:
  - ✓ negotiation,
  - ✓ mediation,
  - ✓ collaborative law, and
  - ✓ arbitration.

  Sometimes a fifth type, conciliation, is included.

The 4 types of ADR

1. **Mediation**: is a voluntary process, where an impartial mediator helps the parties to negotiate towards resolving their conflict. There are various models of mediation.

2. **Negotiation**: is a consensual bargaining process in which the parties attempt to reach agreement on a disputed matter. It usually involves complete autonomy without intervention of third parties.

3. **Collaborative law**: A process designed for the attorneys for both of the parties to assist the parties to resolve conflict using cooperative strategies rather than adversarial techniques and litigation.

4. **Arbitration**: A process through which two or more parties use an arbitrator in order to resolve a dispute; In general, a form of justice where both parties designate a person whose ruling they will accept formally.

Litigation

- Deals with **facts** and the **law.**
- Exclusively with **the past.**
- Decides about **who is right / who is wrong.**
- Who is at **fault?**
- Who is **responsible?**
- **Impose** a solution!
- There is a **winner and a loser.**

Mediation

Mediation focuses on the **preservation of the relationship** rather than what is right and wrong thereby creating a **win-win situation** where both parties to the conflict feel that they are heard and have their interests met.

Types of mediation

- Court Annexed mediation (requires legislation)
- Lawyer mediation
- Private mediation (registered centers)
- Traditional mediation (CIJ)

Mediation phases

Phase 1	Story telling – versions from both parties	Party 1 	Party 2 
Phase 2	Formulating needs		
Phase 3	Brainstorm possible solutions		
Phase 4	Negotiation –the agreement is built up		
Phase 5	Action plan – the agreement is made		

The Mediator’s opening speech

- Introducing him/herself:
  - ✓training,
  - ✓experiences,
  - ✓certification
- Identifying the parties:
  - ✓their addresses and telephone numbers, and
  - ✓if relevant, additional participants in the mediation.

The Mediator's opening remarks

The mediator praises and thanks the parties for having chosen to solve the problem or dispute in a cooperative way, rather than in a contentious one, with great advantage in terms of time, costs, discretion, and flexibility.

Behaviour of the parties

1. They must listen with great attention to what the mediator says and comply. Have eye contact.
2. Use “I” statements.
3. If in doubt, ASK.
4. Speak one at a time.
5. Maintain a respectful behaviour.

THE MEDIATOR

Good Mediators are:

- Certified – attended a certification course
- Unbiased/neutral
- Able to communicate in relevant languages
- Able to embrace multiple realities
- Judges? Lawyers? Psychologists?
- Respected in the community

The Mediator's Job

Mediating, that is staying in the middle, means being:

1. INDEPENDENT since he does not depend on any party;
2. IMPARTIAL as regards both parties' interests;
3. NEUTRAL as regards the interests referred to the object.

The challenges of the Mediator's job

- Do NOT make judgments and leave your own stuff at home.
- The mediator facilitates the process.
- Not always appreciated as scientific technique or skill.
- Adaptability to an unlimited number of very different disputes.

Influence on the parties

The mediator must:

- Motivate without manipulating;
- Ensure that the parties continue to see the benefit of the process;
- Ensure healthy realism;
- Embrace multiple realities;
- Explain the advantage of an agreement.

The Mediator's Discretion

Chatham House rules apply

- One of the fundamental methods of understanding the problems of each party is to speak freely without witnesses or in separate meetings (caucuses).

- But also common meetings must let the parties speak freely without fearing that what is said there may be used against them somehow in a contemptuous session, during a trial or arbitration.

- For this reason practice suggests neither to write a minute, nor to shorthand, nor to record the meetings: a good mediator generally destroys even his own notes after a positive or a negative meeting. In fact the parties must, first of all, feel at ease to express a real collaboration to the agreement.

Mediation Agreement

1. This is the moment when you understand whether the mediation is working:
   - hypotheses are now limited looking forward and both parties' real interests are satisfied (also after many separate meetings).
2. Now the parties no longer wish "to make the other party pay"
   - but they only want "to put an end to the problem".
3. In fact now the mediator loses any importance
   - since s/he has done what had been requested to do to start the mediation which the parties were unable to.
4. In other words, now the parties communicate.

Outline of a final solution

- The end of the procedure is reached when
  - the key points of the agreement are established and
  - the final drawing up is only something technical.

  Generally, the style is simple and informal.

- The parties are the authors of the agreement: the mediator is only a witness or an informal notary.

Signatories and style

The **mediator's assistance** with the written agreement:

- should be limited to suggesting the formulation and the key points
- should sign as witness and guarantor to safeguard both parties.

1. The written agreement:
   - **LEGAL EXPRESSIONS** must be avoided;
   - contract terms and conditions may be used **;**
   - daily language is to be preferred, indicating what each party has to do, with clear references to times and formalities.

Signatories and style

2. The parties :
   - **must be mentioned by their names** - the use of names generates confidence and familiarity
   - and **not by their role** in the procedure - may cause confusion**.**

3. Deadlines:
   - **The times for realizing the agreed behaviours** must be indicated clearly, referring to dates and hours only.
   - Never use ambiguous expressions as "in reasonable times" or " as soon as possible".

Signatories and style

4. If one of the parties has to pay a sum, the agreement must specify:
   - who is obliged and toward whom,
   - when and how the payment is made.
   - A bank credit or a bank draft gives greater certainty.

5. These are the questions you must always answer for any commitment:

- WHO?	- WHOM?
- WHAT?	- WHEN?
- WHERE?	- HOW?

Contractual value of the agreement

- The informality of the agreement does not mean legal insignificance.

- The value of the document must be that of a **legally valid and binding contract**:
  - It must have all the fundamental requirements requested by the applicable law common to both parties or freely chosen by them.

Online Dispute Resolution (ODR)

- ODR is a dispute resolution process which operates mainly online.
- This encompasses both online versions of «Alternative Dispute Resolution – ADR» and Cyber Courts, the former being dominant.
- In other words, **ODR** relates to negotiation, mediation, arbitration and Court proceedings, whose proceedings are conducted online

Advantages and disadvantages of ODR

- **ODR** processes are
  - ✓ quicker,
  - ✓ less expensive,
  - ✓ less complicated,
  - ✓ less formal, and
  - ✓ more flexible than legal proceedings.

- The main disadvantages of **ODR** are
  - ✓ that the parties and the persons involved in the resolution process are not in presence of each other, and
  - ✓ the impossibility to use any material connected to the dispute unless it is in an electronic form.

The Singapore Convention on Mediation

2023 The Singapore Convention on Mediation: Recent Developments (youtube.com)

Introduction stage of Mediation
Practice and feedback

ROLE PLAY: instructions

- Each group nominates 1 mediator and 2 parties in dispute.
- Each group receives one scenario and specific instructions for the players.
- The players have **5 mn** to prepare (in isolation).
- Each group has 10 mins max. to play the scenario.
- Each play will be followed by a 5mn debriefing.