EUROMED Invest Academy in Serbia
Belgrade, March 26\textsuperscript{th} 2015

\textbf{Commercial Mediation & Arbitration}

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ISPRAMED

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EUROCHAMBRES
Program of the session

1) Speakers’ presentations
2) Exercise and debrief
3) Dispute resolution methods
4) Mediation & case stories
5) Arbitration: the basics
6) Questions

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Part 1

Speakers’ presentations

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ISPRAMED: the Institute for the Promotion of Arbitration and Mediation in the Mediterranean Area

Objectives
✓ Spreading ADR culture and the use of arbitration and mediation in the Mediterranean
✓ Supporting the growth of arbitration centres and ADR centres
✓ Elaborating common principles inspiring the practice of each arbitral institutions of the Mediterranean

Activities
✓ Training
✓ Institution building
✓ Conferences and events
✓ Reports

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EUROCHAMBRES & ADR

- Policy work (position papers and conferences)
- Awareness raising activities
- Mediation clearing house: www.gotomediation.eu
- Mediation meets judges project
- Researches and publications
Part 2

Outline of the course
Today’s goals

1) Expand your knowledge of ADR
2) Practice first
3) Then theory
4) Expectations?
Part 3

Exercise and debrief
Part 4

Alternative Dispute Resolution methods

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Alternative Dispute Resolution

What do you mean when you say “ADR”? 

Out-of-Court techniques to solve disputes between and among individuals, business entities, governmental agencies, States

ADR is generally based on an agreement by the parties, either before or after a dispute has arisen
Gradation of Dispute Resolution Methods

- Non-Binding
  - Decision by Disputing Parties
  - Decision by Third Party

- Binding

Alternative Dispute Resolution (ADR)

- Avoidance
- Unassisted Negotiation
- Facilitated Negotiation
- Early Neutral Expert Evaluation
- Mediation
- Conciliation
- Corporate Ombudsman
- Peer Review Panel
- Judicial Dispute Resolution
- Arbitration
- Tribunal/Govt Ombudsman
- Litigation
The Story of the Orange

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<table>
<thead>
<tr>
<th>Negotiation/Compromise</th>
<th>Mediation</th>
<th>Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Consensual nature</td>
<td>- Consensual nature</td>
<td>- Consensual nature</td>
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<tr>
<td>- Informal</td>
<td>- Informal</td>
<td>- Formal</td>
</tr>
<tr>
<td>- Non adjudicative</td>
<td>- Non adjudicative</td>
<td>- Adjudicative</td>
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<tr>
<td>Agreement between the parties</td>
<td>Agreement between the parties with the assistance of a third neutral</td>
<td>Decision by a third neutral</td>
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<tr>
<td>Win-Lose/Win-Lose</td>
<td>Win/ Win</td>
<td>Win/Lose</td>
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<table>
<thead>
<tr>
<th>Arbitration</th>
<th>Mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Imposed decision</td>
<td>- Freedom of Parties</td>
</tr>
<tr>
<td>- Rule of Law</td>
<td>- Dialogue restored</td>
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<tr>
<td></td>
<td>- Creativity</td>
</tr>
<tr>
<td>- Formal</td>
<td>- Informal</td>
</tr>
<tr>
<td>- Little control of procedure</td>
<td>- Based on trust</td>
</tr>
<tr>
<td></td>
<td>- Control of procedure</td>
</tr>
<tr>
<td>- Long Procedure</td>
<td>- Fast Procedure</td>
</tr>
<tr>
<td>- Costly</td>
<td>- Low costs</td>
</tr>
<tr>
<td>- Analysis of facts, positions, claims, liability (the past)</td>
<td>- Negotiation on interests at stake (the future)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>- Feeling of injustice/Frustration/Battling</td>
<td>- Expression of emotions/listening / cooperation</td>
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<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Purpose: defeat the other party</td>
<td>Purpose: resolve the problem/maintain/restore relationship</td>
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</table>
Multistep Clauses

• Negotiation Between Executives (A) The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this contract. Any person may give the other party written notice of any dispute not resolved in the normal course of business. Within [15] days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of that party’s position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within [30] days after delivery of the initial notice, the executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.

Continues…….

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• **Mediation (B)** If the dispute has not been resolved by negotiation as provided herein within [45] days after delivery of the initial notice of negotiation, [or if the parties failed to meet within ]20[ days,] the parties shall endeavor to settle the dispute by mediation under [provided, however, that if one party fails to participate in the negotiation as provided herein, the other party can initiate mediation prior to the expiration of the ]45[ days.] Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.

• **Arbitration (C)** Any dispute arising out of or relating to this [Agreement] [Contract], including the breach, termination or validity thereof, which has not been resolved by mediation as provided herein [within ]45[ days after initiation of the mediation procedure] [within ]30[ days after appointment of a mediator], shall be finally resolved by arbitration in accordance with the rules ____, by [a sole arbitrator] [three independent and impartial arbitrators, of whom each party shall designate one]; [provided, however, that if one party fails to participate in either the negotiation or mediation as agreed herein, the other party can commence arbitration prior to the expiration of the time periods set forth above. The arbitration shall be governed by. The place of arbitration shall be (city, state).
Part 5

Mediation

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The iceberg of conflicts

Objective aspects of the dispute may be apparent

Subjective aspects are often to be discovered

The Facts
The Law(s)
The Positions

Misunderstandings
Perceptions
Emotions
Interests
Concerns
Feelings
Beliefs
Values
Needs
Fears

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The mediation process

1. Preliminary contacts
2. Gather information
3. Framework set-up
4. Exploration of interests, needs & values
5. Brainstorm settlement options
6. Negotiate to resolution
7. Agreement / closure

Private or joint sessions

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The mediation Directive 2008/52/EC

- Limitation to cross border disputes
- Reinforce quality and security
  - Quality of mediation
  - Enforcement of settlement
  - Confidentiality
  - Suspension of limitation periods
- Promote mediation
Case study

RESPONDENT:
Building company

Windows manufacturer and fitter

CLAIMANT:
Debt purchaser

MEDIATOR:
Case study - background

- Building company subcontracted the manufacturing and fitting of the windows – the job is badly done – the building company refuses to pay
- Claimant: company who purchased the debts of a windows manufacturer and fitter
- Defendant: building company
- C claims to D payment of €340,000
Case study - proceedings

- started in March 2012, C claims €340,000
- parallel negotiation not successful
- claim adjourned in summer 2013 for a mediation
- organization of mediation & appointment of mediator
- mediation on 28 October & mediation settlement reached
Case study - exploration

- Accounting error of €60,000
- Failing of evidences
- Needs for the Building Company to get rid of the claim asap
- Window manufacturer is retired
- The debt purchasing contract foresee a % of the gain for the window manufacturer
Case study - outcome

• Mediator opens the mediation and listen to the parties
• Mediator break into sessions (caucus)
  – Mediator challenges the arguments
  – Mediator helps to make a risk assessment analysis
  – Mediator is helping to be creative with the solution
• Parties eventually settle the case in 1 day
Part 6

Arbitration

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Arbitration

The most used ADR method in international contracts. It is an adjudicative form of dispute resolution ending with a decision “the arbitral award” that thanks to International Conventions is worldwide recognized and enforceable. Parties choose the arbitrator, the applicable law, the language and the seat.

The arbitrators’ power to resolve the dispute is founded upon the common will of the parties. Parties deprive State Courts of the power to decide and give this power to arbitrators.
Why choosing arbitration?

- Neutrality
- Competence of the arbitrators
- Less costly than litigation
- Less time-consuming than litigation
- Confidentiality
- Tailor – made procedure
- Enforcement of the arbitral award (1958 NY Convention)

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Enforcement of arbitral awards

✓ Awards are easy to enforce – much easier world-wide than judgments of courts

✓ The 1958 New York Convention on recognition and enforcement of foreign arbitral awards makes awards rendered in Convention states enforceable in all other Convention states on the same basis as domestic arbitral awards, subject to very limited defenses
<table>
<thead>
<tr>
<th>PROs</th>
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<tr>
<td>- Complete freedom of the parties</td>
<td>- Pre-established rules filling in procedural gaps and offering default</td>
</tr>
<tr>
<td>- No administrative costs</td>
<td>- Control on the time limits</td>
</tr>
<tr>
<td></td>
<td>- Control on the costs of the proceedings</td>
</tr>
<tr>
<td>CONs</td>
<td>CONs</td>
</tr>
<tr>
<td>- Procedural gaps</td>
<td>- Administrative costs</td>
</tr>
<tr>
<td>- Deadlock situations</td>
<td>- Some bounds</td>
</tr>
<tr>
<td>- Limited control on time and costs</td>
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</table>
What does the Chamber of Arbitration do in practice?

Offers:

- Sets of rules
- Secretarial assistance to the proceedings
- Locations for arbitration hearings and mediation meetings

Checks and guarantees:

- Neutrality and independence of arbitrators
- Flexibility of the proceedings
- Time and costs control
where do we start from?

Arbitration Agreement must be in writing and can be in the form of:

- **an arbitration clause** *(before the dispute arises)*
  
  It is the clause included in a contract by which parties agree that all the disputes arising out of the contract shall be decide through arbitration.

- **A separate agreement** *(when the dispute has already arisen)*
  
  It is an agreement through which parties in a dispute agree that “the specific” dispute shall be decided through arbitration.
Arbitration Agreements: 2 examples

- All the disputes arising out of or related to the present contract, shall be settled by arbitration under the Rules of the Chamber of Arbitration of Milan (the Rules), by a sole arbitrator / three arbitrators **, appointed in accordance with the Rules. The Arbitral Tribunal shall decide in accordance with the rules of law of ... / ex aequo et bono. The seat of the arbitration shall be ... . The language of the arbitration shall be ...".

- The undersigned ........................ and ................................ , considering that a dispute has arisen between them concerning ................................................................. agree that this dispute shall be settled by arbitration under the Rules of the Chamber of Arbitration of Milan (the Rules). The Arbitral Tribunal shall be consist of a sole arbitrator / three arbitrators **, appointed in accordance with the Rules.

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Another model arbitration clause

Any dispute, controversy or claim arising out of or relating to this contract, its interpretation, execution, the termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of Arbitration of the Cairo Regional Centre for International Commercial Arbitration.

Note: Parties should consider adding:

a. The number of arbitrators shall be ... (one or three);
b. The place of arbitration shall be ... (town and country);
and

c. The language to be used in the arbitral proceedings shall be...

Note: Parties may consider adding:
The time limit within which the arbitral tribunal shall make its final award shall be...

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What matters can be submitted to arbitration (arbitrability)

Generally speaking all matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions:

- any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing;
- construction of works; consulting; engineering; licensing; investment; financing; banking; insurance;
- exploitation agreement or concession; joint venture and other forms of industrial or business cooperation;
- carriage of goods or passengers by air, sea, rail or road.
Content of the arbitration clause

- Will to arbitrate
- Choice of Arbitrator
- Choice of applicable law
- Choice of the language
- Choice of the seat
- Ad hoc vs. institutional arbitration
1. Commencement of the proceedings

The claimant files the request for arbitration with the Secretariat (and pays the filing fee where required)

The Secretariat – after a formal control of the brief - forwards the request to the other party

The defendant has to file his statement of defence within a deadline provided for by the Rules
2. Economic value of the dispute

The Secretariat determines the value of all the primary claims issued by the parties in their briefs.

The Secretariat requests the parties advance payments on the costs of the proceedings.

The advance payment is usually a condition to be met in order to give start to the proceedings.
3. Composition of the arbitral tribunal

Primacy of the parties’ autonomy (expressed in the arbitration agreement)

Default procedures: reference to arbitration rules (institutional arbitration)

Declaration of independence and confirmation procedure where it applies
Once the arbitral tribunal has been duly appointed and confirmed it receives the file from the Secretariat

Hearing minutes or order which specifies some elements of the arbitration (seat and language of the arbitration and the steps of the proceedings)

It runs the time limit for filing the final award – powers of extension

Terms of Reference (where it applies)
5. After the constitution the core of the proceedings

Mediation/settlement attempts at every stage of the proceedings

The issue of all provisional measures not prohibited by the applicable procedural law

Evidence taking (documents, expert witnesses, witnesses)
6. Conclusion of the proceedings

**Award** deliberated by majority vote (personal conference only if so required by the law applicable to the proceedings)

**Settlement** of the dispute (during the hearing or outside it)

Spontaneous execution/ Enforcement/ Challenge

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Part 6

Questions ?

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THANK YOU

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