The recourse to Mediation in Disputes Regarding Distribution. A Tool that Should not be Underestimated.

I. Before going into the analysis of the subject matter, we would like to make a short introduction regarding the legal status of distributors in Greece.

By virtue of Presidential Decree 219/1991, re: "Commercial Agents in compliance with Directive 86/653/CEE of the Council of the European Communities", the legal status of commercial agents has been regulated in detail. This was very positive since up to then all legal matters connected to commercial agency activities were governed by application of the combined distributions of articles 211 and following of the Civil Code regarding representation and articles 713 and following of the same Code regarding mandate, as well as those of articles 90 and following of the Code of Commerce regarding commission agents, in further combination with article 330 of the Civil Code regarding responsibility arising from a fault of a debtor in general.

Law 276/1941 was the very first Law to define the terms "commercial agent" by setting forth the prerequisites for someone to act as commercial agent after having obtained a relevant license. The above Law of was later on modified by Law 3814/1958 and Law 307/1976.

Yet the dispositions of the above Laws were not sufficient, with as a consequence that various legal matters connected to the commercial agency had still to be regulated by mutatis mutandis application of the above mentioned articles of the Civil Code and the Commercial Code. Especially, the issue of indemnification of the commercial agent had to be ruled by application of the general rules of the Civil Code governing indemnification such as articles 297, 298, 914 and following, 281 (abuse of right), 288 (unforeseen change of circumstances (hardship) etc. Said articles continue to apply to complete those of P.D. 219/1991, to which said P.D. makes directly reference.

Presidential Decree 219/1991 has been later on modified and/or completed by P.D. 264/1991, 249/1993, 88/1994, 312/1995 and mainly by virtue of article 14 par. 3 and 4 of Law 3557/2007.

The main modifications introduced by article 14 of Law 3557/2007 are that for the application of the dispositions of P.D. 219/1991 as modified and in force to-day the agency agreement does not need any more to be in writing as it was the

case before. Further, any of the concerned parties may waive beforehand his right to claim from the other a signed document stating the contents of their agreement and its subsequent modifications if any. However, the most important modifications are that the dispositions governing commercial agency agreements apply also when the object of the agreement is the granting of services by the agent (and not only the distribution of products) on the one hand, and, on the other hand, that the dispositions of P.D. 219/1991 apply mutatis mutandis to distribution agreements, which had never been specifically regulated before.

The Doctrine and the Greek Courts Jurisprudence had already accepted that the dispositions of P.D. 219/1991 should be applied not only to agency agreements, but also to distribution agreements, which Greek Courts actually applied in all cases of claims accruing out of distribution agreements brought before them. But, after the case Mavronas versus Delta (case C – 85/2003), where the European Court ruled that Directive 86/653/EEC could not be applied to distributors, since distributorship agreements do not fall into the scope of said Directive, contradictory opinions have developed. According to part of the authors and the judges no room was left for application mutatis mutandis of Presidential Decree 219/1991 governing agency agreements also to distribution agreements. Another part considered that the above mentioned judgment of the European Court was not an obstacle to the application of legal dispositions of a National Legislation, (in this case the Greek Legislation), such as the dispositions of P.D. 219/1991.

The second opinion was followed, some thee years after the European Court rendered its judgment in the above mentioned case, by the Greek Supreme Court which, by its judgment 139/2006, ruled that there is a legislative vacuum regarding distribution agreements and applied by analogy the dispositions of articles 713 and following of the Greek Civil Code governing representation and the dispositions of articles 91 and following of the Code of Commerce, in combination with those of P.D. 219/1991 suitable to the case submitted to it.

Precisely because it has been thus cut short to any controversy and contestation as to the possibility of a mutatis mutandis application of the dispositions of P.D. 219/1991 also to distribution agreements, the relevant modification done to P.D. 219/1991 by virtue of article 14 of L. 3557/2007 is extremely important, all the more that the Law provides expressly one sole condition such an application, which is that the distributor must act as a part of the commercial organization of the supplier. On the contrary, the above mentioned

judgment 139/2006 of the Supreme Court had set five conditions for the application to distribution agreements of the dispositions of P.D. 219/1991, being the following: **a)** the distributor should act as part of the commercial organization of the supplier (principal) having the same weak position and being dependant from the supplier and part of its commercial organization, to the same extent as the commercial agent, who the Legislator of the European Union had in mind when setting forth the dispositions of Directive 86/653, **b)** the distributor should contribute to the increase of the clientele of the supplier, **c)** the distributor should have the obligation to bring his clientele list to the knowledge of the supplier and it should have been agreed that said clientele would be acquired by the supplier at the end of the distribution agreement and **d)** in general, the distributor should have similar economic activities and financial benefits to those of a commercial agent.

It cannot be excluded that by putting one sole condition being that the distributor must act as part of the commercial organization of the supplier, the Legislator has taken as granted that for this condition to be considered fulfilled, those set forth by judgment 139/2006 of the Supreme Court, which had been rendered approximately one year before Law 3557/2007 was promulgated, are underlying and, therefore, must also concur in order for the condition that the distributor be part of the commercial organization of the supplier be considered fulfilled.

Possibly, the above condition has been worded in such a broad way by the Legislator and without further specifications, to allow the Courts to appreciate in each case they rule whether the material facts and data submitted to them ground sufficiently the consideration that the distributor is actually part of the commercial organization of the supplier.

II. As most of the commercial claims, the claims deriving out of distribution agreements rank for solution by means of Mediation.

What is exactly Mediation? It is an Alternative Dispute Resolution (ADR) method as compared to the solution of disputes by means of litigation.

Alternative Dispute Resolution (ADR) methods were looked after in the USA more than thirty (30) years ago. This was one of the results of the Civil Right Movements, which emerged in the USA in the sixties. Actually, the right of the citizens not only to a fair trial but also to a quick solution of the disputes is essential. The rapidity can prove determinant, since a fair solution reached after a long time might end to be of no value**:** the debtor might have disappeared or have gone

bankrupt, the creditor being thus prevented to collect the amount(s) allocated to him by the Court.

Rapidity is one of the characteristics of Mediation. What are the others?

Mediation, which is a flexible process specifically provided for and organized by relevant legal dispositions, is absolutely confidential, in the sense that nothing which is said, happens or produced during the Mediation process can be divulgated by any of the persons participating to it, i.e. the mediators, the assistant mediator, if any, the parties, their attorneys-at-law, if there are present, experts, translators, if any, etc. To be noted that in Greece the presence in the Mediation process of attorneys-at-law of the parties is mandatory.

In case of co-mediation, which is conceivable but not recommended due to the risk of incompatibility of characters and personalities of the mediators, all of them are bound by the confidentiality obligation, which is contained in the agreement regarding the submission of the dispute to Mediation. Another effect of the confidentiality is that no statement done, act occurred, document set up for the mediation process purposes only etc., can be produced in a trial and none of the persons having participated in the process can be examined by a Court in a trial having as object the dispute initially submitted to Mediation or any connected trial, in case the Mediation process does not end to an agreement and legal proceedings are instigated regarding the dispute in question or any other connected to it .

Mediation is voluntary. The parties are free to decide to submit their dispute to Mediation or not. If one of the parties wishes to have recourse to Mediation, but the other does not accept, Mediation cannot take place. As regards the presence of a mediation clause in the agreement having generated the claim, we will revert below to this important issue.

However, nowadays many authors, practitioners, competent Authorities, such as Legislators, the Ministries of Justice of several countries, consider that Mediation should be mandatory at least regarding some categories of disputes, in the sense that, before instigating legal proceedings or before legal proceedings already instigated may progress, there must be an attempt to solve the matter through Mediation, especially when this is suggested by the Court, in case legal proceedings have already started.

Recently, in September 2013, Italy has promulgated a new Law on Mediation providing that Mediation in mandatory in case of disputes arising out of labour agreements, disputes regarding alimony of children and some other categories of

disputes excluding however other disputes where Mediation would help a lot, such as car accident disputes. Further, the new Italian Law provides that the parties are allowed to withdraw from the Mediation process even at its initial stage, if they consider that a settlement is unlikely to occur. This option gives to the parties in dispute the opportunity to get a personal "taste" of what Mediation is, so that, if they make use of the liberty to step out of the process, they do it being aware through personal experience – though short – of what it is. This option to abandon the process attenuates what prima facie seems to be contrary to the voluntary character of Mediation.

Mediation is further a non binding process. The parties (or one of them) may abandon the process at any stage as long as no agreement has been reached, put in writing and duly signed.

But if and when such an agreement is signed, it is binding for the parties and it becomes an enforceable title after fulfillment of the formalities provided for by the Legislation of the State where the declaration of the enforceability is requested. In Greece, the declaration of the enforceability of an agreement having accrued out of a Mediation process is very simple**:** the Minutes drawn up by the Mediator at the end of the process (which are the only Minutes to be drawn during it), which contain the agreement of the parties prepared by their attorneys-at-law and signed by the parties, are submitted in two copies to the Clerk of the Court of First Instance in the area of which the Mediation process took place, at the request of even only one of the parties, without the consent of the other(s) to be required. The Clerk of the Court takes the necessary steps to have the enforceability formula affixed by the Judge of the Court on one of the copies of the Minutes in question. The enforceability formula is affixed after a mere verification that the Minutes contain actually an agreement duly signed and dated, that they have been signed by the Mediator, the parties, their attorneys-at-law and in general all the persons mentioned therein as having been present in the process. The other copy of the Minute is kept by the Clerk in the Court's Archives. The above rules governing in Greece the declaration of the enforceability of an agreement having derived out of a Mediation process has the advantage to secure to the party (or parties) in good faith that, if the other(s) change their mind after having signed the agreement, this will not prevent its compulsory enforcement, which is the main concern of the parties in dispute, who want to be sure that, by using Mediation, they will not simply lose their time, especially when they suspect that the other party (or parties) have accepted to have

recourse to Mediation only to postpone the solution of the dispute, with no real intention to have it solved.

In fact, the enforceability of the agreement having accrued out of a Mediation process is one of the main advantages of Mediation making of it a more attractive, more efficient Dispute Resolution method as compared, for instance, to a compromise, a settlement agreement, which can and could always be reached by the concerned parties with or without the assistance of a third party, following free discussions, negotiations etc., without application of specific rules, as it is the case regarding Mediation, which is regulated as far as transborder disputes are concerned by Directive 2008/52 of the Council and the EU Parliament and by the National Law of each concerned State in respect to domestic disputes. Actually, only the agreement reached through a Mediation process conducted as provided by the relevant legal dispositions can become enforceable in such a quick and almost automatic way. Settlement agreements reached through free negotiations, conciliation attempts etc. are not immediately enforceable since they need first to be vested with the notarial form or homologated by a Court.

In Greece, the above EU Directive has been implemented by Law 3898/2010, governing not only transborder disputes to which the dispositions of the EU Directive must apply mandatorily, but also domestic disputes where the relevant dispositions of L. 3898/2010 deviate somehow from those of the EU Directive. For instance, up to April 2014 in domestic disputes the Mediator conducting a Mediation process in Greece should be a lawyer properly trained, certified and accredited as a mediator, which did not apply to transborder disputes.

Mediation is not judgmental. This is its main difference with Arbitration where the Arbitrator (or the Arbitration Panel) renders an award ruling the case submitted to him, (them). On the contrary, the Mediator does not render any judgment, award or sentence. He is and must be absolutely neutral, listen to the parties with empathy (understand them without identifying himself with them), give to all of them the same chances to express themselves, to vent their feelings, be respectful to all of them equally. In one word, the Mediator’s behavior must be such that he wins all the parties trust and that rapport is created between them and him. This implies primarily that the Mediator must be impartial though interested in all what is said. It has to be noted that the Mediator not only does not render any judgment, but he is not even allowed to indicate to the parties any solutions of the dispute. By using the skills he has developed through his training and experience, he must be successful

in making the parties see clearly their interests putting aside their positions. This is one of the most difficult tasks of the Mediator since usually the parties in dispute stick very strongly on their positions and often do not even try to find out which solution is to the best of their interests.

The Mediator has learned – and should apply – various techniques to help the parties understand what they win and what they lose by solving or not their dispute. The Mediator should make the parties “testing reality” by making them realize what is their Best Alternative to a Negotiated Agreement (BATNA) and their Worse Alternative to a Negotiated Agreement (WATNA). This is one of the most important goals of the Mediator, because it can prove very efficient.

Many experts Mediators are of the opinion that the Mediator should never indicate any solution even if he is requested to. Others are of the opinion that the Mediator could indicate solutions, but only if he is requested to expressly and in writing.

In Greece, the Introduction Report of Law 3898/2010 provides that the Mediator cannot indicate solutions, but he may formulate propositions regarding the solution of the dispute. Another extremely important characteristic of Mediation is that it can lead to win – win solutions. As a matter of fact, when legal proceedings are instigated there will be necessarily one winner and one looser. In the best case, one litigant might win partially and the other loose partially. On the contrary, in Mediation all parties might win precisely because they have different interests. The key is to make such interests come up to the surface where, at the beginning of the process only the top of the iceberg is seen consisting of the positions of the parties in dispute.

In case of a distribution agreement for instance, the supplier needs to collect from the distributor the price of the supplied goods (or services). He sticks on his position and files a law – suit against the distributor, who from his side claims that the products (or the services) were defective and that he was able to sell them only after reducing dramatically the sale price.

He further claims that he has indirect damages since his professional reputation was harmed due the poor quality of the goods (or services) he has put in the market. Both are angry. None of them is in a position to think about the consequences of a break of their collaboration. Therefore, he refuses to pay the supplier. In Court, it is out of question that the procedure could help them in this

direction, in as much as the Court is bound by contents of the judicial act filed by the claimant and by the arguments presented by the defendant.

The Court can do nothing else but either accept the claim and allocate the relevant amount to the claimant or reject it. Definitely, one winner, one looser. The Court cannot rule, for instance, that it would be fair that the supplier grants to the distributor a reduction to compensate him for his damages. Unless there is a counter – claim filled by the defendant, in which case a solution “partially winner, partially looser” is not excluded.

Still, this option is not equivalent to the same one which could be used in Mediation, since the Court procedure lasts for years, while Mediation is very quick (it is considered that within eight (8) hours of Mediation, the mediator and the parties themselves can see whether there are chances for a solution or not, so that they continue or stop the process). Even more, having a dispute continuing for years, it is almost granted that the parties will not be willing to continue their collaboration, which is thus destroyed. On the contrary, in the Mediation process, with the help of the Mediator, the parties, after having come down, may put themselves in the shoes of the other, see that there is no interest for them to stop the collaboration, which would be detrimental financially speaking, but also business and reputation wise, realize that their real interest is to continue collaborating, try to think what could be a solution acceptable to both of them and then start negotiating up to the finding of an agreement.

Sometimes, one sole word of the Mediator is able to overcome the deadlock. In their book “NEGOTIATION GENIUS – How to Overcome Obstacles and Achieve Brilliant Results at the Bargaining Table and Beyond” Messers DEEPAK MALHOTRA and MAX H. BAZERMAN, professors at Harvard Business School, relate an example of their own experience regarding the conclusion of a distribution agreement.

Before exposing the above example (paraphrasing it), we would like to strengthen two points. First, the connection between Mediation and Negotiation, which are very closely linked. Negotiation or bargaining is the fourth among the five phases of the Mediation Process. It is considered to be the most important phase equally to the third phase, which concerns the exploration by the Mediator of the data of the dispute, of the character and the expectations of the parties, of their feelings vis-à-vis the dispute and the other party, in order to use the most appropriate techniques to bring up their real interests and guide them accordingly.

Because Negotiation and Mediation are interactive, a Mediator should be trained in Negotiation, not to negotiate because he is not allowed to, but to facilitate the parties and their attorneys-at-law when negotiating during the Mediation process. This is why the Mediator is considered to be a facilitator and Mediation a "facilitated Negotiation". The attorneys-at-law assisting their clients during the Mediation process should also be trained in Negotiation. But also the parties themselves should be able to conduct negotiations efficiently, which assumes that they should have been properly educated to this end, especially when the parties are legal entities represented in the Mediation process by officers of them (CEO, CFO) for whom negotiation ability is a must.

The second point to be retained is that Mediation is a tool, which can be used not only when a dispute has arisen, but also when discussions for the conclusion of a contract are in progress, in order for them to be facilitated by the Mediator.

Let us go now to the example of the "NEGOTIATION GENIUS" who achieved the conclusion of a distribution agreement by pronouncing one sole word! A large American company conducting researches regarding diseases and health problems in general and the ways to face them, had found out following numerous laboratory tests, that a herb cultivated only in a small area in India, could help very much asthma. They decided to buy all the quantity of this herb produced in India and commercialize it in all countries over the world, as a distributor of the Indian producer selling it to pharmaceutical firms. To this end, they sent two negotiators to negotiate an agreement with the Indian producer of the herb. When the negotiators arrived, they found out that the producer was a small family enterprise cultivating all together the herb, collecting it and selling it to individuals, who used it by mixing it in their foods and beverages. The owners, father and two sons, were very astonished when they were told by the negotiators that the large American company they represented wanted to buy all the quantity of this specific herb produced by them and they were very happy when they heard that the price they would receive per tone was far beyond anything they could dream of. The price they would collect for the production of one year could secure the future of the whole family for three generations at least! The deal was practically concluded and the two negotiators stared to each other wondering why they were two to come for the conclusion of such an easy agreement. After a while, the situation was totally reversed. The discussions had come to a dead lock! As a matter of fact, the representatives of the American company noticing the enthusiasm of the small Indian business did not

even think to put on the table for discussion the issue of exclusivity, considering it as granted. They handed to the Indian father the distribution agreement, which they had prepared beforehand. Father and sons read it carefully smiling with satisfaction up to when they came to the exclusivity clause. They immediately stopped smiling and politely, with sadness, but firmly handed back the document to the Americans, stating that it was out of question for them to grant exclusivity to the American company regarding the distribution of the herb. A long and tough discussion started. After three hours, the Indians had not changed their mind. The Americans exhausted and having no more arguments seeking to convince the Indians, called one of their colleagues at the seat of the American company, who everybody used to call “genius” because he was seen as the “genius negotiator”. Let us call him Tim. After having heard his colleagues over the telephone, Tim took the first flight to India and arrived after a long trip in the village, where his colleagues were waiting for him. When the answer of the Indians to the question of Tim as to whether they would be prepared to grant exclusivity was again “NO”, Tim asked “WHY?”. The Indian father explained that he could not undertake such an obligation because every year ten percent of the herb he and his sons were cultivating was sold to his son-in-law established with his wife and children in a small town located at some fifty kilometers from the village. The problem was solved immediately, Tim proposed that an exclusivity clause in favor of the American company be included in the agreement providing however one exception: the sale of ten percent of the yearly production to the son-in-law of the Indian cultivator!

Another advantage of the Mediation as compared to litigation is that Mediation offers the possibility of what is called “extension of the pie”. This means that, if the parties with the help of the Mediator are able to overcome their negative feelings, find out their real interests and admit that the other party too has interests standing good, then the picture changes totally. The sentence “let us speak because we can” is as true as valuable. People can speak, if they want to. The Mediator facilitates them to develop such willingness. If this is achieved, the parties may not only find a solution to their dispute, but also start thinking about further or extended collaboration. The possibility to extend the pie is particularly important in cases where the parties would like to maintain their relationship. Once again, distribution agreements are a good example of cases where it is very probable that the parties might consider the continuation of their relationship: In the example given above regarding win-win solutions which cannot be envisaged in litigation, a

distributor who has respected all his contractual obligations, is a good distributor. If for any reason, now for the first time, he does not pay the supplier's invoices, the latter should put in the trays of the balance the collection of his money on the one and, on the other, the replacement of the distributor by another one and all the complications which this would entail. From his side, the distributor should put on one tray of the balance his need to be compensated for the looses and damages he has suffered due to the defectiveness of the products (or services) delivered to him by the supplier and on the other tray all the difficulties he would be faced to if his business relationship with the supplier stopped. Possibly he would not be able to find another company to entrust with him the distribution of his products (or services), especially in the middle of the economic crisis suffered at present by many States, and, in any event, it would take time for him to get familiar with the new products (or services) and to be able to handle their distribution as successfully as those of the products or services he distributes now. Possibly his reputation in the market will be spoiled due to the termination of the distribution agreement, since rumors might circulate against him implying that he is responsible for the termination. If the parties are in a position to use the trays of a balance, this means that they have vented their anger, bitterness, frustration, that they can identify their real interests, understand those of the other, be prepared to find a solution to the specific dispute, but also consider to keep in force the distribution agreement and even extend their collaboration to other products or services, and/or to other territorial areas, to offer additional advantages to each other, in brief to continue make business rather than cut short the existing one.

As stated above, the Mediation process has five phases:

(1) The preparation phase, which is the phase before the process as such starts. This phase is extremely important. Experience has proven that a good Mediator is a well prepared Mediator. Before starting the process or, as we say, before "the mediation day" and after the agreement of submission of a specific dispute to Mediation is signed by the Mediator and the parties including – among others – a confidentiality clause and providing also the fees of the Mediator, the Mediator should have at his disposition anything which could help him to fully understand the case. To this end, he may contact the parties and their attorneys-at-law by telephone, by email or even meet them to ask for as much as possible information about the facts and the claims of the parties, just in an informative way and not going further. An efficient tool is that the Mediator asks for a memo to be

submitted to him by each party. It is also strongly recommended that, at this stage, in case one party or more are legal entities attending the Mediation process through physical persons acting on their behalf or if one party or more do not attend personally together with their attorneys-at-law, but are represented by them at the Mediation process (the parties have no obligation to attend personally. They may be represented by their respective attorney-at-law, whose presence is nevertheless mandatory even when the parties are present), that the Mediator asks said persons to submit to him proofs of their authority to represent and bind validly the parties, to avoid contestations as to whether the agreement – if any – can be signed validly and bind the parties, which could arise at a later stage of the process and block it.

(2) The second phase of the Mediation process is the Opening. On the first day of the process, the Mediator, after welcoming the parties, has a joint session with all of them during which he asks the parties to expose briefly (which is perfectly enough in case memos have been already provided to the Mediator during the preparation phase) the facts, how they see the situation and which are their claims.

(3) Thereafter, if the mediator considers it useful, he may have separate meeting(s) (also called caucusses(s)) with each party and his attorney-at-law, during which the Mediator will apply the techniques he has learned and use his skills in the most appropriate way in order to bring to the surface the real underlying interests of the parties, by means of open questions, i.e.-questions which cannot be answered by "yes" or "no", but need more explanations leading step by step to the deeper reasons of the dispute and to the expectations of the parties, by making the parties testing reality, by asking them to reverse the situation, i.e. to put themselves in the place of the other etc. This is the third phase of the mediation process, which is called exploration phase and which has been already exposed hereinabove. The exploration phase is determinant. Many times propositions are formulated during the caucusses, which however cannot be conveyed to other party by the Mediator unless he is expressly authorized to do so by the party having formulated them. More precisely, the Mediator may convey to the other party what one party told him in a separate meeting only with his express authorization. This is another aspect of the confidentiality characterizing the Mediation process.

(4) The fourth phase of the Mediation process is the bargaining phase during which the parties and their attorneys-at-law negotiate solutions possibly leading also to the extension of the pie. As already repeatedly stated above, the Mediator merely facilitates the parties in their negotiations and takes care to make them abandon an

agreement they are considering when he notices that it is contrary to the Law, which would prevent its compulsory enforcement should the case occur.

(5) The last phase of the Mediation process is the closing phase, during which the Mediator drafts Minutes summarizing the process, without mentioning anything about what happened, said, discussed, negotiated, stated during it. If no agreement has been reached by the parties, the Mediator makes a relevant mention in the Minutes. If an agreement was reached and the relevant document has been drafted by the parties and their attorneys-at-law and duly signed, the Mediator includes it in the Minutes which, at the request of either party, must be submitted by the Mediator to the Clerk of the competent Court of First Instance, i.e. the Court of First Instance in the territorial area of which the Mediation process took place, in order for it to be vested with the enforcement formula in case its compulsory enforcement is envisaged, as per what has been already exposed.

In the light of the above, it accrues that this flexible way of solving disputes, this Alternative Dispute Resolution method called Mediation is an appropriate tool for solving disputes connected to a distribution agreement, alike the disputes deriving out of any commercial agreement in general.

As a consequence, the presence of a mediation clause in a distribution agreement is more than advisable. However, under Greek Legislation at least, such a clause has not the same force as, for instance, an arbitration clause, in the sense that, if one of the parties does not respect it and instigates legal proceedings before the Court without submitting first the dispute to Mediation, the other party can not raise a “Mediation plea” before the Court and, if he does so the Court cannot sustain such a plea. Actually, in article 3 para I of Law 3898/2010, it is provided that Mediation is possible (among others) (a) if the parties agree to have recourse to Mediation before or during the litispendence. Reference being done to “litispendence”, it is clear that the dispute must at least have been generated. It is not necessary that legal proceedings be already instigated, but the dispute must be there. But, when a distribution agreement or any other agreement is drafted and concluded including a Mediation clause, obviously no dispute has arisen, yet connected to it. Consequently, the Mediation clause has in view future disputes. This is why it has been accepted and stated in the Introduction Report of Law 389/2010 that the agreement of the parties to submit their dispute to Mediation must be repeated after a specific dispute has appeared, even if a Mediation clause is included in the agreement being the source of the dispute. This position is

reinforced by the fact that both Directive 2008/52/EU and article 3.1 of Ministerial Decision 1090 88/2-12-2011 of the Ministry of Justice issued based on a relevant delegation of authority done by Law 3898/2010, provide that the Mediator, before starting the Mediation process, must make sure that the parties are clearly and fully aware of their dispute in respect to its material and legal aspects so as to be in a position to agree validly to its submission to Mediation and that they have perfectly understood and agreed the terms and the conditions of the Mediation process. Needless to say more on the sense of said dispositions which imply without any doubt that the dispute has already arisen.

It goes without saying that the above deprive the Mediation clause from any legal consequences, because it is not binding and ends to merely express an intention of the parties, which they are free not to materialize. .

Recently, on the occasion of a Law introducing a New Code of Civil Procedure providing Mediation expressly for the first time but not organizing it sufficiently (most probably considering that Mediation is sufficiently governed by Law 3898/2010 and does not need to be further regulated), we have submitted to the Ministry of Justice a Memorandum containing our propositions as to the dispositions regarding Mediation which should be included in the New Code of Civil Procedure, since it is a nonsense that such an important matter as Mediation is be not provided in the basic Legislative Text regarding the solving of disputes. By the same occasion, various dispositions of Law 3898/2010 could be amended among which those mentioned hereinabove so that a Mediation clause be binding and gives ground to a relevant plea.

To be noted that these last years, combinations of Arbitration and Mediation have developed. They are called MED ARB and ARB MED. In the first, the dispute is initially submitted to Mediation and if it is not solved through it or if some of the issues of the dispute are not solved through it, they are sent to Arbitration, based on a relevant agreement reached beforehand by the parties. It is recommended that the Mediator be not the Arbitrator as the second stage, because it is almost certain that during the Mediation process he has got a personal opinion on the merits of the dispute, he has possibly felt more sympathy for one party than for the other etc. Being requested to try the case, the above elements could influence him and make him have preconceived ideas regarding the issue of the dispute. But the adverse opinion is also grounded**:** by having conducted the Mediation process the Mediator is aware of the facts, he has identified the various aspects of the claim and

therefore he is in a position to render more easily an accurate arbitral award. We could share the second opinion only in case Arbitration would be conducted by an Arbitral Panel, one of the members of which could be the Mediator.

In Arb-Med, the dispute is submitted first to Arbitration. The Arbitrator or the Arbitral Panel does not render any award but sends the case to Mediation according to a relevant previous agreement of the parties, after having fully heard it. The Mediator deals with all the aspects of the dispute. If all of them are solved by the parties, though the Mediation process, the Arbitrator or the Arbitral Panel are notified accordingly. No arbitral award is rendered then. On the contrary, if only some issues of the dispute have been solved through Mediation, those remaining unsolved are sent to the Arbitrator or to the Arbitral Panel, which tries them and renders an award where the solutions given by the parties to the issues regarding which they have reached an agreement during the Mediation process are included in the arbitral award.

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We do hope that this article will help the reader to become as much as possible familiar with Meditation and that we have thus contributed to the willingness of concerned partied to have recourse to this very efficient Alternative Dispute Resolution method, which has the big advantage to make the parties feel more satisfied because their dispute was solved directly by them, even though with the assistance of the Mediator and the solution has not been imposed to them by a third party regardless to whether is a Court or an Arbitrator or an Arbitral Panel.

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