

Maritime Disputes
Alternative Resolution Methods
Mediation, Arbitration, Arb–Med and Med–Arb

Advantages and disadvantages

I. INTRODUCTION

As of the beginning of the eighties, Mediation appeared in the United States of America generated by the Civil Rights Movements, which had been organized in the sixties.

Later on, Mediation was introduced in the Legislation of almost all the States all over the World.

In fact, Mediation is not a modern institution. In Greek Mythology, examples of Mediation can be found such as in the case of Orestes, the son of Agamemnon, who, with the help of his sister Electra, murdered their mother, Clytemnistra, because she had killed Agamemnon with the help of her lover, Aegisthus. Although Oreste's actions were what God Apollo had commanded him to do, Orestes had nevertheless committed matricide, a grave sacrilege. Because of this, he was pursued and tormented by the terrible Erinyes, also known as Furies, the "Infernal" goddesses demanding

further blood revenge. The Goddess Athena arranged for Orestes to be tried by a Jury of Athenian citizens with her presiding.

Apollo spoke in defense of Orestes, The Jury vote was evenly splitted, but Orestes was acquitted because the vote of Athena was for acquittal. Despite the verdict, the Erinyes threatened to torment and poison all inhabitants of Athens. But Athena succeeded to decompress the situation by offering them a new role as protectors of Justice and of the City of Athens, instead of their role of avengers. While promising that, Athena added that the goddesses would receive due honor from the Athenians, but she also reminded them that she was holding the key to the storehouse where Zeus was keeping the thunderbolts, which had defeated other older Erinyes. This mixture of bribes and veiled threats calmed the Erinyes, who were thereafter addressed as the “the Gracious ones”, the “Kindly ones”.

This example could be used to show how “testing reality” by the parties in a conflict - which they do with the assistance of the Mediator as it will be exposed below - can make them more flexible regarding their claims, when they realize that the alternative to a solution proposed by the other party (in the myth the offer of Athena to become protectors of Justice and of the City of Athens and to be honored by the Athenians) could be worse (in the myth, the alternative was the danger to be faced with Zeus’s thunderbolts).

Another well known example is the one where King Solomon was requested by two women to solve their dispute regarding the maternity of a baby. Each one of them claimed that the baby was hers. After having listened attentively to both of them, King Solomon said something like “Well, I think that the only way for both of you to be satisfied is to split the baby in two and give one part to each one of you.” One of the women accepted immediately, while the other screamed “No”, because she was the real mother and she obviously preferred that the child remains alive and be with the other woman rather than to die. Solomon gave the child to his mother!

The above case is considered to be the first dispute in Humanity History solved by Arbitration (and not by Mediation). Actually, King Solomon rendered a judgment, while a Mediator does not.

In China, solving disputes out-of-Court is strongly preferred. Such preference finds its roots in the Confucian philosophy advocating that “a person should pay attention and live according to virtue rather than Law.”

Mediation serves such purposes, its aim being to make each party respect the other’s interest instead of focusing only on his, and to get the parties prepared to abandon what they do not really need and what does not really safeguards their interests, even if they are entitled to it by strict application of the Law, helping thus the conservation of social peace and the development of good human relations.

In France, in the thirteenth century, King Louis the Ninth, later Saint-Louis, used to sit under an oak and to encourage his citizens to approach him and to expose any problem they possibly had, in order to help them to solve it.

Let us remind some adages, which Mediation might serve:

“It is always preferable to keep a friend than to win a war”

“Behind any dispute there is always a broken relationship”

“Mediating disputes smoothes away discords”

“It is not possible to shake hands with clenched fist”

“We have one mouth, but two ears, because it is preferable to listen than to speak”

I. MARITIME DISPUTES and ALTERNATIVE DISPUTE RESOLUTION METHODS

Maritime claims

Maritime claims are usually classified in two categories: wet claims and dry claims:

- Wet maritime claims are mainly those related to collision, general average, salvage and marine pollution.
- Dry claims are those related to:
 - cargo claims (construct of carriage, bills of lading, dangerous cargos).
 - charter party disputes (freight, hire, demurrage).
 - ship building contract disputes.
 - ship repair disputes.
 - hull damage claims.
 - bunker disputes.
 - crew, passengers, stowaway and shore workers, claims.

II. Methods of Maritime Disputes Resolution

Likewise for civil and commercial civil disputes, the most commonly used method for solving maritime disputes up to some decades back was Litigation.

Yet, about fifty years ago, for many reasons the most important of which was the overloading of the Courts of Justice and the subsequent important delay in trying the cases pending before them, shift was done towards Alternative Dispute Resolution Methods.

The main Alternative Dispute Resolution (**ADR**) methods (the acronym **ADR** was often interpreted by Lawyers as **Alarming Drop in Revenue**, this evidencing at once that lawyers have been reluctant vis-à-vis **ADR** at the beginning) are, mainly, Arbitration, Mediation, Negotiation, Conciliation and Adjudication, the last one being applied almost exclusively in Common Law Countries.

As far as Maritime Disputes are concerned, Arbitration was and still is the favorite ADR method, for their out-of-Court resolution.

Some authors, judges and practitioners contest the character of Arbitration as an ADR method due to the fact that the Arbitrator or the Arbitration Tribunal renders a judgment (award), while neither the Mediator nor the Conciliator, nor the Negotiator render any judgment. Even the decision of the Adjudicator, who adjudicates a claim to the claimant or rejects his relevant application, cannot be considered as a judgment because it is not enforceable and it is applied only by willingness of the parties.

To our opinion, Arbitration is an Alternative Dispute Resolution method, because the Arbitrator(s) is or are selected by the concerned parties, while in Litigation the parties in dispute cannot select the Judge(s), the Arbitration process can take place where the parties have agreed and be conducted in the language agreed by them, while in Litigation the Court having *ratione loci* competency is designated by strict procedure rules, the deviation from which is usually not allowed (as to the *ratione materiae* competency, it is always determined by the procedural rules of the State where the Court trying the case is located) and the language in which the procedure is conducted before the Court is the official language of the State, where the trial takes place. Further, the Arbitration procedure is very flexible, the relevant rules giving room to the parties to agree differently, but also to the Arbitrator or to the

Arbitration Tribunal to decide which set of rules it will apply as far as the procedure is concerned (for example, if the parties do not object, an Arbitrator or an Arbitration Tribunal may decide to apply to the Arbitration process the procedure rules applicable when a Court of Justice tries an application seeking provisional or conservative measures, regardless to whether it has to try on the substance of the dispute, while the Courts of Justice, when trying the substance must apply more strict and almost always mandatory legal provisions.

Although Arbitration is still the preferred ADR of parties involved in Maritime Disputes, the recourse to Mediation has recently increased substantially.

A. Mediation

1. Law 3898/2010 regarding Mediation in civil and commercial cases has been enacted in Greece in compliance with EU Directive 2008/52 of the Council and the European Parliament regarding Mediation in civil and commercial transborder cases.

The above mentioned EU Directive applies to transborder disputes. The Member States have been requested to incorporate its dispositions in their respective National Legislation for transborder civil and commercial disputes, without being prevented to extend the application of the relevant dispositions to domestic civil and commercial disputes. However, in case national legal dispositions make deviations from those of the EU Directive, such deviations are acceptable only in respect to domestic disputes.

An example of such a deviation was the requirement of Greek Law 3898/2010 that the Mediator be a lawyer, which is not a prerequisite under the EU Directive. Because the prerequisite to be a lawyer is a restriction not provided by the EU Directive (on the contrary, the European Union Authorities have asked the Member States to lift any impediment to the practice of a

profession, both in their respective Territory as well as in the Territory of the other Member States, regardless to the nationality of the concerned persons), Greece has been requested to strike out of L. 3898/2010 the above prerequisite for a person to become a Mediator. This was done in April 2014, by virtue of Law 4254/2014. To be noted that even before this latest Law, the Mediator should be a lawyer only in domestic cases. In transborder disputes, the Mediation process could be conducted in Greece also by non lawyers provided they had been duly trained, assessed and accredited as per the relevant dispositions of Law 3898/2010.

Greek Legislation does not contain specific rules regarding Mediation in maritime disputes. Mediation having as an object a maritime dispute is governed by the dispositions of L.3898/2010, since maritime issues are contained in the broader category of commercial ones.

1.1 Article 4(a) of L.3898/2010 provides that transborder disputes are those where at least one of the concerned parties has its permanent domicile or resides usually in a Member State other than the one where any other party has his domicile or place of residence on the date on which:

- the parties agree to have recourse to Mediation after the dispute arose.

European Directive 2008/52 provides in paragraph 15 in Line of its Preamble that, in case there is no written agreement of the parties, it should be considered that they agree to have recourse to Mediation at the moment when they take specific steps so as the Mediation process starts.

Greek Law 3898/2010 does not contain such a provision. Yet, by interpretation, this could apply also to determine in Greece whether a dispute is a transborder one or not.

- Mediation was ordered by a Court of a Member State.
- there is an obligation to mediate by virtue of the National Legislation and

- the parties are requested by the Court, where the case is pending, to go to Mediation

The definition given to transborder disputes by Directive 2008/52 is the same as the one constrained in Law 3898/2010.

1.1.2 Article 2 of L.3898/2010 provides that disputes regulated by Private Law can be submitted to Mediation following a relevant agreement of the parties involved, provided the latter have authority to dispose of the object of the dispute. Consequently, disputes the object of which is governed by mandatory legal rules do not rank for Mediation. For example, a divorce case cannot be submitted to Mediation, neither can the waiver from a claim by an employee or a worker. Further, the claim in dispute must be governed by Private Law. Disputes between private physical persons or legal entities on the one hand and the State on the other hand can be submitted to Mediation only in case the State has acted in the conclusion of the agreement, of the contract etc. out of which the dispute has derived, as a private person, i.e. if it has not acted exercising Jure Imperii, but Jure Gestionis. Are considered to be private, disputes between the State and one or more private persons, for example, those accruing out of supply of goods and services agreements, lease agreements, purchase of immovables, chattel or merchandise etc. On the contrary, fiscal disputes, for instance, are not eligible for submission to Mediation since they are linked to fiscal obligations imposed by the State to its citizens and to various categories of foreigners, by means of mandatory rules enacted in the frame of the exercise by the State of its Public Powers (Jure Imperil – Dominion rights).

1.2 According to article 4 paragraph (b) of Law 3898/2010, Mediation is a regulated process (i.e. a process governed by specific rules to the contrary of the discussions/negotiations of the parties conducted with the assistance or not of a third party, which lead possibly to resolution of the dispute by means of a compromise or otherwise) **where two or more parties in a dispute attempt voluntarily to solve it by means of an agreement,**

with the assistance of a Mediator. This explains why frequently Mediation is referred to as an “assisted negotiation”.

1.2.1. Mediation can take place:

- if the parties agree to have recourse to Mediation before or during legal proceedings
- if they are requested by the Court before which the case is pending to go to Mediation. If the parties comply with such a request of the Court, the case is obligatorily postponed to a hearing to take place after three months, at least, but not after more than six.
- if Mediation is ordered by a Court of another Member State or
- if Mediation is imposed in a mandatory (obligatory) way by the Law.

1.2.2 The agreement of the parties to have recourse to Mediation can be proven only by written evidence. It can be concluded in two ways, **(a)** either by means of a separate document, in which reference is done to the main agreement or the legal relation to which the dispute to be referred to Mediation is connected or **(b)** by insertion in the main agreement of a Mediation clause.

At this point, it worths stressing that the Mediation agreement should not be confused with the agreement, which is signed by the parties and the Mediator regarding the submission of a dispute to Mediation, before the process starts. By virtue of said agreement, the parties **repeat** (in case they have already signed a relevant agreement previously or if they have inserted in the main agreement entered to between them a Mediation clause) or express for the first time their will to submit to Mediation a specific dispute of them (if they have not signed previously a relevant agreement or inserted a Mediation clause in the main agreement), but they have to include other

provisions in it regarding the appointment of the Mediator, his rights and obligations, as well as his fee and other issues.

If the parties have not agreed before to submit a specific dispute to Mediation, they can include in the agreement, which they sign with the Mediator as above, their decision to go to Mediation. In such a case, the parties should take care to make said agreement in writing, since the agreement of the parties to mediate can be proven only by means of written documents as stated above, while the agreement concluded between the parties and the Mediator can be proven also by other means of proof, such as witnesses. However, even said agreement must be in writing even if one of the parties asks for a written document to be signed in this respect. If goes without saying that it is preferable that the agreement between the parties and the Mediator be in writing though this is not mandatory, because a written document is a more solid mean of proof, all the more that the agreement under discussion contains provisions regarding the obligations of the Mediator such as, especially, his obligation to keep the whole process confidential.

1.2.3 In case the parties have recourse to Mediation following recommendation of the Court (which assumes that legal proceedings have been already instigated), the acceptance by the parties of said recommendation is recorded in the Minutes drawn up by the Clerk of the Court, which constitute a full proof of the acceptance of the parties to Mediate.

1.2.4. As to the Mediation clause, it is a very important and thorny issue. Although such a clause can be included, a priori, in any agreement (sale agreement, distribution agreement, ship construction agreement....) it is not binding for the parties. This is clearly stated in the Explanatory Report of L.3898/2010, which provides that any Mediation clause should be confirmed after the dispute has occurred.

The agreement of the parties to submit a dispute to Mediation is concluded either before or after legal proceedings have been instigated. In the second alternative, it is obvious that the dispute has already arisen. But if

the parties agree to have recourse to Mediation before legal proceedings are instigated, their dispute might not have occurred yet.

Both Greek Law 3898/2010 and European Directive 2008/52 consider that the agreement of the parties to go to Mediation must occur after the dispute has arisen, since, before that, the parties do not know whether any dispute will be generated by their main agreement and even less the nature of such a dispute. However, both the above Legislative texts set forth the general principle that the freedom of the parties to have recourse to Mediation or not - which is one of the fundamental characteristics of Mediation - assumes that the parties have clear and full knowledge of their dispute as to its real and legal dimensions, so as they can decide to submit it to Mediation or not. Clearly it is not possible for this condition to be fulfilled neither at the time when a Mediation clause is inserted by the parties in their main agreement nor in case they set up an agreement to mediate before the dispute has been generated. This is the main argument in favor of the position that, in both the above cases, the agreement of the parties to submit their dispute(s) to Mediation must be repeated after the dispute(s) have occurred.

To be noted that the Explanatory Report submitted to the Greek Parliament together with the draft of Law 3898/2010 by the competent Ministers provides expressly that the agreement of the parties to have recourse to Mediation does not have procedural consequences as it is the case if there is an agreement of the parties for Arbitration (concluded either by insertion in the main agreement of an Arbitration clause or by means of a separate agreement concluded before or after the dispute has occurred). The procedural consequences are that, in case of an Arbitration clause or agreement for instance, if one of the parties disregards it and starts legal proceedings before the Courts of Justice, the other(s) may raise an Arbitration plea, following which the Court must suspend the proceedings filed with it and send the case to Arbitration. A Mediation clause or agreement having not procedural consequences, if any of the parties disregards it, the other(s) cannot raise a relevant plea before the Court. This makes of the Mediation clause or agreement a kind of pious aspiration. Still, a Mediation clause or

agreement could be of essence because, on the one hand, its infringement allows the party damaged by the infringement to claim for indemnification (this is theoretical since it would be rather difficult to prove damages suffered because the other party instigated litigation instead of submitting first the dispute to Mediation) and, on the other hand, it creates an ethical obligation of the parties, who might voluntarily wish to respect it. Therefore, it is advisable that Mediation agreements, either in the form of a Mediation clause or in the form of a separate agreement, be concluded by the parties, even before any dispute occurs between them.

The above apply in case legal proceedings are instigated in spite of the existence of a Mediation clause or agreement. On the contrary, after a Mediation process has started regardless to whether there is a Mediation clause in the main agreement or a separate Mediation agreement has been concluded before or after the dispute has occurred or even if there was not any such agreement but the parties submitted voluntarily their dispute to Mediation, the Court has – at the request of any one of the parties – to suspend the course of the trial until the Mediation process is over. If the Mediation process ends to an agreement by which the parties solve their dispute, the trial is terminated. If the Mediation process fails, the trial continues.

1.2.5. In case a dispute is referred to Mediation, the prescription and the limitation period are interrupted for the entire duration of the Mediation process. The prescription and the limitation period start again **(a)** as soon as the Minutes pertaining to the failure of the Mediation process are drawn up by the Mediator (to be noted that during the Mediation process no Minutes are drawn up except those prepared by the Mediator at the end of the process, either to record its failure or to include the agreement reached by the parties) or **(b)** as of the service by one party upon the other(s) and upon the Mediator of a statement that he abandons the Mediation process or **(c)** as soon as the Mediation process stops in any manner whatsoever.

2. The Principles and Characteristics of Mediation

2.1. Confidentiality

Confidentiality is one of the most important principles of Mediation, if not the most important one.

Eventually, confidentiality will be a determinant reason for the parties to select Mediation instead of Litigation. This applies not only to disputes between well-known and famous parties, where it is granted that divulging a dispute – which will certainly happen in case of legal proceedings since the trial is public and the Court rooms are open to everyone (save the cases where public order or ethics are at stake) - but also to family cases where usually all concerned parties wish to keep their dispute as much as possible far from gossips and comments.

In almost all the cases of maritime disputes, the parties involved are large and well-known companies, most of the time international ones. Any rumors regarding their involvement in a Court case would be a negative advertisement, with negative impact on all litigants, no matter who loses and who wins the case.

The confidentiality principle has four aspects:

- i. anything said, exposed, stated, alleged, invoked, referred to etc. during the Mediation process must be kept secret and cannot be used before a Court in case the Mediation process fails and the parties decide to instigate legal proceedings or to submit their dispute to Arbitration. The above principle applies as well in case the Mediation process ends to an agreement of the parties. It applies also to any legal proceedings or Arbitration processes which could be instigated later on, regarding disputes directly or in directly connected to the one submitted to Mediation.

Confidentiality is a legal duty of any person participating in a Mediation process. Concerning the Mediator, to keep absolutely confidential anything connected to the Mediation process is further a duty deriving out of the Code of Mediators' Deontology applicable in the Member State where the Mediation process takes place. The sanctions provided for a Mediator infringing said duty of his are usually heavy.

Despite the fact that the observance of the confidentiality obligation is mandatory by Law, it is advisable – and this is usually done – that specific clauses be included in the agreement, which is signed by the Mediator and the parties before the Mediation process starts as exposed above, providing expressly the obligation of all of them to respect confidentiality. In case the agreement is extended to third parties, for instance when parties agree that other persons (Court experts, surveyors etc.) will be present at the Mediation process, a confidentiality agreement should be signed with them as well, to strengthen what is provided expressly by the Law, i.e. that all parties participating in a Mediation process are bound by a confidentiality obligation.

- ii. the Mediator and any person having participated in a Mediation process cannot be examined as witnesses in case no agreement is reached through Mediation and the parties in dispute decide to proceed to Litigation or to Arbitration. This aspect of the confidentiality principle stands good not only concerning a trial or an Arbitration process having as object a dispute initially submitted to Mediation, but also future trials directly or indirectly connected to a dispute previously submitted to Mediation. The consequence of the prohibition to be examined as witness grants to the Mediator and to any person having participated in a Mediation process the right to refuse to testify in case they are invited to do so, as an exception to the rule that, if requested by the Court, any person must give testimony.

- iii. no documents prepared specifically for a Mediation process (memoranda handed to the Mediator before the starting of the process, e-mails, telefaxes, letters exchanged with him or any other person participating in the process etc....) cannot be used by any party in case, following failure of a Mediation process, the parties decide to go to Litigation or Arbitration. This applies also to trials or Arbitration processes directly or indirectly connected to a dispute initially submitted to Mediation.

One of the effects of confidentiality is that – as stated above – no Minutes are drawn up by the Mediator, except those he prepares at the end of the process. If the parties have reached an agreement, the Mediator includes it, after it is signed, in the sole Minutes he draws up at the end of the process, as above.

In case even one of the parties requests him to do so, the Mediator must submit said Minutes to the Clerk of the First Instance Court in the territorial area of which the Mediation process took place. When the above Minutes are submitted to him, the Clerk of the Court takes steps to have the enforcement formula affixed on them by the President of the Court, who does not check the contents of the agreement, but only whether the document submitted to him contains actually Minutes drawn up by a Mediator, whether it contains the formal mentions provided by the Law (place, date, names and surnames of the persons having attended the Mediation process etc.) and whether it contains a duly signed agreement. Although the Law provides nothing in this respect, the fact that the President of the Court has no authority to check further the Minutes submitted to him before affixing on said document the enforcement formula, the President can nevertheless refuse to make of the Minutes an enforceable title based on the general rule that the Court has the right – and the obligation – to refuse an action contravening to Public Order.

According to the Law, **the parties may agree in writing** to extend the confidential character also to their agreement, should they reach any.

The submission of the Minutes to the Clerk of the Court as above does not constitute an infringement of the confidentiality obligation even if extended to the agreement having reached during a Mediation process, since the Law provides expressly that the divulgation of such an agreement is allowed when needed for its enforcement. The obligation of confidentiality and of keeping the whole Mediation process secret steps back in case of violation of Public Order and also in case this is needed to safeguard the protection of underaged persons or in order for damage to the physical integrity or the psychological health of person(s) be avoided.

- iv. In case the Mediator has separate meetings with each party, what is said to him during their course cannot be communicated by him to the other party or parties, except if he is expressly requested or authorized by the concerned party to do so.

2.2. Voluntary

Another principle of Mediation is that it is **voluntary**, in the sense that the parties may or may not agree to have recourse to Mediation. Further, they are free to abandon the process until an agreement is possibly signed. Once an agreement is signed, it is binding and must be enacted by the parties.

Even though they have signed an agreement to submit their dispute to Mediation, the parties have no obligation to continue participating in the process. They have not even the obligation to start participating in it although this contravenes to what they have agreed. However, it is generally acknowledged that, as provided also in the Explanatory Report of L.3898/2010, the parties must participate in the Mediation process, if they have agreed to Mediate, in good faith and provide their best endeavors for its success.

As stated above, Mediation might also be suggested to the parties by the Court. In such a case, the parties have no obligation to accept such

suggestion. But, in some Member States, it is admitted – and possibly expressly provided by Law in some of them - that if one party has refused to go to Mediation while the other accepted, even if the party having refused Mediation wins the case in Court, he is condemned to pay, not only his own judicial expenses, but also those of the other party or parties, who lost the case.

Recently, a discussion has started also in Greece as to whether Mediation should be mandatory at least in some specific cases. There is a strong argument against such an approach, which is clearly against the principle that Mediation is a voluntary process. Yet, the opinion in favor of obligatory Mediation considers that Mediation will expand broader and quicker in case it is mandatory. Then comes the question; shall one of the fundamental principles of Mediation be sacrificed because the use of Mediation is to the benefit of people and society? Are we, therefore, prepared to make of Mediation a mandatory process, which the parties in dispute should first try before they go to Litigation?

Italy has responded yes to this dilemma by including provisions making Mediation mandatory in some cases, in Presidential Decree 28/2010 promulgated by delegation of the Italian Parliament in order to incorporate in the Italian Legislation the dispositions of EU Directive 2008/52.

Italy having adopted Mediation not only regarding transborder disputes, but also domestic disputes, Italian lawyers thought that their revenue was threatened! As it was the case at the beginning, in all countries where Mediation was adopted, Italian lawyers were against this new method of resolving disputes out – of – Court. The fact that Mediation was not only adopted but, in addition, provided as a mandatory prerequisite to the instigation of legal proceedings had as a result that their reaction was the strongest recorded in the Member States. They went on strike, they organized public demonstrations and, in one word, they created tremendous disorder and eventually they attacked the above Decree before the Italian Constitutional Court, as unconstitutional. The Court ruled that Presidential Decree 28/2010 did not comply with Italian Constitution, not because

compulsory Mediation was a breach to the right of citizens to have recourse to the Courts of Justice, but because the above Decree had gone beyond the delegation of the Parliament, which did not include expressly the introduction of compulsory Mediation in the Italian Legislation. That is to say that the Italian Constitutional Court did not rule on the merits, but only on the formal characteristics of Legislative Decree 28/2010 on Mediation. Consequently, a Legislative Decree issued following adequate delegation could make of Mediation a mandatory prerequisite to Litigation. Actually, in the Preamble of EU Directive 2008/52, it is provided that the Directive should not be an impediment for National Laws to provide mandatory Mediation or to link it with incentives or sanctions, as long as the National Laws would not prevent the parties to exercise their fundamental right to have recourse to Judicial Courts.

In September 2013, Italy has promulgated Legislative Decree 69/2013 providing that Mediation is mandatory in certain disputes, such as neighbor disputes (condominium), property rights, division of goods, trust and real estate, family owned business, landlord/tenant disputes, loans, leasing, medical malpractice, libel, banking and financial contracts, insurance except the cases regarding compensation for damage caused by the traffic of vehicles and boats.

In practice, Italy has organized things so as the mandatory character of Mediation even in the above cases does not contravene to the voluntary character of the submission of a dispute to Mediation, by providing that, in the above cases, only the attendance at the first meeting of the Mediation process is mandatory for the parties involved. After that, they are free to leave and not continue the process. The reasoning is that, in this way, the voluntary character and the positive results of Mediation, especially in the cases enumerated hereinabove, are combined since the parties are not forced to submit the dispute to Mediation, but only to “have a taste of it”, so as if they discontinue their participation after the first meeting, they do so knowing what they..... miss! To our opinion, the Italian model is an appropriate one and should be used by other Legislations in States, where –

as it is at present the case in Greece – it is the more and more envisaged to make Mediation mandatory, in specific cases at least.

2.3. Non - judgmental

Another principle of Mediation is that it is **not judgmental**. The first and most important aspect of this principle is that **the Mediator does not render any judgment**. This is a fundamental characteristic of the Mediation process, which makes the difference, not only between Mediation and Litigation, but between Mediation and other ADR methods as well, such as, mainly, Arbitration, but also adjudication of claim(s), attribution of claim(s) by a special Board of Disputes (BOD) (which is present especially in construction disputes and the functioning of which is expressly regulated by the rules of the Fédération Internationale Des Ingénieurs-Conseils (**FIDIC**)).

As a matter of fact, the Mediator merely assists the parties to find themselves an agreement satisfying their needs and interests. The Mediator will carry this task successfully by exploring the parties' will. Eventually, what is exposed, stated, described or alleged by the parties at the beginning of the process constitutes only the top of the iceberg. The real needs, emotions and interests of the parties are hidden. The Mediator must try to bring them at the surface, by using specific techniques he has learned during his training and thereafter developed through experience in mediating cases.

One basic tool the Mediator will use to the above end is open questions. Are considered to be “open” those questions which cannot be answered by “yes” or by “no”, but need narration of facts by the party, description of his feelings, reflexion about what he really wants by digging beyond his positions etc... Open questions often have as a result the venting by the parties of their negative feelings vis-à-vis the dispute, but mainly vis-à-vis the “adversary”.

The Mediator must hear very actively whatever the parties say, not only because hidden facts might come to the surface, but also because the

real reasons of the dispute might emerge, of which possibly the parties themselves were not aware or were not conscious of. Active listening has proven to be a very efficient tool for the Mediator for the additional reason that it helps to create rapport and trust between the parties and him.

The Mediator must have a deep knowledge of body language and be able to interpret it. Surveys have shown that only thirty percent (30%) at the maximum of what we say is expressed by means of words, while the large percentage of what we say or mean is expressed by the position of our body, our gestures, our facial expressions etc. And it is not rare that what our body “says” is possibly the contrary of what we state orally.

The Mediator must show empathy to the parties. Empathy means that we understand the feelings, the needs, the interests of the parties, but we do not identify with them.

As already underlined above, the Mediator does not render any judgment. He merely facilitates the parties to find themselves an agreement satisfying equally all of them. According to an opinion, a Mediator should not even suggest a solution, but only if requested by the parties (in writing preferably, for his own protection). According to another opinion, the Mediator should never suggest a solution even if he is requested by the parties to do so. According to a third opinion, the Mediator may suggest solution(s) whenever he considers it appropriate, pertinent or useful. In any case the Mediator, by applying the relevant techniques, will contribute to the finding by the parties of a suitable and viable agreement solving their dispute to the benefit of all of them (win–win solution).

The Mediator may – or even must – intervene when he notices that the parties are moving towards an agreement which is illegal, especially if it violates public order or mandatory legal dispositions or that they are moving towards an agreement, which could not be enforced in a compulsory way in case it is not implemented by one of the parties.

It will sound strange, but it is so: the fact that the Mediator does not render a judgment, but the dispute is solved – if it is – by means of an agreement freely reached by the parties, is one of the reasons of the skepticism of people vis-à-vis Mediation! The fact that the Mediator does not render any judgment makes that the concerned parties are reluctant to turn to him, since they do not encompass him with the same respect and confidence as the Judges and the Courts in general. When referring to the competent Court, we say in Greek: “The Natural Judge”, in the sense that, according to the standing Legislation, the specific Court has authority to solve a specific dispute and no one can be deprived from the right to submit his dispute(s) to it. This explains why it is a condition sine qua non set forth by European Legislation that Mediation can be obligatory provided the right of the persons to have recourse to the Judicial Courts is not jeopardized, as exposed above.

Even if and when the first obstacle is overcome, which is that people do not know what is an Alternative Resolution Method, even then people continue to be reluctant regarding Mediation considering that their problem cannot be solved in a definitive way through it and considering henceforth that, if they have recourse to Mediation, they will just lose time and money and that, at the end, they will have to turn anyway to the Courts for instigate Legal Proceedings.

This is the main reason making necessary to provide the enforceability of the agreement – if any – accruing out of a Mediation process. This is provided both by the European Directive and by the National Legislations of the Member States. Some of them had already provisions on Mediation in their National Legislation, which could remain in force regarding transborder disputes under the condition that they did not contravene to the dispositions of EU Directive 2008/52, otherwise they should be modified accordingly. Those Member States, which had no provision on Mediation in their respective National Legislation, have been granted a period of time up to May 21, 2011 to introduce such provisions mandatorily regarding civil and commercial transborder cases, but the option was also given to them to introduce dispositions providing and organizing Mediation regarding to domestic cases,

in respect to which deviations from the dispositions of the EU Directive were acceptable.

The mandatory presence of lawyers in the Mediation process regardless to whether it concerns a transborder or a domestic case provided by Greek Law 3898/2010 is an admissible deviation from EU Directive 2008/52, since it is a procedural rule, any State having exclusive authority to regulate procedure matters.

Another acceptable deviation concerning a procedural matter as well is the way of vesting with enforceability an agreement deriving out of a Mediation process regarding either a transborder dispute or a domestic one.

While EU Directive provides that any such agreement can be declared enforceable by the competent Court of the Member State where the enforceability is sought, **following an application of all the parties or at least with the consent of all the parties**, Greek Law 3898/2010 provides that, if requested to do so even by **one sole party** and even without the consent of the other(s), the Mediator must submit the Minutes closing the Mediation process, when containing an agreement of the parties, to the Clerk of the Court of First Instance in the territorial area of which the Mediation process took place, in order for the President of said Court to affix on said Minutes the enforceability formula. As soon as this is done, the agreement becomes an enforceable title, as more extensively exposed hereinabove.

It is clear that the way provided by Greek Law for an agreement having been generated during a Mediation process to become an enforceable title grants to the parties greater legal safety as compared to the way provided by EU Directive 2008/52 regarding the same matter, since it guarantees the enforceability even if one or more parties change their mind and do not comply with the agreement they have signed. On the contrary, under the European Directive the refusal of one of the parties to ask for the declaration of the enforceability or the refusal of one of the parties to give his consent at least may block the enforcement of the agreement and bring back to zero the solution of the dispute.

To be noted that the various surveys done up to now show that, in most of the Countries, once signed the agreement is respected. This is due to the fact that the agreement was reached by the free will of the parties, who considered it to be the best solution for them, without being imposed upon them by a third party.

In principle, the contents of such an agreement are not confidential, but can be declared so by the parties, since in various cases the divulgation of even the fact that they have entered into agreement solving a dispute might be detrimental for the parties since the mere divulgation that they have been in dispute could be a negative advertisement for them. To facilitate the enforcement of the agreement of the parties, based on both Greek Law and on EU Directive, even if the confidentiality has been extended by the parties to the agreement having accrued out of a Mediation process, the confidentiality obligation is lifted in case this is needed to enforce the agreement. This is in a way the “cost” incurred by the party or the parties denying the implementation of the agreement.

The enforceability of an agreement having derived out of a Mediation process is its main advantage as compared to other methods of resolution of a dispute out-of-Court, such as negotiation conducted by the parties themselves with or without the assistance of a negotiator, negotiations conducted instead and place of the parties by professional negotiators, conciliation or compromise.

As to the difference between the way provided for by Greek Law and EU Directive regarding the declaration of the enforceability of an agreement having accrued out of a Mediation process, if the process has been conducted in Greece and the enforcement is to take place in Greece, the enforceability is obtained in compliance with Greek Law, regardless to whether the agreement concerns a domestic or a transborder dispute, since the enforcement is governed by the relevant dispositions of the Legislation of the Member State where it takes place. If the Mediation process has been conducted in Greece but the agreement having accrued out of it is to be enforced in another

Member State, one should turn to the Legislation of such other Member State to identify the ways in which an agreement vested with the enforceability formula in Greece can be enforced in the other Member State. If the Mediation process has taken place in another Member State and the agreement having accrued out of it is to be enforced in Greece, the legal dispositions will apply regarding the enforcement in Greece of enforceable acts generated in other Member States. As a matter of fact, in both the above cases, the agreement will be enforced either by application of the dispositions of EU Regulation 2015/2012 re: “recognition and enforceability of judgments and other acts rendered in another Member State” or by application of the dispositions of Regulation 805/2004 of the European Parliament and the Council re: “European Enforcement Order” or by application of EU Regulation 1896/2006” re: “European Order for Payment”.

It is worth pointing out that, according to the EU Directive, the Court or other Authority, which have competence to declare the enforceability, might refuse to declare enforceable an agreement having accrued out of a Mediation process: **(a)** in case its contents are adverse to the Legislation of the Member State where the declaration of its enforceability is sought and **(b)** in case the Legislation of the specific Member State does not provide the enforceability of such an agreement. In the light of the above, the EU Directive grants the right to the Court or to such other competent Authority to verify – in particular in the case under (a) herein above - the merits of the contents of the agreement, while under Greek Legislation the Judge, who is competent to affix on the agreement the enforcement formula, may only verify it from a formal viewpoint, save the cases where the Judge notices that the agreement is against Public Order and/or boni mores, where he will deny the declaration of the enforceability based on the relevant legal principle applicable in all contemporary jurisdictions.

2.4 Non-binding

Another characteristic of Mediation is that it is **not binding**. Any of the parties or all of them may leave the room, where the process takes place and abandon it. The process is not binding until an agreement is signed, should the case occur. If signed, the agreement is binding for the parties and, if it is not respected by anyone of them, there is a breach of contract, which attracts all the consequences of the breach of any agreement provided for by the Law governing the substance of the agreement having accrued out of a Mediation process. Further, any of the parties may ask the Mediator to take the necessary steps to have the agreement vested with the enforcement formula, as exposed in detail in precedent paragraphs, in order to proceed to its compulsory enforcement.

The agreement is drawn up by the lawyers of the parties, who must attend as stated above. The Mediator may verify whether the text reflects actually what has been agreed between the parties by reading loudly the document and by asking the parties whether this is exactly what they wanted. Thereafter, the agreement is signed by the parties and their lawyers and it is handed to the Mediator, who must incorporate it in the Minutes closing the Mediation process. Said Minutes are signed by the Mediator, the parties, their lawyers and by any other person(s) having possibly attended the process.

In case of failure of the Mediation process, the Minutes closing it may be signed only by the Mediator.

2.5 Neutral

The Mediation process must be absolutely neutral. The Mediator must not show any preference to any of the parties or that he considers that the position of one of them is stronger than the one of the other(s). All the parties must feel comfortable and trustful vis-à-vis the Mediator. Otherwise, they will never reveal their deeper feelings and thoughts. If the Mediator feels that he

cannot be neutral for any reason, he must quit. Also, the Mediator must never evaluate the parties' statements and even less criticize them. The Mediator is not there to say who is right and who is wrong, but only to assist the parties to solve their dispute, in a way satisfying all of them. The parties may make an agreement based on which they get less than what they are entitled to by the Law, but obtain something else, which does not enter in the field of the legal dispositions governing the dispute, but accrues, for instance, from the will of the parties to exchange something, which is not important for one of them while it is for the other, in order to get something valuable for him, but not important for the other.

2.6 Authority

To prevent situations where, although the Mediation process progresses well, it might be stuck towards the end, because it appears then that one or more persons attending the process to represent a party have no authority to bind the principal, the Mediator must check beforehand this issue. This is of essence in the case of either physical persons not attending personally but only through their lawyers and in case of legal entities where the physical person(s) representing them in the Mediation process must be duly authorized to this end, according to the relevant, legal dispositions in force in the State where the delegation of authority is done.

According to Greek Legislation, a power of attorney granted to a lawyer has usually – save a few exceptions – to be a notarized one. This applies for the attendance in Court. Mediation is not a Court process. The agreement, which will derive from it, if any, will not be a public document, the signature of which should be done by a holder of a notarized power of attorney. Consequently, to our opinion, the power of attorney granted to a lawyer in order for him to attend the Mediation process and sign any agreement, which will possibly derive out of it, might be in the form of a private document bearing possibly a legalized signature of the Mandator. In case the agreement contains clauses for the setting up of which and for their acceptance, the Law

requires a notarized document, then the power(s) of attorney of the lawyer(s) should also be notarized. This will occur, especially, when the dispute concerns immovables or rights on immovables.

Based on the relevant dispositions of Greek Legislation, if the Mandator is a société anonyme, a decision of its Board of Directors is required, by virtue of which either one or more physical persons are authorized to represent the company in the Mediation process or by virtue of which the legal representative of the company (usually the Managing Director) is authorized to grant any power of attorney, in the form of a private document or of a notarial deed, to one or more lawyers, in order for them to represent the company at the Mediation process. In case of a limited liability company, if the Administrator(s) have full authority to represent the company, he or they will attend the Mediation process on behalf of it or he or they will appoint one or more lawyers and grant them any power of attorney needed for the representation of the company.

Usually at the pre-Mediation stage, i.e. before the Mediation process commences, the Mediator asks the parties to submit to him their powers of attorney if needed, as above.

The parties must comply with such a request of the Mediator, who is otherwise entitled not to allow them to participate in the process. This is one of the rare cases where the Mediator is allowed to preclude someone from participating in the Mediation process, without asking the parties.

The submission to the Mediator of copies of the powers of attorney does not necessarily allow the verification of whether one or more persons attending the Mediation process by virtue of a power of attorney have unlimited authority to bind their principal. If there is a limitation, most of the times it will be in a separate document, which the concerned person(s) might not disclose to the Mediator.

Therefore, the Mediator should make sure that, if needed, the representatives having a limited authority shall be able to get in touch at any

time with the decision makers, so as no impediment occurs to the Mediation process due to lack of authority of the representative(s) to exceed a certain amount or to make bigger concessions.

3. Prescription and time limitation

By application of article 11 of L.3898/2010, the submission of a dispute to Mediation interrupts the prescription and the time limitation of the claim(s) involved, regardless to whether such a submission is done spontaneously by the free will of the parties or following a relevant recommendation of the Court or following an order of a Court of another Member State or because Mediation is obligatory according to Law. In case of recourse to Mediation, the Court postpones the case for at least three months, but for no more than six months.

In case of Mediation starting while legal proceedings have already been instigated, the prescription and the time limitation have already been interrupted by the instigation of legal proceedings. The start of the Mediation process interrupts them anew. That is to say that a new period of prescription, as well as of time limitation will start running after the process is over. This is of interest mainly if the Mediation process fails. More precisely, the new period of prescription and of time limitation starts again as of the date on which the Mediator draws up the Minutes closing the process or as of the date of service by one party upon the other and upon the Mediator of a statement of withdrawal from the process.

In case the Mediation process ends by an agreement of the parties, the rights and obligations contained in it are not necessarily identical to those being initially the object of the dispute. In such a case the prescription and the time limitation period will be the those is appropriate to the rights and obligations deriving out of the agreement having accrued out of the Mediation process.

4. Phases of the Mediation process

The phases of the Mediation process are five:

- Preparation, which takes place before the Mediation process per se starts.
- Opening, which is a joint session attended by the Mediator, the parties, their lawyers, the experts if any and any other persons participating in the process.
- Exploration, where the Mediator, using his skills, will try to bring to the surface the real needs and interests of the parties. This will be done especially during the separate meetings the Mediator will possibly have with the parties (caucuses) if he decides so, but also during the joint session(s).
- Negotiation or bargaining phase.
- Closing.

5. Skills of the Mediator and techniques applied by him

Important skills and techniques of the Mediator have been mentioned in the preceding paragraphs, especially in the ones regarding the Principles of Mediation. Needless to say that there are many others, such as –indicatively – eye contact, creating momentum, paraphrasing, summarizing, reframing, rephrasing, salami slicing, dove rolling, reality testing, assessing risk, pushing the red button, using silence, etc. Important techniques are all those helping the parties to decide whether they will accept an agreement or not and to make them realize which is their Better Alternative to a Negotiated Agreement

(**BATNA**), their Worse Alternative to a Negotiated Agreement (**WATNA**), a Realistic Alternative to a Negotiated Agreement (**RATNA**), a Positive Alternative to a Negotiated Agreement (**PATNA**) and the Zone of a Possible Agreement (**ZOPA**). The use of appropriate techniques to the above ends might be determinant, especially during the negotiation or bargaining phase.

Empathy, trust, rapport, respect, are also to be sought after, since they contribute in a decisive way to a positive outcome of the Mediation process.

Other skills and techniques of the Mediator are: to put hypothetical questions (for example: if this would be done, would it be an acceptable solution for you?), to make the parties identify risks, which could occur out of Litigation, such as uncertain result, negative advertisement about them, judicial expenses, delays etc.

Expanding the pie (i.e. creating additional opportunities) is an extremely efficient tool. Mirroring (ask each party to put the shoes of the other) might also have very good results.

Forward looking perspectives, Intelligence Quota (**IQ**), Emotional Quota (**EQ**), Pareto efficiency criterion, wise agreement, interest based bargaining, win-win solutions are also notions to be highly taken into consideration and explored.

- 6.** There are several types of Mediation, the most important of which are:
- **Narrative Mediation**, which is focused on the relations and develops a new frame and a new description of the conflict, where all the parties admit their respective role, both in the creation and in the escalation of the conflict.
 - **Problem focused or facilitative Mediation**, where the Mediator is more focused on the process, on underlying interests (under the top of the iceberg) and on clarification and elucidation of conflicting issues rather than on the finding of a concrete solution.
 - **Mediation focused on the relation**, where the Mediator concentrates on

the communication between the parties and on helping them in assessing the various perspectives and perceptions and, consequently, their underlying feelings.

- **Transformative Mediation**, which places the principle of empowerment and recognition at the core of helping the parties in conflict change how they interact with each other. This type of Mediation has not as main goal the reaching of an agreement. The Mediator has a non-directive style, which excludes any influence of his on the contents of the agreement. The mutual interactive behavior of the Mediator and the parties is of huge importance. As the process progresses, the parties might get a different perspective regarding their conflict and clarify their interests and capacities. Each party gets a better understating of the position of the other and becomes thus more able to solve the problem.
- **Evaluative Mediation**, which is focused on reaching an agreement and considers that the parties are responsible for the finding of a viable solution.
- **Directive Mediation**, where the Mediator leads the concerned parties to the finding of a solution to their dispute by using appropriate techniques, he has learned, the skills he has developed and the tools he has acquired.

B. ARBITRATION

1. Until some years ago, Arbitration was the most used Alternative Dispute Resolution Method. Especially in maritime disputes, it was practically speaking the sole ADR to be used for their solution. Although Mediation has started to expand in Europe almost twenty years ago and in the United States of America more than thirty years ago, Arbitration remains the preferred and most popular ADR in Maritime Industry.

As a matter of fact, Arbitration is not new! It is very, very ancient! Remember the story of King Solomon and the two women claiming for the maternity of the same child.

Arbitration was also known in the ancient Roman times. The Romans were very capable Legislators and very focused on the ruling of any and all matters, activities and issues by means of Laws. Eventually, they have set up a rich Roman Legislation, which is at the basis of all contemporary Continental Legislations.

The Napoleonian Code is based on Roman Legislation and the contemporary Continental Legislations are based on the Napoleonian Code.

Roman Legislation provided that the parties could include in their agreement(s) a clause according to which any dispute arising out of it would be submitted to Arbitration and that, in case one of the parties did not respect said clause, he would be liable to pay to the other a kind of fine. In Latin, the arbitration clause is called “compromissum”, in French it is called “clause compromissoire” and in Greek “συνυποσχετικό διαιτησίας” (synyposhetiko diaitisias).

According to René David, a French jurist and scholar of the 20th century, specialist in comparative Jurisprudence, Arbitration is a technique seeking the solution of a case concerning the relations between two or more persons by one or more other persons i.e. the Arbitrator(s), whose authority accrues out of an agreement of the parties and who decide based on it, without being vested with their mission by the State.

1.1. In Greece, there are no specific legal dispositions governing Arbitration in Maritime Disputes, whether domestic or transborder. There are legal dispositions governing Arbitration in domestic cases in general, those of articles 867 and following of the Greek Code of Civil Procedure and legal dispositions governing Arbitration in transborder or international commercial disputes, those of Law 2735/1999.

To decide which rules will apply in an Arbitration having as object a maritime dispute, its nature as a domestic or an international one has first to be identified. If all the parties reside in Greece and the Arbitration is to be conducted in Greece, the dispute to be submitted to Arbitration is clearly a domestic one and the Arbitration process will be governed by the dispositions of the above mentioned articles of the Greek CCP. This will happen rarely maritime disputes involving frequently parties residing in different countries.

In case of different domiciles, it has to be checked whether the dispute is a commercial one or not. If it is not, the Arbitration taking place in Greece will be conducted according to articles 867 and following of the Greek CCP, again, regardless to the fact that it is a transborder one. Actually, Law 2735/1999, which has followed the UNCITAL Model Law for Arbitration, rules only Arbitration in International Commercial Cases.

1.2 Maritime matters being considered commercial ones, the Arbitration regarding a dispute having as object maritime issue(s) connected to an international or transborder relationship will be conducted based on the rules of the above mentioned Law, which will be completed, if needed, by the rules set forth by articles 867 and following of the GCCP.

1.2.1 The kind of the specific maritime dispute is also important.

If it is a dry maritime claim (such as claim(s) accruing out of a charter party, of a bill of lading, of a Sale Agreement regarding a ship, claims connected to cargo, hull damage claims, disputes regarding ship repairs etc.,) it is almost certain that there will be in the main agreement/document an arbitration clause. If it provides that the process will be conducted in Greece, then the above Law will apply.

If the dispute is a wet one (collision, general average, salvage, marine pollution...), obviously there is prior agreement as to their solution. The concerned parties may agree to submit their claim(s) to Arbitration after they have been generated, by means of a submission agreement.

Up to a few years ago, it was almost granted that the parties involved in a maritime relationship would choose Arbitration to solve any possible disputes of them and, consequently, they would insert in their main agreement an Arbitration clause. Recently Mediation clauses started to be inserted in maritime agreements, most of the time additionally to an arbitration clause, all the more that the two processes can be combined, in which case it will be a Mediation – Arbitration (**Med-Arb**) or an Arbitration Mediation (**AR-Med**) process, which will be applied. About the above combinations, we will revert below.

1.3 An Arbitration agreement is an agreement by virtue of which the parties submit to Arbitration all the disputes or only certain of their disputes generated by a legal relation, whether contractual or not. When the relationship having generated the dispute is a contractual one, the Arbitration agreement may have the form of an Arbitration or of a submission agreement. When the relationship having generated the dispute is not a contractual one, the Arbitration agreement will have necessarily the form of a submission agreement concluded after the cause of the claim(s) has emerged.

1.3.1 To the contrary of a Mediation clause, an Arbitration clause can refer also to future disputes, with the same consequences if not respected as those in case it refers to disputes having already occurred. The main consequence of the violation of an Arbitration clause by one of the parties, who despite of it instigates legal proceedings before a Judicial Court, is that the other party can raise the Arbitration plea, while in case of infringement of a Mediation clause in respect to a dispute, which had not been generated when the agreement containing the Mediation clause was signed, does not constitute legal ground for a Mediation plea to be raised, as already exposed herein above.

Regretfully, even if the Mediation agreement is concluded after the dispute has arisen or, in case a Mediation clause regarding future disputes is confirmed by the parties after any dispute(s) have arisen, even then the Mediation agreement or clause do not confer a Mediation plea. The Mediation agreement and the Mediation clause are considered private law agreements,

the infringement of which attracts the same consequences as the infringement of any private contract, such as liability for damages, indemnification, repair, fulfillment in rem of an obligation etc. The Arbitration agreement / clause are also private law agreements, but by virtue of express legal dispositions it is possible to ground on them an Arbitration plea, which is not the case for Mediation clauses or agreements. This is one of the most important if not the most important - to our opinion - advantages of Arbitration as compared to Mediation. As far as Mediation is concerned, only if all the parties implement the Mediation agreement / clause and start the Mediation process, the Mediation agreement / clause can be invoked before a Court of Justice, where one of them has instigated legal proceedings, the Court having then to stop the progress of the procedure until the Mediation process is over.

1.3.2 Law 2735/1999 provides expressly that the Arbitration agreement may have the form of an Arbitration clause included in a contract or the form of a separate agreement. The Arbitration agreement must be in writing. However, there is a flexibility as to the written form, since it is also expressly provided by the Law that the Arbitration agreement must not necessarily bear the signature of all concerned parties on the same document, but that the agreement is considered to have been concluded in writing if it derives out of exchanged letters, telefaxes or other means of communication (such as e-mails nowadays), where the agreement is recorded. An Arbitration agreement is also considered to be in writing when one of the parties alleges, in the frame of a judicial act, that there is an Arbitration agreement and the other party does not contradict said allegation. Further, in case of an oral Arbitration agreement the written form is considered to have been respected if the Arbitration agreement is recorded in a document, which has been transmitted by one of the parties to the other(s) or by a third party to all the parties, provided its contents have not been contested (no objections have been put forward within a reasonable period of time), so as they can be considered as contents of an Arbitration agreement according to *lex mercatoria*. The absence of written form is also remedied in case the parties participate unreservedly to the Arbitration process.

1.4 The Arbitration plea must be raised at the first hearing of the case before a Court of Justice. Even if the Arbitration process is on, the Court is not prevented from ordering security measures at the request of one of the parties in respect to the object of the Arbitration.

2. Arbitration can be either “Institutional” or “ad hoc”.

Arbitration is an Institutional one when the parties have, by means of an Arbitration clause contained in their main contract or by means of a separate Arbitration agreement (submission agreement) making express reference to their main agreement (which possibly will or has already generated dispute(s) between them) provide the recourse to an International Commercial Arbitration Center, having put in place Arbitration Rules and a list of Arbitrators out of which the parties may select their respective Arbitrator. Such Centers are mentioned below.

Arbitration is an ad hoc one when the Arbitration clause or the Arbitration agreement does not provide recourse to a specific Arbitration Institution or to a specific set of Rules governing the Arbitration process. In the ad hoc Arbitration, the parties set up, in the frame of the relevant Arbitration clause or agreement, the rules which will apply to the Arbitration process.

As Alan Redfern and Martin Hunt state in their book “International Commercial Arbitration”, the difference between an ad hoc Arbitration and an Institutional Arbitration is like the difference between a tailor-made suit and one which is “bought off-the-peg”. In the light of the above, it is clear that an ad hoc Arbitration is more flexible as to the rules applicable to the process, which have been set forth and agreed by the parties, while in an institutional Arbitration, by choosing an Arbitration Institution, the parties are considered to have automatically submitted the Arbitration process to the Rules of Arbitration set up by said Institution.

3. As stated above, International Commercial Arbitration is regulated in Greece by Law 2735/1999. In its article 1, said Law provides that its dispositions apply to International Commercial Arbitration, which takes place in the Greek Territory. An Arbitration is considered to be an international one (1) if the parties have their location in different States when the Arbitration agreement is concluded or (2) if one of the following places is not in the State where the parties are located: (i) the place where the Arbitration will take place, if such place is provided by the Arbitration clause or by the Arbitration agreement or if it derives out of them or (ii) any place where considerable part of the liabilities accruing out of the commercial relationship should be justified or (iii) the place with which the object of the dispute is most closely linked and (3) the parties have agreed that the object of the Arbitration is connected to more than one States.

4. Based on the UNITED NATIONS COMMISSION FOR INTERNATIONAL LAW (UNCITRAL) Model Law, a dispute is considered to be a commercial one – indicatively and not in a limitative way – when accruing out of any agreement for the procurement or the exchange of merchandise or services, out of distribution agreement, commercial agency agreement, a license agreement, from factoring, leasing, investment, financing, banking, insurance, joint venture agreement(s), transportation of persons or goods by sea or air and others.

5. Greek Legislation provides that the Arbitration Tribunal is composed of one or more Arbitrators. Unless the parties have agreed otherwise, the Arbitration Tribunal is composed of three Arbitrators. When the Arbitrators are three, each party nominates one Arbitrator and the two Arbitrators nominate the Referee, who presides over the Arbitration Tribunal. The parties may determine by common agreement the procedure of nomination of the Arbitrator(s). If the parties have not agreed upon the way of appointment of the Arbitrators, the Law provides that if one of the parties fails to nominate an Arbitrator within thirty (30) days as of the day on which he receives a relevant request of the other party or if the two Arbitrators are not able to agree upon the nomination of the third Arbitrator, within thirty (30) days as well, as of their

nomination, the third Arbitrator is nominated by the One Member Court of First Instance of the place where the Arbitration is to take place, following a relevant application of either party. The above apply also in case the Arbitration Tribunal is composed of one sole Arbitrator and the parties cannot agree on the way of his appointment.

5.1 The nationality of a person is not an impediment for him to be appointed as Arbitrator, unless the parties have agreed otherwise. Yet, when the nomination is done by the above mentioned Court, in case there is one sole Arbitrator, nominated by the Court or in case the Court nominates the Referee, the Court might consider whether it would be appropriate to nominate a person of a nationality different than those of the parties.

5.2 The Arbitrators must be neutral and independent. The parties may agree about the procedure of recusation of the Arbitrators. Each party may apply for recusation of an Arbitrator only if there are elements generating reasonable doubts about his neutrality or independency or in case he has not the capacities possibly agreed by the parties. A party may recuse the Arbitrator he has nominated or to the nomination of whom he has participated, only for reasons having come to his knowledge after the nomination. In case an Arbitrator is prevented from fulfilling his duties, his authority stops by waiver of his or by means of an agreement of the parties or following a judgment of the One Member Court of First Instance of the place where the Arbitration takes or is to take place.

5.3 The Arbitration Tribunal decides regarding its jurisdiction, as well as regarding the existence and the validity of the Arbitration agreement. The parties may raise pleas before the Arbitration Tribunal such as the plea of lack of jurisdiction of the Tribunal or the plea of exceedance of its jurisdiction. Unless the parties have agreed otherwise, the Arbitration Tribunal may order security measures following a relevant application of one of the parties. During the Arbitration process the parties are treated equally. Each party is allowed to develop his arguments and to produce his means of evidence.

The parties are free to agree upon the Arbitration process. If there is no agreement of the parties, the Arbitration Tribunal determines the procedure regarding the Arbitration process, which is, to its opinion, the most appropriate.

5.4 In the light of the above dispositions combined with those of article 2 para (e) of Law 2735/1999, providing that “where the Law refers to the agreement or to the right to conclude an agreement (regarding Arbitration), said reference extends to the Arbitration Rules contained in the agreement the parties may provide, in the Arbitration clause or in the submission agreement, that the Arbitration process will be conducted by application of the Arbitration Rules of a specific Arbitration Center. In such a case, the procedure is conducted by application of the Rules thus selected by the parties and not by application of the rules set forth by Law 2735/1999, even if the Arbitration will take place in Greece.

5.5 The most well-known Arbitration Centers having developed Arbitration Rules are the International Court of Arbitration of the International Chamber of Commerce (**ICC**) located in Paris, the London Court of International Arbitration (**LCIA**), the United Nations Commission for International Trade Law (**UNCITRAL**), the Arbitration Institute of the Stockholm Chamber of Commerce, the American Arbitration Association (**AAA**), the London Maritime Arbitration Association (**LMAA**), the International Centre for the Settlement of Investment Disputes (**ICSID**), the Singapore International Arbitration Center, the China Economic and Trade Arbitration Commission (**CIETAC**), the China Maritime Arbitration Commission (**CMAC**) and others.

Since 2005, there is a Greek Arbitration Center located in Piraeus under the name Piraeus Arbitration and Mediation Center (**PAMA**), which has elaborated Arbitration Rules in 2007. The parties may provide, in the Arbitration clause or in the submission agreement, that the Arbitration process will be conducted by application of the Arbitration Rules of PAMA or submit the Arbitration to PAMA, which implies that they accept the application of its Arbitration Rules to the Arbitration process. The PAMA Arbitration Rules do

not differ substantially from those of Law 2735/1999, which has, as stated above, followed the UNCITRAL Model Law on Arbitration.

The Arbitration Centers do not solve themselves the disputes. They only assist the parties to form the Arbitration Tribunal. They also assist the Arbitration Tribunal to organize and conduct the Arbitration process.

By selecting a specific Arbitration Center, the parties are ipso facto considered to have submitted themselves to its Arbitration Rules as being part of their Arbitration agreement / clause.

6. Not all disputes rank for Arbitration. More particularly criminal matters cannot be submitted to Arbitration. Fiscal disputes or other disputes between the State acting iure imperii and its citizen(s) cannot be solved by Arbitration. Disputes arising between the State exercising its Administrative Authority (iure gestionis) and physical persons or legal entities, either Greek or foreign, i.e. disputes having not a public character, can be submitted to Arbitration. These are mainly specific disputes, regarding which relevant legal dispositions provide that they will be solved by Arbitration. For instance, Investment Laws almost always provide Arbitration, since investor(s) wish to know whether there will be a process allowing the quick settlement of any dispute, which could arise between them and the State.

6.1 These are also commercial matters not ranking for Arbitration. For instance, bankruptcy cannot be declared by means of an Arbitral award since not only the interests of the trader, who is to be declared bankrupt, are at stake, but also those of all his creditors. Further, the declaration of a person into bankruptcy attracts consequences regarding his debts vis-à-vis the State, the Public Security Institutions etc. and has, therefore, to be examined by a Court of Justice, which applies specific and rules more strict than those applied during the Arbitration process.

7. One important item, which has to be provided in the Arbitration clause/submission agreement, is the place where the Arbitration will be conducted. This is mostly important in case of an ad hoc Arbitration, since in

Institutional Arbitration the place or the way in which the place of Arbitration will be determined is provided by the Rules to which the parties have submitted the Arbitration clause or their Arbitration agreement.

Law 2735/1999 provides that the parties are entitled to determine the place of the Arbitration, otherwise it is determined by the Arbitration Tribunal. Further, the Law provides that, unless the parties have otherwise agreed, the Arbitration Tribunal may, in any case, convene in any place it considers appropriate to proceed to specific acts, such as the examination of witnesses, of documents, to make a survey of chattels or other objects etc.

8. The Arbitration process starts if the parties have not otherwise agreed on the day on which the application of one or more parties for submission of a dispute to Arbitration reaches the party or parties against whom it is directed.

9. Another important matter of the Arbitration process is the language in which the Arbitration process will be conducted. This is regulated in the same way as the question of the place where the Arbitration process will be conducted. To be noted that it can be agreed between the parties or determined by the Court that the Arbitration process will be conducted in more than one languages. The Court may request that the documents submitted to it be accompanied by a translation into the language(s) in which the Arbitration process will be conducted, in case they are worded in another language.

10. The party against whom the application for submission to Arbitration of claim(s) is directed (the “defendant”) may file with the same Arbitration Tribunal a counter-application to submit claim(s) of his to it, provided said claims are connected to the claims of the first applicant.

11. If there is no adverse agreement of the parties, the Arbitration Tribunal decides whether the process will be conducted orally or based on documents.

12. The absence of the “defendant” is not considered as a presumption that he acknowledges the allegations of the claimant.

13. Unless the parties have agreed otherwise, the Arbitration Tribunal may appoint one or more experts to make an expertise and submit their report to it. The expert(s) might be requested to participate to the oral procedure of Arbitration.

14. An extremely important issue is the Law applicable to the merits of the case. By virtue of the dispositions of the Treaty of Rome of 1980 (Rome I), as modified and in force today, the parties to an agreement are allowed to select the Law, which will govern the substance of their contractual relations, while the dispositions of the so-called Treaty of Rome II provide the Law governing the substance of non-contractual claims, such as claims occurring out of an accident, claims due to infringement of personality, out of diffamation etc..

Law 2735/1999 refers implicitly to the principles of Rome I by providing that the Arbitration Court applies to the merits of the case the substantive rules of the Law selected by the parties. But if the parties have not agreed upon the applicable Law, the Tribunal applies the substantive Law, determined by the rules of International Private Law, which the Tribunal considers as the most appropriate ones. Such substantive Law might be the Law of the State where the Arbitration takes place (*lex arbitri*).

15. The Arbitration clause is an agreement in the agreement (midnight clause).

Based on Rome I Treaty, the parties may submit part of a contract to a Law other than the one governing the rest of the contract. Consequently, the Arbitration clause can be submitted to a Law, which is not the same as the one selected by the parties to govern the substance their contractual relations. A fortiori this can be done when the Arbitration agreement (submission agreement) is entered to after the signature of the main contract.

To be noted that, in case the contract of the parties including the Arbitration clause, is not valid, the Arbitration clause is not considered *ipso facto non valid* too. This is consistent with the fact that the main agreement of

the parties and the agreement in the agreement (arbitration clause) can possibly be governed by different Laws.

As to the procedure rules applicable to the Arbitration process, they will be the Arbitration Rules of the specific Arbitration Center selected by the parties, regardless to the Law they have possibly determined to be the Law applicable to the substance of their contractual relationship.

15.1 The above apply mainly to institutional Arbitration. In case of an ad hoc Arbitration, the relevant clause must be very explicit and provide as much matters of the Arbitration process as possible (place of the arbitration, number of the Members of the Arbitration Tribunal, Law governing the arbitration process, the way of nomination of an Arbitrator in case one of the parties does not nominate his Arbitrator, the way in which the Referee is nominated in case the two Arbitrators do not appoint the third one, the language(s) in which the process will be conducted and others).

The ad hoc Arbitration is not very frequent. Not only in the frame of the Arbitration clauses, but also in case of submission agreements, the parties will usually make of the Arbitration an institutional one in the above sense, in spite of the advantages of an ad hoc Arbitration, which are – among others – the freedom of the parties to regulate most of the issues of the process as they wish, the flexibility of the procedure, the low cost, the rapidity of the process, the confidentiality which can be safeguarded more in an ad hoc arbitration than in an institutional one and also the fact that the rules set forth by the parties for the conduct of the Arbitration process are adapted as much as possible to the specific case (tailor made), while, in institutional Arbitration, the Arbitration Rules of the Arbitration Center selected by the parties are the same in all the cases.

15.2 In the light of the above, it accrues that the Arbitration rules set forth by Law 2735/1999 are rules of soft law (*jus dispositivum*), which apply only if the parties have not agreed in a way other than the one they provide.

One strong example of the freedom of the parties is that they may submit the Arbitration to the Rules of an Arbitration Center, which has as a result that the dispositions of Law 2735/1999 are set aside even if the Arbitration is to take place in Greece.

16. The Arbitration Court decides as “*amiable compositeur*” or *ex aequo et bono*, i.e. in an equitable way, only in case it has been expressly authorized by the parties to do so. In any event, the Arbitration Tribunal makes its decision according to the terms of the agreement taking also into consideration the *lex mercatoria* (trade practices and business ethics), which suits to the specific case.

16.1 If the Arbitrators are more than one and it is not provided otherwise by the clause of Arbitration or the submission agreement, they decide by majority. If no majority is reached, the vote of the Referee prevails. This is why it is advisable and recommended that the number of the Members of the Arbitration Tribunal be odd.

17. If during the Arbitration the parties solve their dispute by means of a compromise, the Arbitration Tribunal terminates the process. Following a relevant demand of the parties, the Arbitration Tribunal confirms the compromise agreement provided it is not contrary to Public Order. Thereafter, the Arbitration Tribunal issues an arbitral award containing the terms of the agreement of the parties. This is highly important and might be one of the reasons for which the parties decide to have recourse to Arbitration. Actually, in any Jurisdiction, the parties are entitled to compromise, with or without the help of a third party, provided their dispute has an object of which they can dispose freely. Claims having such an object are most of the civil and commercial claims, unless they are governed by imperative legal dispositions. For instance, a divorce case, which is a civil one, cannot be solved by means of a compromise of the parties, since they are not allowed to dissolve freely their marriage.

17.1 Although the parties are free to conclude a compromise agreement to solve those of their disputes ranking for compromise, the compromise

agreement is not enforceable automatically. It has to be vested with the enforcement formula, which can be done in two ways:

- i. either by making it in the notarial form, which is very expensive due especially to a stamp duty of either 3,6% or 2,4% on the initial amount of the claim(s) (and not on the amount of the compromise), which has to be paid to the Public Treasury or
- ii. by presenting it for ratification to the Court, before which legal proceedings are pending. This assumes that Litigation has already commenced and that the compromise occurs later. In case it is so, then this solution is envisage- able. But, what if the parties have started negotiations seeking to reach a compromise before instigating legal proceedings? Will they start Litigation just to have the opportunity to present to the Court the compromise agreement for ratification? This would be very risky because one party (or more) could change his mind meantime and deny the compromise agreement, although this would attract consequences as in all cases a private agreement is not respected.

17.2 If the dispute is submitted first to Arbitration while negotiations occur later, there are more chances that the problem be solved by means of a compromise. As a matter of fact, when they are in dispute, the parties involved are usually upset, they have not the calmness needed to discuss with the “opponent” and to find solutions. They do not trust enough each other so as to reach a compromise since they consider that there is a risk – which is true - that the other party will not respect the compromise agreement, which is not enforceable unless one of the two above mentioned ways is followed. On the contrary, if the Arbitration process has started, the parties feel more secured, more protected since the Arbitration Tribunal having already been constituted and the dispute having already been submitted to it, if any compromise is reached, it will take the form of an arbitral award, which is enforceable in any case, as it will be exposed below.

17.3 To be noted that for a compromise to take the form of an arbitral award, there **must be a relevant request of all the parties involved** in the Arbitration process. This is a “weak” point of Arbitration ratifying a compromise agreement as compared to Mediation, where – in Greece at least – the agreement reached by the parties, if any, can be declared and become an enforceable title **at the request of even one of the parties, without need of even the consent of the other(s), as already exposed herein above.**

18. It worths strengthening again that one of the reasons making people more keen until our days to go to Litigation rather to go to Arbitration or Mediation, is that they distrust Arbitrators and Mediators, who are not vested with Public Power and Authority as the Judges are. This is reinforced by the flexibility of both Arbitration and Mediation processes, especially of Mediation, where the Mediator does not render any judgment, while in Arbitration there is eventually an award rendered by the Arbitration Tribunal. The change of mentality of people is a sine qua non prerequisite for Alternative Dispute Resolution methods to expand. Arbitration has expanded already, but not in all fields. Regarding maritime disputes, it is almost always preferred to Litigation especially when the claim(s) at stake are important. Regarding other commercial matters and also civil matters, the disputes submitted to Arbitration are still much less due to the usually high cost of the Arbitration process, which is justified only when the claim(s) involved are high.

19. The Arbitral award must be in writing. It is signed by the Arbitrator(s). If there are more than one Arbitrator, the award can be signed only by the majority of the Arbitrators, provided the absence of the signature of the other(s) is mentioned in the award. This is one of the rare cases where the parties cannot agree otherwise.

19.1 The arbitral award must contain the motives, which constituted the basis of the conviction of the Arbitration Tribunal, unless it is an arbitral award having the contents of a compromise agreement of the parties according to what has been exposed above or unless the parties have agreed that the motives do not have to be mentioned in the award.

19.2 The Arbitration process is terminated by means of a relevant act of the Arbitration Court, when the arbitral award is rendered or when (a) the claimant withdraws his application for Arbitration, unless the other party objects and the Arbitration Tribunal decides that he objecting party has legal interest in solving the dispute (b) the parties agree to terminate of the Arbitration process and (c) the Arbitration Tribunal finds that the continuation of the process is useless or impossible for any reason whatsoever.

19.3 Unless otherwise agreed by the parties, the Arbitration Tribunal, taking into consideration the facts of the case and especially the outcome of the Arbitration process, allocates to the parties, by means of a decision of it, the expenses of the Arbitration process, in which are included the expenses of the parties to sustain their application and counter-application, if any. If the expenses are not fixed when the Arbitration process ends, they are fixed and allocated by means of a separate arbitral award.

19.4 Unless there is an adverse agreement of the parties, when the Arbitration award is to be enforced in Greece, the Arbitrator or, if the Arbitration Tribunal is composed of more than one Arbitrators, the Arbitrator designated by the Tribunal to this end has the obligation, when so requested, to submit one original of the arbitral award to the Clerk of the One Member Court of Instance in the territorial area of which the Arbitration process took place. The Law does not provide whether such a request should be submitted to the Arbitrator(s) jointly by all the parties or whether it might be submitted by only one of them. We would have tendency to give to the relevant provision of the Law the interpretation that such a request can be filed by only one of the parties, since the arbitral award is enforceable without need of any formalities as of the day on which it is rendered. However, we appreciate that the opposite opinion also is sustainable since, following its submission to the Clerk of the abovementioned Court, the award is no more confidential and, although confidentiality is not provided by rules as express and clear as those imposing it regarding Mediation, a deviation from confidentiality in Arbitration as well should be decided by all parties in concert.

19.5 The arbitral award can be corrected regarding material mistakes it possibly contains (accounting, typing etc.). It can also be interpreted by the Arbitration Tribunal. Both for the correction and for the interpretation of an arbitral award a relevant request is needed, which has to be submitted within thirty (30) days as of the notification of the arbitral award upon the requesting party, unless the parties have agreed otherwise. The Arbitration Tribunal may correct any possible material mistakes of it also ex officio.

The Arbitration Tribunal is not allowed when interpreting its award as above to change its operative.

20. The arbitral award can be attacked only by means of a cancellation recourse. The arbitral award can be cancelled only in the cases provided for by Law 2735/1999, the main of which are:

- i.** the parties having concluded the Arbitration clause or the submission agreement had not the legal capacity required to this end or the clause of Arbitration or the submission agreement is not valid. The above are verified by application of the Law applicable to them or, otherwise, by application of Greek Legislation.
- ii.** if the claimant has not been notified in an appropriate way regarding the nomination of an Arbitrator or regarding the Arbitration process or if, for another reason, he was unable to present his arguments, without any fault attributable to him.
- iii.** the arbitral award concerns a dispute which does not fall in the scope of the arbitration clause or of the submission agreement or if it includes dispositions exceeding the terms of the Arbitration clause or of the submission agreement and
- iv.** when the composition of the Arbitration Tribunal or the Arbitration process was not in accordance with the agreement of the parties or, if there is no such agreement, with the dispositions of Law 2735/1999.

20.1 The Court, before which the cancellation recourse is filed, may rule ex officio (i) whether the object of the dispute did not rank for Arbitration according to Greek Legislation and (ii) whether the arbitral award is contrary to the International Public Order as determined by relevant dispositions of the Greek Civil Code.

20.2 The cancellation recourse has to be filed within three (3) months as of the day on which the arbitral award has been notified upon the party filing the recourse.

20.3 No appeal can be filed against the arbitral award. If the Arbitration clause does not provide any other recourse against the arbitral award before other Arbitrators or if the period of time within which any recourse before other Arbitrators should be filed has elapsed, the arbitral award has force of res judicata retroactively as of the day on which it was rendered, according to both the relevant provisions of Law 2735/1999 and those of articles 867 and following of the Greek Code of Civil Procedure and it constitutes a precedent or prior judgment in Law, which is binding for any person(s) bound by a judgment having force of res judicata according to the relevant dispositions of the Greek Code of Civil Procedure.

20.4 In case of a cancellation recourse, its filing does not prevent the enforcement of the arbitral award, which is enforceable as of the day on which it was rendered, as stated above. Nevertheless, the Court, with which a cancellation recourse has been filed, may pronounce the stay of the execution, with or without deposit of any guarantee by the defendant, until it renders a final judgment on the cancellation recourse, in case it considers that any of the cancellation reasons contained in the recourse will probably be sustained.

21. As to the recognition and the enforcement of foreign arbitral awards, Law 2735/1999 provides that they are done according to the dispositions of the **United Nations “Convention regarding the recognition and the enforcement of foreign arbitral awards”**, (hereinafter “the Convention”)

which was signed in New York on June 10, 1958, and ratified by Greece by virtue of Legislative Decree 4220 dated September 19, 1958.

21.1 According to article I of the above Convention, same applies to the recognition and the enforcement of arbitral awards made in a State other than the State where the recognition and the enforcement are sought. It is clarified that the terms “arbitral awards” include not only awards made by Arbitrators appointed for specific cases, but also those made by permanent Arbitral Bodies to which the parties have submitted the Arbitration. It is further provided that the Courts of a Contracting State, when seized of an action in a matter in respect of which the parties have made an Arbitration agreement, shall, at the request of one of the parties (arbitration plea), refer the parties to Arbitration, unless it finds that the Arbitration agreement is null and void, inoperative or incapable of being performed.

There are more than 150 States having ratified at present the above Convention. Greece is one of them.

21.2 In its article II para 1, the Convention provides that each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to Arbitration all or any differences, which have arisen or which may arise between them in respect to a defined relationship whether contractual or not, concerning a subject matter capable of settlement by Arbitration. In its paragraph 2, the same article provides that the terms “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams, while in its paragraph 3, it provides the arbitration plea which can be raised by one party in case the other(s), by infringement of the arbitration clause or of the arbitration agreement, instigate legal proceedings. It provides also the cases in which such a plea can be rejected.

21.3 The reasons provided in article V, of the Convention as reasons for which, at the request of the party against whom it is sought, the recognition or the enforcement of an arbitral award may be refused, are the same of those

provided by Greek Law 2735/1999 as reasons on which the recourse seeking the cancellation of an arbitral award rendered in Greece regarding an international commercial dispute can be grounded. Said reasons concur if:

- i. the parties to the arbitration clause or agreement were, based on the Law applicable to them, under some incapacity or the arbitration clause or agreement is not valid under the Law to which the parties have submitted it or if, not submitted to any specific Law by the parties, under the Law of the country where the award was made or
- ii. the party against whom the award is invoked was not given proper notice of the appointment of the Arbitrator or of the Arbitration proceedings or was otherwise unable to present his case or
- iii. the award deals, with a dispute not contemplated or not falling within the terms of the submission to Arbitration or
- iv. the composition of the Arbitral Court or the Arbitral Procedure was not in accordance with what the parties have agreed in this respect or, in the absence of such an agreement, was not in accordance with the Law of the country where the Arbitration took place.
- v. The award has not yet become binding on the parties or it has been set aside or suspended by a competent Authority of the country in which or under the Law of which the award was made.
- vi. The subject matter of the dispute does not rank for settlement by Arbitration in the country where the recognition and the enforcement of the arbitral award is sought or
- vii. the recognition or the enforcement of the arbitral award would be contrary to the public policy of said country.

21.4 The recognition or the enforcement of an arbitral award can be refused if – among others – it has been set aside or suspended by a competent

Authority of the country, in which or under the Laws of which, the award was made (article V para i(e) of the Convention).

In its article VI, the Convention provides that, in the above case, the Authority, before which the award is sought to be relied upon, may adjourn the decision on the enforcement of the award and may also - following a relevant application of the party asking for the enforcement - order the other party to give suitable security.

21.5 The dispositions of the New York Convention have been adopted by many National Legislations – among which Greek Law 2735/1999 – so as National legal dispositions regarding the issuance of arbitral awards in International Commercial cases be compatible with those of the New York Convention, in order for arbitral awards rendered based on National Laws be enforceable in all the Countries having ratified the Convention.

Arbitral awards rendered in Countries, which have not ratified the New York Convention, are considered as *res judicata* in Greece by application of article 903 of the Greek Code of Civil Procedure, which is the last article of Chapter Seven of said Code containing articles 867 to 903 governing Arbitration. Said articles regulate Arbitration in a way very similar to the one of Law 2735/1999. They apply not only to domestic Arbitration, but also to Arbitration having as object an international dispute, when it is not a commercial one and in Arbitration regarding international commercial cases for issues possibly not regulated by Law 2735/1999, as already exposed above.

The enforcement in Greece of a foreign award made in a Country having not ratified the New York Convention will be done by application of articles 904 and following of the Greek Code of Civil Procedure. Article 904 sets forth the enforceable titles based on which compulsory enforcement can be done in the Greek Territory. The Arbitral awards are included in the enforceable titles, but they are also mentioned among the titles in general being enforceable in Greece when they have been declared enforceable by a Greek Court. The combination of the above dispositions lead to the

conclusion that, to be enforced in Greece, an arbitral award rendered in a Country having not ratified the New York Convention has first to be declared enforceable in Greece, based either on the dispositions of a relevant Treaty entered to between Greece and the Country where the arbitral award was made, if there is such a Treaty or, otherwise, by application of the dispositions of articles 905 and 906 of the Greek Code of Civil Procedure on the declaration of the enforceability of foreign titles.

22. Many of the Countries having followed the UNCITRAL Model Law on Arbitration have enacted National Laws governing International Commercial Arbitration, which are quite similar between them. Subsequently, it can be said that the sets of rules governing International Commercial Arbitration in most Countries being quite similar and most of said Countries having ratified the New York Convention, there is an uniformity in the way International Commercial Arbitration is conducted in said Countries and, further, an uniformity in the way in which arbitral awards rendered in the Territory of such Countries regarding international commercial cases are enforced in the Territory of the others. Obviously, such an uniformity facilitates the enforcement of arbitral awards in Countries others than those were they have been issued.

The PAMA Maritime Arbitration Rules

The Piraeus Association for Maritime Arbitration (PAMA) (www.mararbpiraeus.eu) is a private non-profit Association founded in 2005 to promote the resolution in Piraeus of Maritime Disputes, by Arbitration. Maritime Arbitration taking place in Piraeus is conducted, if the parties have submitted to the auspices of **PAMA** the resolution of their disputes by Arbitration (arbitration clause, submission agreement), according to the Rules for Maritime Arbitration adopted by **PAMA** in 2007, subject to **UNCITRAL'S Model Law for International Commercial Arbitration (The UNCITRAL Model Law)** adopted also by Greece by virtue of Law 2735/1999, as already stated above.

If a specific issue is not regulated by the **PAMA** Rules for Maritime Arbitration, it will be governed by the relevant dispositions of Law 2735/1999 and, if not regulated by it as well, by the dispositions of articles 867 and following of the Greek Code of Civil Procedure. In case dispositions of the **PAMA** Rules for Maritime Arbitration contravene to mandatory dispositions of the above Law, the latter will prevail. This will occur very rarely since, as exposed hereinabove, almost all the matters regulated by the above Law can be regulated otherwise by means of an agreement of the parties, the dispositions of said Law being almost all soft Law dispositions and not mandatory ones.

The flexibility granted to the parties, both by UNCITRAL Model Law and by Greek Law 2735/1999 (as well as by almost all National Legislations) to regulate in the way they consider most appropriate the issues connected to the Arbitration process is undoubtedly positive. However, it implies the necessity for the parties to regulate beforehand and in detail the Arbitration process. In case they have omitted to regulate any matter, same will be regulated thereafter in the way provided for by Law. This is why usually the parties submit themselves to an Arbitration Institution (institutional Arbitration), which means ipso facto – as already exposed hereinabove – that they accept the application of the Arbitration Rules of the Institution they have selected.

Herebelow are some examples illustrating the advantages of institutional Arbitration versus ad hoc Arbitration.

A common arbitration clause included in the main Agreement of the parties is usually worded as follows: “any dispute arising out of or in connection with this Agreement shall be referred to and solved by Arbitration. This is a clause for ad hoc Arbitration since the parties do not provide that they submit themselves to any Arbitration Institution and to its Arbitration rules. Therefore, the Arbitration clause will have to be completed by applying the appropriate dispositions of Law 2735/1999 and possibly those of articles 867 and following of the GCCP.

Law 2735/1999 provides that, in case the parties have not determined in the frame of the Arbitration clause or of the submission agreement, the number of Arbitrators, there will be a Panel of three Arbitrators. The **PAMA** Rules of Maritime Arbitration provide that, in case the parties have not agreed otherwise (freedom of the parties, flexibility), if the dispute does not exceed fifty thousand (50.000) euros, one sole Arbitrator shall be appointed by agreement of the parties. If the claim exceeds, the above amount, the Arbitration Tribunal shall consist of three Arbitrators. In this way, the procedure is even more facilitated and kept cost effective for claims having as object amounts not excessively high.

If the parties fail to appoint the sole Arbitrator or their own Arbitrator or if the two appointed Arbitrators fail to appoint the Referee, who presides over the Arbitration Tribunal, such appointment shall be done by the President of **PAMA** from the Roster of Arbitrators, within five (5) business days as of the submission of a relevant request by any party. This way to regulate the above issue is much quicker than the one provided by Law 2735/1999, according to which, in case of failure as above, the Arbitrator(s) or the Referee are appointed by means of a judgment to be rendered upon application of any party by the One Member Court of First Instance of the place where the Arbitration is to take place, which will obviously take much more time than five (5) working days.

Regarding the place where the Arbitration will take place, the **PAMA** Rules provide that, unless the parties agree otherwise, the place of Arbitration will be Piraeus, in Greece, while Law 2735/1999 provides that, if the parties have not determined by common agreement the place where the Arbitration will be conducted, the place is determined by the Arbitration Tribunal.

The **PAMA** Rules provide that the Arbitration shall be conducted in the Greek language unless a party expressly disagrees in writing, in which case the Arbitration shall be conducted in the English language. Thus, the parties know beforehand the language in which the Arbitration will be done, if they have not agreed upon this matter between them. Law 2735/1999 is more

vague as compared to the **PAMA** rules in respect to this matter, since it provides that, if the parties have not determined by common agreement the language in which the Arbitration will be conducted, it is determined by the Arbitration Tribunal and, subsequently, the parties are not aware of it in advance.

The **PAMA** Rules provide that the Arbitrators fees are calculated on the basis of the value of the amount in dispute and vary depending on whether the Arbitration is conducted by an oral hearing or based only on documents, the time of the procedure and the complexity of the dispute. They are based on a publicated Table of fees set up and periodically readjusted by **PAMA**, which fixes the upper and the lower limits.

Law 2735/1999 does not specify the fees of the Arbitrators, leaving the parties to fix them by agreement. Otherwise, the Arbitration Tribunal does so.

According to the **PAMA** Rules, if the claim does not exceed fifty thousand (50.000) euros, the Arbitration shall be conducted by documents only, unless the Arbitration Tribunal rules otherwise. This is one of the rare case where the parties are not allowed to agree otherwise, i.e. they cannot agree that for such claims, the Arbitration will be conducted orally. Regarding claims exceeding fifty thousand (50.000) euros, the parties may agree whether the Arbitration will be done by documents only or orally, being understood that in oral arbitration as well the parties submit briefs in writing (besides the oral pleadings) and documents supporting/evidencing their allegations. Law 2735/1999 regulates this issue in another way. More specifically, based on its relevant dispositions, the parties are free to agree whether the Arbitration will be an oral or a documents-only Arbitration, regardless to the amount of the claim in dispute. If there is no agreement of the parties, the Arbitration Tribunal decides about the way in which the Arbitration will be conducted. Further, the above Law provides that, if the parties have not excluded the oral procedure, the Arbitration Tribunal must, if requested by one of the parties, conduct, in any case, an oral process at a time it considers appropriate.

By setting as a prerequisite that the claim be higher than fifty thousand (50.000) euros for the procedure to be conducted orally, the **PAMA** Rules offer a cheaper and quicker procedure to the benefit of the parties for smaller claims.

To the contrary of what is provided regarding the Mediation process, it is not mandatory that the parties be represented or attend the Arbitration process accompanied by lawyers.

The **PAMA** Rules contain some important dispositions, which are not found in Law 2735/1999, such as dispositions according to which, if two or more Arbitration Tribunals notice that common issues of fact or Law arise in Arbitration procedures pending before them, they may – upon request of a party - decide to hold joint hearings, saving time and expenses to the parties by providing an efficient and coordinated process.

According to the **PAMA** Rules, the Arbitral award is rendered by the Arbitration Tribunal within sixty (60) days as of the submission by the parties of their memoranda of evaluation of the hearing or the expiration of the time limit provided for such submission, which is of seven (7) working days after the hearing. Law 2735/1999 does not provide any time period within which the award must be rendered.

One question which worths to be explored is whether a domestic maritime dispute could be solved by Arbitration under the **PAMA** Rules. **PAMA** Rules refer, to our opinion, only to International Maritime Disputes. First they refer to Law 2735/1999 re: International Commercial Arbitration. Second, articles 867 to 903 of the Greek Code of Civil Procedure, which apply in domestic Arbitration, allow expressly – to the opposite of the above Law and to the opposite of the **UNCITRAL** Model Law on Arbitration – the submission of the parties to an Arbitration Institute and to its relevant Arbitration Rules only if the Institution selected is governed by Public Laws, which is not the case of **PAMA**, same being a Private Law Institution. However, the dispositions of both the above articles of the GCCP governing Arbitration, as well as the **UNCITRAL** Model Law allowing the parties, in most

of the cases, to regulated certain issues in a different way, specific rules among the **PAMA** Rules could be selected by the parties when agreeing about the various points of the Arbitration process, without referring to the **PAMA** Rules en bloc. Consequently, domestic maritime disputes also could be solved in practice by application of specific rules of **PAMA**.

As exposed above, the dispositions of articles 867 and following of the GCCP apply also to transborder commercial disputes regarding questions not regulated by Law 2735/1999. For instance, according to article 900 of the GCCP, the waiver from the right to file a law-suit (recourse) with a Court of Justice (when the conditions needed are fulfilled) seeking cancellation of an arbitral award is null and void if done before the arbitral award is rendered. This is a mandatory rule, safeguarding the right of the citizens to have recourse to the Courts of the State. Law 2735/1999 provides nothing regarding such a waiver. Consequently, in case the parties agree that they waive beforehand of their right to file a recourse as above, article 900 of the Greek Code of Civil Procedure will apply and the waiver will not have any legal effect.

Although Maritime Disputes are transborder in their overwhelming majority, it is not excluded that a maritime dispute be a domestic one. For instance, a dispute between the Greek owner of a ship acting as carrier and the Greek shipper is of course conceivable. If both are established in Greece, the dispute will be a domestic one, which could be ruled also by selected rules among the **PAMA** Rules according to what is exposed above.

PAMA charges a non-refundable administrative fee of 500 euros for a documents – only Arbitration and of 2.000 euros for an oral Arbitration.

C. MEDIATION – ARBITRATION AND ARBITRATION MEDIATION

Mediation expanding the more and more these last years and given it has substantial advantages as, the practice has created two ADRs, which are

mixtures of Mediation and Arbitration. They have recently emerged, but they are considered efficient and become popular as time elapses.

1. MEDIATION – ARBITRATION (Med-Arb)

By means of the Arbitration clause or the submission agreement, the parties may agree to submit their dispute(s) first to Mediation and thereafter to Arbitration. In case this is provided in an Arbitration clause, which obviously refers to future dispute(s), or when the submission agreement is entered to before specific disputes have occurred, it is advisable that, when the dispute to be submitted to Arbitration arises, the parties confirm in writing their will to try Mediation and then Arbitration, to be in line with the position adopted in respect to an agreement of the parties to mediate concluded beforehand, both by the Introductory Report of Law 3899/2010 re: Mediation in Civil and Commercial Cases and by European Directive 52/2008 re: Mediation in Civil and Commercial Transborder Cases.

In Med-Arb, the dispute is first submitted to Mediation. If it not solved through it or if some of the issues of the dispute are not solved, they are sent to Arbitration. According to one opinion the Mediator could act later as an Arbitrator. According to another opinion, the Mediator should not act later as an Arbitrator. Both opinions are sustainable: the first considers that, by having conducting the Mediation process, the Mediator is aware of the facts he has identified and of the various aspects of the claim and, therefore, he is in a position to render more easily an accurate arbitral award on the issues submitted to him, being understood that he should always remain impartial and not take into consideration to ground his decision what has been revealed to him confidentially by the parties during the Mediation process. The reasons invoked by the second opinion are that it is almost certain that, during the Mediation process, the Mediator has got a personal opinion regarding the merits of the dispute, which – in spite of his efforts to be neutral and non-judgmental – could influence his opinion and the arbitral award he will render, if he acts also as an Arbitrator also.

2. ARBITRATION - MEDIATION (Arb-Med)

In Arb-Med, the dispute is first submitted to Arbitration based on a relevant clause inserted in the main contract of the parties or based on a submission agreement concluded after the dispute has arisen. For the same reasons as above, the clause should be confirmed to the extent it provides Mediation for future disputes.

In Arb-Med, the Arbitrator or the Arbitrators and the Referee are duly appointed, the case is fully heard, but no arbitral award is rendered. The entire case is sent to Mediation, by the Arbitrators. The Mediator deals with all the aspects of the dispute. If all of them are solved by the parties through the Mediation process, the Arbitrator or the Arbitration Tribunal are notified accordingly. In such a case, no arbitral award is rendered. To our opinion, an Arbitral award could be rendered, at the request of the parties, by mutatis mutandis application of the rules mentioned above regarding a compromise reached by the parties during the Arbitration process. Yet, in the Med-Arb process it is not as useful as it is in case of mere Arbitration, because an agreement accruing out of a Mediation process is immediately enforceable as the Arbitral award is. The rendering of an Arbitration award in Arb-Med containing the agreement of the parties reached during the phase of Mediation would be important however, in Jurisdictions where the Agreement occurring during a Mediation process needs to be declared enforceable by a Tribunal or other Authority before it can be enforced.

In such Jurisdictions, the parties shall have good reasons for the case to be sent back to the Arbitrator or to the Arbitration Tribunal, in order for them to include the agreement of the parties in an arbitral award. Said arbitral award will include only the parties' agreement. In this way, the agreement of the parties will become ipso facto an enforceable title, as any arbitral award. And although an arbitral award is not appealable but can be attacked by means of a law-suit seeking its cancellation, this will not put the parties in a worse condition as compared to the one in which they would be in case their agreement was not given the arbitral award form. On the contrary, it can be

said that the Agreement of the parties will be less “vulnerable” if included in an arbitral award. Actually, the reasons for which an arbitral award can be attacked for cancellation are mainly formal procedure reasons, while the Agreement of the parties reached through a Mediation process can be attacked, not only for formal reasons, but also for reasons connected to the substance of the Agreement.

If only some issues of the dispute are solved during the Mediation process, those remaining unsolved are sent back to the Arbitrator or to the Arbitration Tribunal, which renders an award regarding them, including also the agreement reached by the parties in respect to the issues solved during the Mediation process. Thus, the agreement of the parties “finds a place” necessarily in the arbitral award.

Athens, July 28, 2015

Catherine Cotsaki