

# ALTERNATIVE DISPUTE RESOLUTION

## COURSE OUTLINE: 2019

### PART A: NEGOTIATION AND MEDIATION

#### 1 INTRODUCTION

##### Overview

The Negotiation and Mediation parts of the Alternative Dispute Resolution course consist of a theoretical and a practical component. There is a skills-orientated emphasis, designed not only to expose students to the practical skills required during negotiations and mediations, but also to provide a theoretical context for such skills and the analytical skills to adapt to various circumstances. Particular emphasis is placed on developing group, inter-personal and problem-solving skills.

Students will also be able to develop a range of broader, transferable life skills for dealing with issues of professional and personal life, including: basic negotiation and mediation skills; a methodical approach to problem solving; confidence in oral communication; working effectively in teams; and the importance of responding with integrity and moral courage in professional contexts.

Some of the learning principles upon which this course is based are:

- Skills are best learnt by working things out for oneself.
- It is assumed that students will bring some prior knowledge, experience, attitudes and skills into the course.
- To develop skills, students need to have the opportunity of practising them and obtaining feedback.

#### 2 SPECIFIC LEARNING OUTCOMES

At the end of the course, students should have the ability to conduct negotiations and simple mediations, and should have developed effective techniques for autonomous learning and problem-solving, which can be applied in both their professional and personal lives.

The course is designed to achieve the following specific learning outcomes:

- The ability to analyse a conflict situation and to select the appropriate dispute resolution strategy.
- An ability to negotiate effectively.
- An ability to conduct or participate appropriately in a mediation process.
- An ability to participate effectively in meetings, in a range of roles.
- An ability to work effectively as a member of a team, and recognition of the value and constraints of team work.
- The ability to separate process of decision-making from the object of the process and the final product that results from the process.
- The ability to apply problem-solving techniques, including: identification of core issues from a set of facts; thinking laterally and innovatively in order to find effective solutions to those issues.
- An ability to situate dispute resolution processes in their wider social, political and theoretical contexts.
- An ability to respond ethically, and to operate with integrity – in professional and other contexts.

### 3 TEACHING AND LEARNING METHODS

Students will be expected to assume responsibility for their own learning, and the extent of their knowledge at the end of the course will depend on the effort they put into the course.

In this course a distinction is drawn between theory and concepts – that need to be understood – and physical skills – that need to be experienced by doing. Students will be provided with a course outline and a list of readings for each seminar session. They are expected to do the preparatory reading in advance to familiarise themselves with the theory and concepts. Each person has his or her own way of assimilating knowledge. Students are not restricted to the material provided in the outline. Should they prefer to use other materials, they are free to do so. *Students are also not obliged to refer to all the reading material*, although it would be advantageous. In many instances the materials are merely different ways of saying the same thing. Students might find one author's exposition easier to understand than another's, and are free to select the readings that are appropriate to their learning needs.

The readings will be referred to briefly during seminars to highlight certain issues and to clarify where necessary. The purpose of the seminars is merely to help students to improve their understanding of the theory. Lectures will be semi-Socratic and class participation is emphasised. The purpose of the practical class exercises is to make learning overt and to develop the practical application of the theoretical concepts. Provision is made for individual differences in application and learning. The learning environment will hopefully be safe and encouraging. Students should constantly question, request feedback and reflect. Making mistakes is part of the learning process and in this course mistakes can assist one to understand issues or to develop skills.

Class exercises provide students with the opportunity to practise their negotiation and mediation skills. At the end of each exercise students will assess their own performances and that of their partners and thereafter they will present feedback to the person with whom they interacted. The lecturer will then also provide feedback, by commenting on specific issues that arose, or by analysing and discussing DVD recordings of certain exercises or of experts demonstrating certain skills.

Students should also not feel constrained to follow the views that the lecturer expresses in seminars. If they feel someone else has a better approach, they should accept that approach. It is important that they are comfortable with the theory that they intend applying. If they are not comfortable, the application thereof will be artificial and insincere. So students are free to experiment and the course provides them with the space to do so.

### 4 RESOURCES

(# = books on short loan)

- # *Anstey Managing change, negotiating conflict (3<sup>rd</sup> ed, 2006)*
- Anstey Negotiating Conflict*
- Asherman Negotiation Sourcebook (2<sup>nd</sup> ed)*
- Bevan Alternative Dispute Resolution*
- Brand et al Labour Dispute Resolution (2<sup>nd</sup> ed)*
- Brown and Marriott ADR Principles and Practice (2<sup>nd</sup> ed)*
- Craver Effective legal negotiation and settlement (5<sup>th</sup> ed)*
- # *Fisher and Ury Getting to Yes (2<sup>nd</sup> ed)*
- Halpern Negotiating Skills*
- Inns of Court School of Law Negotiation 1999/2000*
- # *Kennedy Everything Is Negotiable: How to Get the Best Deal Every Time (4<sup>th</sup> ed 2008)*

Kovach *Mediation: principles and practice (3<sup>rd</sup> ed)*

Lewicki et al *Essentials of Negotiation*

Lewicki et al *Negotiation (5<sup>th</sup> ed)*

Lewicki et al *Negotiation: readings, exercises and cases (5<sup>th</sup> ed)*

Moore *The Mediation Process (3<sup>rd</sup> ed)*

Stone *Representing Clients in Mediation*

Ury *Getting Past No*

# Ury *The Power of a Positive No* (2007)

# Weeks *The Eight Essential Steps to Conflict Resolution* (1992)

## 5 EVALUATION

Students are required to complete evaluation questionnaires according to the Law Faculty's evaluation cycle.

## 6 STUDENT ASSESSMENT

Informal assessment will occur throughout the course. Self-assessment, peer assessment and lecturer feedback will take place from time to time after exercises, and at the end of each session students will be given an opportunity to reflect on what they have learnt during the course of that session.

Formal assessment will take three forms:

- Student journal (20% of overall result for the ADR course): Students must compile a journal in which their learning during the course is recorded. Students should choose examples of their work that match the objectives and outcomes of the course, or that best illustrate the quality of their learning. The journal should contain, amongst others, an analysis of the readings and their relevance to the course; an evaluation of the practical class exercises; reflection on one's skills development during the course; and comment upon broader issues, outside the course, which now appear more relevant or understandable. The journal will be assessed for the quality and depth of the analysis, evaluation, reflection and comment. Journals must be handed in by **Monday 29 April 2019**.  
*Examples of journals are available for scrutiny. A mark sheet setting out the assessment criteria for the journal is attached.*
- Practical examination (20% of overall result for ADR): At the end of the course, students will participate in a negotiation exercise during which the internal and external examiners will assess their negotiation and communication skills. *The material for the practical negotiation examination will be similar to that used in the class exercises. A mark sheet setting out the assessment criteria for the practical examination is attached.* The practical examination will likely take place at times still to be arranged with the external examiner (a one hour commitment on one or the other date for each student).
- Theoretical examination (50% of overall result for ADR). A two hour written examination at the end of the course (in June) will assess students' understanding of the readings and the theoretical concepts. One half (25% of the overall result for ADR) of the written examination will cover theoretical aspects of the negotiation and mediation section of the course, and one half (25%) will cover the arbitration section of the course.

An external examiner assesses the quality of the examination paper and the student answers, as well as the practical examination.

### CRITERIA FOR ASSESSING THE JOURNAL

**Task:** Students must compile a journal in which their learning during the course is recorded. They should choose examples of their work that match the objectives and outcomes of the course, or that best illustrate the quality of their learning. The journal should contain, amongst others, an analysis of the readings and their relevance to the course; an evaluation of the practical class exercises; reflection on one's skills development during the course; and comment upon broader issues, outside the course, which now appear more relevant or understandable. The journal will be assessed for the quality and depth of the analysis, evaluation, reflection and comment.

Category	Descriptive Statement	Mark
Outstanding	All the criteria mentioned in the "excellent" category are met, and the overall quality of the contents and the presentation is creative and exceptional. For example, presentation is polished and imaginative; the information is comprehensive, and clearly and logically organised and synthesised. The material demonstrates integration and innovation in the selection and handling of theory. Contexts and boundaries are explored, tested, illustrated and critically reviewed. Reflective practice is of exceptional standard, including analysis of strengths and weaknesses in light of theory and class exercises, and taking action according to own developed criteria.	83% +
Excellent	The journal contains evidence: (a) That the student has understood the purpose of the course, demonstrating that the student has achieved the majority of the outcomes of the course. (b) Indicating that the student understands the theories encountered during the course. (c) That the student can apply theory to practical situations, and evaluate theory in the light of class discussions and everyday encounters. (d) Indicating the extent of the student's professional and personal development – the extent to which the student's knowledge and skills have progressed since the beginning of the course measured against the course outcomes. (e) That the student has a clear understanding of his or her "negmed" strengths and weaknesses and knows what he or she can and cannot do. (f) Of a high level of critical analysis and evaluation – of the reading material, the classroom interaction and of events outside the formal learning environment – and an ability make linkages and to see the broader picture. (g) Rendering a coherent picture of the student as a reflective learner. (h) Of a high degree of clarity of thought – ideas communicated clearly and succinctly, in a structured and polished fashion.	75% - 78%
Very good	All the criteria mentioned in the "excellent" category are met, but the level of critical analysis and evaluation could have been more rigorous.	70% - 73%

Good	<p>All the criteria mentioned in the “excellent” category are met. Aspects of the journal have merit, matching the levels required for placement in a higher category, but either one or both of the following aspects are present:</p> <p>(a) While the student has indicated a fair understanding the interaction of theory and practice, as well as of his or her growth and development, the analysis and evaluation lack depth.</p> <p>(b) The organisation and presentation of the journal, while sound, could have been developed further.</p>	62% - 68%
Competent	<p>The majority, and even all, of the criteria mentioned in the “excellent” category are met, some even at levels sufficient to be considered for placement in a higher category, but some or all of the following aspects are present:</p> <p>(a) The analysis and evaluation, while coherent, is weak.</p> <p>(b) There is an inability or reluctance to confront the materials critically and reflectively.</p> <p>(c) The journal gives a superficial account of the student’s growth and development.</p> <p>(d) The organisation and presentation of the journal is weak.</p>	52% - 58%
Not competent	<p>While the majority, or even all, of the criteria mentioned in the “excellent” category have been addressed, some or all of the following aspects are present:</p> <p>(a) The student has provided insufficient evidence to indicate that he or she is a reflective learner.</p> <p>(b) The analysis and evaluation is either patchy or poor.</p> <p>(c) The journal gives a superficial and/or incoherent account of the student’s growth and development.</p> <p>(d) The organisation and presentation of the journal is weak.</p>	43% - 47%
Bad	<p>While the majority, or even all, of the criteria mentioned in the “excellent” category have been addressed, there is a clear lack of effort to confront the learning objectives of the course. The student is unable to learn reflectively and the material gives the impression that the student is disinterested in the course. Some or all of the following aspects are present:</p> <p>(a) The student has provided little or no evidence to indicate that he or she is a reflective learner.</p> <p>(b) The analysis and evaluation is either non-existent or extremely poor.</p> <p>(c) The journal gives an incoherent account of the student’s growth and development.</p> <p>(d) The organisation and presentation of the journal is weak.</p>	40% >

## CRITERIA FOR ASSESSING THE PRACTICAL EXAMINATION

**Task:** At the end of the course, in June, students will participate in a negotiation exercise during which the internal and external examiners will assess their negotiation and communication skills. Students will negotiate in pairs, and each pair will be given a different set of facts. The detail will be similar to that found in class exercises, but the topics and the issues will not necessarily be the same. Participants will be given 30 minutes to prepare, after which they will negotiate for approximately 15 minutes. *It is not necessary to reach an agreement in the time allocated, but negotiators should try to do so and should not take too long over one particular issue.* At the end of the exercise participants will be given an opportunity to comment upon their performance, and to point out factors which they think the examiners should consider in their assessment.

Category	Descriptive Statement	Mark
Outstanding	All the criteria mentioned in the “excellent” category are met, but the student demonstrates exceptional ability – in particular, but not limited to, the following: the student is confident and in control of the process, negotiates in a manner suited to the factual situation, consistently displays exceptional communication skills, explores perspectives and responds creatively and imaginatively, and obtains a result that optimises the positions of both parties.	83% +
Excellent	<p>Students must demonstrate that they are highly skilful in most of the following areas:</p> <ul style="list-style-type: none"> <li>(a) Preparation: That they understood the facts of the exercise, analysed the conflict, identified the core issues, considered a BATNA, and selected an appropriate negotiation strategy.</li> <li>(b) Introduction: That they introduced themselves appropriately, selected appropriate opening statements and created a positive negotiating atmosphere.</li> <li>(c) Story-telling: That they have communicated their views rationally and coherently, ascertained the views of the other party (where necessary probing and clarifying), that they discerned the interests of both parties, grasped the core issues and identified the boundaries of the dispute.</li> <li>(d) Communication skills: That they can communicate confidently and assertively, using verbal and non-verbal means, and that they can listen empathically.</li> <li>(e) Negotiation skills: That they control their own destiny and can select appropriate tactics, and adapt or modify their strategies and tactics if required to do so. In particular, that they can separate the people from the problem, and the decision-making process from the subject-matter of the negotiation.</li> <li>(f) Values: That they can negotiate ethically and with appropriate sensitivity towards the other party’s needs and interests, but not at the expense of their own; and, if applicable, that they can respond ethically to unethical behaviour.</li> <li>(g) Problem-solving skills: That they apply appropriate problem-solving processes and techniques – isolate the problem, identify possible causes, think innovatively, and generate and select implementable options using appropriate objective criteria.</li> <li>(h) Consensus-building: That they can fashion a realistic and workable agreement and record it in an appropriate way.</li> </ul>	75% - 78%

Very Good	All the criteria mentioned in the “excellent” category are met, but either not consistently throughout the exercise, or, alternatively, some of the criteria details are not met. Small mistakes are made in some of the areas, but the flaws are not of major importance and do not materially effect the outcome of the exercise. The negotiator nonetheless performs with a high level of skill.	70% - 73%
Good	All the criteria mentioned in the “excellent” category are met. Aspects of the student’s performance have merit, matching the levels required for placement in a higher category, but other aspects were not performed satisfactorily. For example, the negotiator might not have analysed the conflict properly and as a result adopted an incorrect strategy, might not have clarified issues sufficiently, might have proceeded too quickly to the next negotiation stage or might not have been fully in control at some stage in the negotiation. Nonetheless the outcome is a satisfactory one. The negotiator performs competently in some areas and skillfully in others.	62% - 68%
Competent	The majority of the criteria mentioned in the “excellent” category are met, some even at levels sufficient to be considered for placement in any of the higher categories. The negotiator performs competently, but there are flaws which, although not disastrous, could be material to the outcome of the negotiation. For example, the negotiator might have made an error in analysing the conflict and as a result adopted an incorrect strategy, might not have clarified a vital issue sufficiently, or failed to ascertain an important need or interest, did not stick to the mandate, might have made an incorrect offer, might have proceeded too quickly to the next negotiation stage or might not have been fully in control of the exercise, allowing the other party to dominate the process. Although there is evidence of a lack of confidence and/or of poor communication skills, and the negotiator has not optimised his or her position, the result is still acceptable.	52% - 58%
Not competent	The majority of the criteria mentioned in the “excellent” category are met, but there are flaws which are material to the outcome of the negotiation. For example, the negotiator might have made a serious error in analysing the conflict properly and as a result adopted an inappropriate strategy, might not have clarified a vital issue sufficiently, or failed to ascertain an important need or interest, or might have proceeded too quickly to the next stage in the process. The negotiator has poor communication skills, lacks confidence, was definitely not in control of the situation and allowed the other party to dominate the process. The negotiator achieved an unfavourable result.	43% - 47%
Bad	The criteria mentioned in the “not competent” category are present but, in addition, the student succumbed to the pressure of the situation, all but abandoned his or her case, and achieved a result that is unacceptable on the facts.	40% >

## **PART B: ARBITRATION**

### **1 INTRODUCTION**

The Arbitration section of the course will occupy approximately one third of the lectures, and will carry a 35% weighting in the overall examination result for the course.

The focus of the arbitration section of the course is on the arbitration of commercial disputes, and in particular international commercial disputes. The reason for the focus on this area is that there is strong anecdotal evidence that the number of commercial arbitrations has increased significantly over the past few years and continues to increase. This is part of the broader trend towards the “privatisation” of litigation, as formal litigation becomes increasingly difficult (because of the clogged court rolls) and expensive, and as companies become increasingly aware of the reputational risk associated with (public) litigation as opposed to (private) arbitration of their disputes.

The course will not deal with the arbitration of labour disputes. Labour arbitration is highly specialised and very different from “ordinary” commercial arbitration. It is therefore appropriate that it be looked at within the context of labour law, rather than as part of a more general arbitration module.

### **2 Content of the commercial arbitration component**

The following topics to form the core content of the arbitration section of the course:

- Factors influencing the choice between arbitration and other methods of dispute resolution: the case for arbitration.
- Legislative framework, with a focus on the Arbitration Act of 1965 and the International Arbitration Act of 2017.
- Arbitration rules with a particular focus on the UNCITRAL rules, comparing these briefly with at least one other set of arbitration rules, for example the rules of the London Court of International Arbitration and/or the Standard Procedure Rules of the Association of Arbitrators of Southern Africa.
- The arbitration agreement.
- Enforcing the agreement to arbitrate.
- Conduct of the arbitration hearing.
- The arbitration award and enforcement thereof.
- Judicial review of arbitration awards.



Depending on time availability, we may also cover:

- Ethics in arbitration, including the arbitrator's duty of disclosure.
- Challenging the appointment / seeking the removal, of the arbitrator.
- Punitive damages in arbitration awards.
- The arbitration of constitutional and other statutory rights.

### **3 Textbooks**

The following textbooks are available in the Law Library. Students are strongly encouraged to make use of them.

- Blackaby, N, *et al: Redfern and Hunter on International Arbitration*; (2015) Oxford University Press
- Born, G: *International Arbitration: Law and Practice* (2nd ed.); (2016) Kluwer Law International
- Moses, Margaret L.; *The Principles and Practice of International Commercial Arbitration* (2nd ed.); (2012); Cambridge University Press
- Bantekas, I: *An Introduction to International Arbitration*; (2015) Cambridge University Press

### **4 Assessment**

Assessment of the arbitration section of the course will take two forms: there will be one assignment, which will count for 10% of the total mark in the ADR course. In addition, the arbitration component will occupy one half of the June written examination. The June examination counts for 50% of the total mark in the ADR course, and the arbitration component thereof will thus be 25% of the total ADR course mark. 10% for the assignment plus 25% for the examination thus means that the arbitration component has a 35% weighting in the total course.