

MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION

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ABSTRACT

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With the development of technology, international competition, communication and commerce, the world has become a global marketplace. This caused growing number of international and national disputes. Parties to a dispute seek rapid and mutually workable dispute resolution systems instead of referring their disputes to litigation and arbitration. Although, mediation is applicable to some types of disputes, its growth is inevitable. All regional trade blocs have included mediation as a compulsory pre-trial method of dispute resolution. Among different types of alternative dispute resolution mechanisms, mediation raises as the most remarkable mechanism, due to its speed and convenience for the parties who particularly seek to maintain their ongoing relationship. The advantages, disadvantages, characteristics and different types of mediation have been examined. As conclusion, mediation is a sound, mutually workable and rapidly growing type of alternative dispute resolution.

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ABBREVIATIONS

Am. Rev. Int'l Arb.	:	American Review of International Arbitration
Ann. Surv. Int'l & Comp. L.	:	Annual Survey of International and Comparative Law
Ann.	:	Annotated
B.Y.U. L. Rev.	:	Brigham Young University Law Review
Batider	:	Banka ve Ticaret Dergisi
Calif.	:	California
Civ.	:	Civil
Conn.	:	Connecticut
Const.	:	Constitution
Dick. J. Int'l L.	:	Dickinson Journal of International Law
Fl. L. Rev.	:	Florida Law Review
Fla.	:	Florida
Hastings Int'l & Comp. L. Rev	:	Hastings International and Comparative Law Review
IBL	:	International Business Lawyer
J. Int. Arb.	:	Journal of International Arbitration
Kan.	:	Kansas
Loy. L.A. Int'l & Comp. L. J.	:	Loyola of Los Angeles International and Comparative Law Journal
N.J.	:	New Jersey
Neb.	:	Nebraska
Ohio St. J. on Disp. Resol.	:	Ohio State Journal on Dispute Resolution
OJ	:	Official Journal

Or.	:	Oregon
P.	:	Procedure
PLI	:	Practicing Law Institute
R.	:	Restatement
R.I.	:	Rhode Island
Rev.	:	Revised
St. Louis U. L. J.	:	St. Louis university Law Journal
Stat.	:	Statute
Tulsa J. Comp. & Int'l L.	:	Tulsa Journal of Comparative and International Law
U. Chi. L. Rev.	:	University of Chicago Law Review
Wash.	:	Washington
Wis.	:	Wisconsin
Yale L. J.	:	Yale Law Journal

CHAPTER I

CONCEPTS AND DEFINITIONS

With the development of technology, international competition, communication, and commerce, the world has become a global marketplace. States have become more interdependent as has never seen before. This wave of globalism and regionalism, naturally caused growing number of international and national disputes. Public trust and respect for legal institutions is a fundamental component of a successful democracy and vital. Throughout the twentieth century, lawyers, businessmen and diplomats have tried to find a sound and rapid solution for the resolution of international disputes, which arises out of day-to-day business relationships. These solutions should address new challenges, and eventually conclude with rapid and mutually workable results. The mistrust of the parties to the supposed neutrality of the foreign legal systems and courts has resulted with the growth of alternative dispute resolution (hereinafter referred to as "ADR") mechanisms.

For the last half of the twentieth century, the usage of non-binding forms of ADR mechanisms in international commercial transactions and international business is on the rise. ADR is an approach that can improve the efficiency and effectiveness of the management of business and public disputes. The reason that the cost of litigation and arbitration, in some type of disputes, is quite expensive in North America and in Europe has led the parties to find alternatives to litigation and arbitration to resolve their disputes. The imbalance of power is another crucial ground that leads the rise of ADR. The idea that underlies the ADR is that an assumption of a rough equality between the adversary parties. In other words, "it treats the settlement as the anticipation of the outcome of trial and assumes that the terms of settlement are

simply a product of the parties predictions of that outcome.”¹ Litigation and arbitration are traditional methods of dispute resolution both for national and international controversies between individuals, businesses and countries. Arbitration is generally known as “an alternative to recourse to the courts.”² Sometimes arbitration is included in the term ADR. Any alternative way to those traditional methods of dispute resolution based on voluntary third party assisted negotiation such as mediation is covered by the term ADR. One can define ADR as “systems of formalized third party assisted negotiation.”³ Mediation, like most of other methods of ADR, has been developed in the USA to resolve disputes outside the public court system. The aim of all the different ADR methods is to work out a lasting solution of any given conflict between the parties involved. They try to avoid disadvantages inherent in the regular court system and offer a possible way to new, alternative solutions, which are not within the competence of a judge.

Mediation, as one of the methods of ADR, uses the mediator, a third party without any interest in the outcome of the dispute between the parties, to guide and help the parties to come to a solution of their problem. It has a long history in the diplomatic arena. The parties may agree to their utilization after a controversy has arisen or may require it for future conflicts by including a mandatory mediation and/or arbitration clause in their contract. In mediation, a neutral third party meets with the disputants both as a group and on an individual basis, then makes non-binding suggestions as to how to resolve their controversy. If the parties cannot resolve their dispute by mediation, they will often submit it to binding arbitration by a neutral arbitrator or to a court. In the United States, arbitration and mediation are often used to settle labor disputes arising from conflicting interpretations of existing employment contracts, construction disputes between general contractors and subcontractors relating to construction damage claims, or between contractors and owners relating to the interpretation of work and payment clauses in construction contracts, shareholder

¹ See Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073, 1076 (1984); but cf. Jeffrey Z. Rubin & Bert R. Brown, *The Social Psychology of Bargaining and Negotiation* 79 (1975) (stating that “if parties generally come to a dispute with power imbalance, ADR procedures may simply reinforce and reward such a power imbalance.”); Jerold S. Auerbach, *Justice Without Law?* 120 (1983) (stating that “the weaker party....will be at an even greater disadvantage as informality compounds inequality.”)

² Martin Hunter et al., *The Freshfields Guide To Arbitration And ADR Clauses In International Contracts* 6 (1993).

³ See Hunter et al, *Id.*, at 6.

disputes concerning the valuation of stock in closely held corporations, international commercial disputes when there is an ongoing business relationship and when time is limited and in international relations arena, to name but a few examples. Although mediation is popular in certain industries and in certain countries, such as in the USA and in the Far East, it is less popular in other parts of the world. One can argue that lack of familiarity with mediation and its outcomes and lack of trained mediators can be the reason of less popularity in the rest of the world.⁴ Mediation has proven an outstandingly successful management tool for resolving difficult disputes and should always be considered when negotiations fail before proceeding to arbitration or litigation. It is a means by which the parties can re-learn the basis of communication with which they can resolve future disputes. This is particularly important in family disputes where invariably there are ongoing issues to be resolved e.g. arrangements for children.

Conciliation and mediation are often terms used interchangeably to describe very similar processes. There are no universally agreed definitions due to their close natures. Both involve the appointment of a third party to assist disputing parties to reach a settlement of their difference. A mediator is an active participant in the process and informally makes suggestions to the parties based on the information that the parties supply, whereas, a conciliator has more rights to make formal proposals for resolutions based upon independent investigation of the dispute. Furthermore, conciliation is mostly used in the resolution of public international disputes, whereas, mediation is mostly used for the resolution of private international disputes. However, it is very difficult to draw the line among these two types of ADR mechanisms. For convenience we will use the term mediation. Most widely known types of ADR are mediation, conciliation, mini-trial, med-arb, non-binding arbitration and expert opinion. However, other types of ADR which are more or less similar to each other or in other words "a different way of describing the same process"⁵ such as supervised settlement, 'Rent-a-Judge' or 'Michigan Mediation' are also used in resolving disputes.

One can argue that ADR procedures should not be regarded as a substitute for arbitration or litigation due to their non-binding characteristics. In this regard, in the

⁴ For further information see Richard Hill, *Non-adversarial Mediation*, 12 *J.Int.Arb.* 4 (1995).

⁵ See Hunter et al, *supra* note 2, at 64.

event that ADR process is unsuccessful, beside an ADR provision, a contract should contain arbitration or a litigation clause. In no way we meant that mediation is a better way of resolving disputes than arbitration. Both have different places of use and effectiveness. However, one can argue that although sometimes arbitration is included in the term ADR, it is different than the non-binding and voluntary ADR procedures. Arbitration, like other ADR procedures, is an alternative to recourse to national courts. However, unlike other ADR procedures, "it is nevertheless intended to lead to a binding and enforceable determination of a dispute."⁶ In this context, arbitration "should be contrasted with forms of ADR which involve a consensual (rather than adjudicative) process, often with the involvement of a neutral third party."⁷ In this regard, we will not include arbitration as types of ADR in the following chapter on the grounds that only consensual and non-binding procedures are explained in this chapter. We will not examine a certain type of mediation *i.e.* international commercial mediation or family mediation, instead, examine mediation in general, while elaborating the subject matter with its special types. It should, hereby, be strongly indicated that the success of any ADR process depends on the skills, experience and knowledge of the neutral, who brings the parties together for a settlement.

⁶ See Hunter et al., *supra* note 2, at 63.

⁷ See Hunter et al., *supra* note 2, at 63.

CHAPTER II

ALTERNATIVE DISPUTE RESOLUTION SYSTEMS (“ADR”)

I. HISTORY OF ADR

There are many different types of alternative dispute resolution systems, which have been evolved during the second half of the twentieth century. In general, ADR procedures are traditional methods for dispute resolution and have been used in China, Japan and other Far Eastern countries and they have a very long history of usage.⁸ Asia has always carried great importance for North American continent and in this regard, her traditions influenced the way of thinking in the said continent.⁹ ADR systems that have evolved as an alternative to the classical types of dispute resolution techniques such as litigation or arbitration have been developed in the US and then spread to other Western countries. Early critiques of mediation and ADR challenged these informal processes as ‘second class justice.’ From this perspective these types of programs were aimed at the poor and disadvantaged, diverting them away from courts where they had rights and where procedural protections gave them a chance to prevail against more advantaged parties.¹⁰ A significant case in the US has led the businessmen to refer their disputes to ADR, a more cost effective and time

⁸ For further information *see* Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* [Drafting the International Commercial Contracts and Systems Of Dispute Resolution] 373 & n.355 (1996); for a similar statement *see* George W. Coombe, Jr, *The Resolution of Transnational Commercial Disputes: A Perspective From North America*, 5 *Ann. Surv. Int'l & Comp. L.* 13, 20 (1999) (stating that “Throughout Asia, strong emphasis has been placed upon the conciliation technique, and upon the historical, social and cultural derivatives pertaining to its use. Indeed, avoidance of confrontational, adversarial, and adjudicatory dispute resolution appears almost an end in itself at many Asian arbitration centers.”)

⁹ For a similar statement *see* Coombe, *Id.*, at 24 (stating that “Due to the commercial importance of Asia to the United States and Canada, it is not surprising that Asian traditions influence U.S. and Canadian thinking. One such tradition—conciliation of commercial disputes—is already firmly established throughout North America as a useful augmentation to arbitration. Business executives and their counsel have come to appreciate, through direct negotiating experience with their Asian counterparts, that Asian values emphasizing preservation of the business relationship and maintenance of party credibility and trust are the very heart of responsible commercial dispute resolution.”)

¹⁰ For critiques on ADR and mediation *see* Craig A. McEwen & Laura Williams, *Legal Policy and Access to Justice Through Courts and Mediation*, 13 *Ohio St. J. on Disp. Resol.* 865-68 (1998) (stating that “if adjudication provides the single model for justice, then the public justice system should provide the opportunity to present a case to a judge at a minimum cost to parties....Many would argue today that mediation [and ADR] provide “first class justice” and that an increasingly important issue of access revolves around the availability of mediation, especially to low and moderate income disputants.”)

saving process, instead of litigation.¹¹ The increasing popularity of ADR procedures “reflects a high degree of frustration with cost and delays often associated with traditional dispute resolution procedures.”¹² Among the ADR systems, mostly, arbitration and mediation have been used to settle many different types of disputes. The disputes that have fallen into one of the following categories can be resolved through ADR- international disputes, commercial disputes, family disputes and labor disputes.

There are numerous examples of the historic resolution of international conflicts by arbitration, such as its use by warring Greek city states and by various Catholic Popes who acted as arbitrators of conflicts between European countries during the Renaissance.¹³ A recent example of the successful employment of an international mediation is that conducted by the former President of the United States Jimmy Carter, through the Carter Center and Foundation,¹⁴ in Bosnia. Furthermore, during the first decade of the twentieth century the president of the United States Theodore Roosevelt employed a successful mediation between the war of Russia and Japan.¹⁵ International attempts to provide a foundation for lasting global peace have also incorporated arbitration in the late nineteenth and in the early twentieth centuries.

¹¹ For detailed information see Şanlı, *supra* note 8, at 372; see also Coombe, Jr, *supra* note 8, at 14 (stating that “Adversarial adjudicative techniques, such as arbitration and litigation, remain important; but executive management has begun to inquire into the efficacy of those techniques....United States business interests continue to expand dramatically their use of domestic dispute resolution techniques ... This expansion has several critical implications.... First, business relies far or less upon courts and lawyers. Second, business executives are increasingly determined to manage and control the dispute resolution process. Third, there is a growing reliance upon negotiation, mediation and conciliation dispute resolution techniques, in lieu of traditional litigation and even arbitration. And finally, there is greater awareness of the need to include an appropriate dispute resolution clause in the underlying commercial agreement.”)

¹² See Hunter et al., *supra* note 2, at 63; see also Coombe, *supra* note 8, at 25 (stating that “The objectives which have motivated the search for alternative procedures mirror the list of problems identified as inherent in the conventional adjudicatory procedures: the desire for party participation; the need to resolve the dispute without terminating the underlying business relationship or destroying the confidence upon which it is based; the need to focus the parties’ attention on the main issues in the dispute and to minimize the diversions of time and energy to procedural and other ancillary issues and the encouragement of free dialogue.”).

¹³ For more information about the resolution of conflicts through arbitration in the Ancient Greek and during the Middle Ages and the Renaissance see Mehmet Gönlübol, *Uluslararası Politika İlkeler – Kavramlar – Kurumlar* [International Politics Principles – Concepts – Institutions] 374-75 (4th ed. 1993).

¹⁴ For more information about the Carter Foundation see www.cartercenter.org

¹⁵ For different examples of international mediation attempts such as Henry Kissinger’s and Cyrus Vance’s for the prevention of war and providing the signing of a peace agreement between the Arab States and Israel; and the “Rhodes Formula” by UN Vice Secretary General Ralph Bunche in 1949 see Gönlübol, *supra* note 13, at 370.

Two examples of this are the Permanent Court of Arbitration,¹⁶ which resulted from international meetings conducted between 1899 and 1907 in the Hague, Netherlands and the development of the League of Nations in 1918, which employed arbitration as one mechanism of dispute resolution.¹⁷ Regulations with regard to good offices and mediation were incorporated in the first Convention of the Hague Peace Conference of 1899.¹⁸ In the same Convention the Permanent Court of Arbitration was also established.¹⁹

¹⁶ For detailed information regarding the establishment of Permanent Court of Arbitration see I Hüseyin Pazarıcı, *Uluslararası Hukuk Dersleri* [International Law Courses] 54 (rev. 3rd ed. 1992).

¹⁷ See Gönlübol *supra* note 13, at 371.

¹⁸ See Title II On Good Offices and Mediation Convention (I) for the Pacific Settlement of International Disputes (Hague I) (29 July 1899) «**Article 2** In case of serious disagreement or conflict, before an appeal to arms, the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 3 Independently of this recourse, the Signatory Powers recommend that one or more Powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the States at variance. Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities. The exercise of this right can never be regarded by one or the other of the parties in conflict as an unfriendly act.

Article 4 The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment, which may have arisen between the states at variance.

Article 5 The functions of the mediator are at the end when once it is declared, either by one of the parties to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

Article 6 Good offices and mediation, either at the request of the parties at variance, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice and never have binding force.

Article 7 The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war. If mediation, occurs after the commencement of hostilities it causes no interruption to the military operations in progress, unless there be an agreement to the contrary.

Article 8 The Signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form: In case of a serious difference endangering the peace, the States at variance choose respectively a Power, to whom they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations. For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in conflict cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, who must use their best efforts to settle it. In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.»

¹⁹ See Chapter II On the Permanent Court of Arbitration Convention (I) for the Pacific Settlement of International Disputes (Hague I) (29 July 1899) «**Article 20** With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Signatory Powers undertake to organize a permanent Court of Arbitration, accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention.

Article 21 the Permanent court shall be competent for all arbitration cases, unless the parties agree to institute a special Tribunal.

Article 22 An International Bureau, established at The Hague, serves as record office for the Court. This Bureau is the channel for communications relative to the meetings of the Court. It has the custody of the archives and conducts all the administrative business. The Signatory Powers undertake to communicate to the International Bureau at The Hague a duly certified copy of any conditions of

arbitration arrived at between them, and of any award concerning them delivered by special Tribunals. They undertake also to communicate to the Bureau the Laws Regulations, and documents eventually showing the execution of the awards given by the Court.

Article 23 Within the three months following its ratification of the present Act, each Signatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators. The persons thus selected shall be inscribed, as members of the Court, in a list, which shall be notified by the Bureau to all the Signatory Powers. Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Signatory Powers. Two or more Powers may agree on the selection in common of one or more Members. The same person can be selected by different Powers. The Members of the Court are appointed for a term of six years. Their appointments can be renewed. In case of the death or retirement of a member of the Court, his place shall be filled in accordance with the method of his appointment.

Article 24 When the Signatory Powers desire to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the Arbitrators called upon to form the competent Tribunal to decide this difference, must be chosen from the general list of members of the Court. Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued: Each party appoints two Arbitrators, and these together choose an Umpire. If the votes are equal, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord. If the agreement is not arrived at on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected. The Tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court and the names of the Arbitrators. The Tribunal of Arbitration assembles on the date fixed by the parties. The Members of the Court, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities.

Article 25 The tribunal of Arbitration has its ordinary seat at The Hague. Except in cases of necessity, the place of session can only be altered by the Tribunal with the assent of the parties.

Article 26 The International Bureau at The Hague is authorized to place its premises and its staff at the disposal of the Signatory Powers for the operations of any special Board of Arbitration. The jurisdiction of the Permanent Court, may, within the conditions laid down in the Regulations, be extended to disputes between non-Signatory Powers, or between Signatory Powers and non-Signatory Powers, if the parties are agreed on recourse to this Tribunal.

Article 27 The Signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them. Consequently, they declare that the fact of reminding the conflicting parties of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

Article 28 A Permanent Administrative Council, composed of the Diplomatic Representatives of the Signatory Powers accredited to The Hague and of the Netherlands Minister for Foreign Affairs, who will act as President, shall be instituted in this town as soon as possible after the ratification of the present Act by at least nine Powers. This Council will be charged with the establishment and organization of the International Bureau, which will be under its direction and control. It will notify to the Powers the constitution of the Court and will provide for its installation. It will settle its Rules of Procedure and all other necessary Regulations. It will decide all questions of administration, which may arise with regard to the operations of the Court. It will have entire control over the appointment, suspension or dismissal of the officials and employees of the Bureau. It will fix the payments and salaries and control the general expenditure. At meetings duly summoned the presence of five members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes. The Council communicates to the Signatory Powers without delay the Regulations adopted by it. It furnishes them with an annual Report on the labours of the Court, the working of the administration, and the expenses.

Article 29 The expenses of the Bureau shall be borne by the Signatory Powers in the proportion fixed for the International Bureau of the Universal Postal Union.»

Outside the political and diplomatic arena, arbitration and mediation have been used by businesses to settle their commercial disputes. At this point it should be indicated that "traditionally alternative dispute resolution systems are preferred in the far-eastern countries in resolving disputes."²⁰ Furthermore, in the Common Law countries alternative dispute resolution systems have been developing since the early second half of the twentieth century.²¹ Since the beginning of the commercial life "international commercial disputes have been resolved through national courts, arbitration and mediation."²² In Europe, businesses of differing national origin have frequently submitted their controversies to arbitration, mediation and to other ADR mechanisms. ADR procedures are either used as a precondition and a part of official procedure, regulated by codes, in referring to courts or based on a mutual agreement between the parties.²³ It should be pinpointed that "the European Union and other regional trade bloc regulations have included mediation process requirements."²⁴ In the USA, in most of the states, the ADR is a compulsory pre-trial method for resolving disputes.²⁵ In the agreements of certain regional economic settings the use of transnational dispute resolution techniques have been encouraged. The North American Free Trade Agreement ("NAFTA") provides for arbitration between a foreign investor and a member state pursuant to the rules of either the International Center for the Settlement of Investment Disputes ("ICSID") or of the United Nations Commission on International Trade Law ("UNCITRAL"). Also NAFTA has encouraged the establishment of centers such as the Commercial Arbitration and Mediation Center for the Americas (CAMCA) for the facilitation of international dispute resolution within the North American free trade area. Furthermore, American Arbitration Association is another leading institution that facilitates the international dispute resolution for decades. In the Central and Eastern European and in the Latin American countries the use of mediation and arbitration have been encouraged and

²⁰ See Ziya Akıncı, *Milletlerarası Ticari Uyuşmazlıkların Alternatif Çözüm Yolları* [Alternative Resolution Systems of International Commercial Disputes], 18 *Batider* no.4, 93, at 101 (1996).

²¹ See for a similar statement Akıncı, *Id.*, at 101 (stating that "it has been realized that especially for the last 20 years the system has attracted interest in the US legal system. Furthermore, it has been realized that the system has been developing in the countries such as New Zealand, Australia, Hong Kong, Canada and England in order to save time and litigation costs.")

²² See Şanlı, *supra* note 8, at 341.

²³ See Şanlı, *supra* note 8, at 373.

²⁴ See Eileen Carroll & Karl Mackie, *International Mediation—The Art of Business Diplomacy* 8 (2000).

²⁵ For a similar statement see Şanlı, *supra* note 8, at 371 & n.349.

expanded.²⁶ Also, ICSID, WIPO, UNCITRAL and other international commercial organizations and chambers have rules regulating mediation, arbitration and other types of ADR techniques.

One can say that in the near future, the Internet and e-commerce will become the commercial backbones of the world economy. As they increase in importance to the national and international economy, their trouble free operations will be seen as essential to commercial and national interests. In this regard, in the near future Internet users will be able to submit their controversies to arbitration and mediation or other types of ADR.²⁷

II. TYPES OF ADR

1. Mediation – Arbitration (Med-Arb)

Med-arb is a hybrid ADR mechanism that is favored in the US.²⁸ As a matter of fact, med-arb is an abbreviated amalgam of mediation and arbitration. In this particular type of ADR, the process of resolving a dispute commences with mediation and then, in the event that the mediation fails, parties switch to binding arbitration. It is argued that “med-arb is sometimes said to be superior to pure mediation on the grounds that a binding resolution is assured.”²⁹ One can say that med-arb

²⁶ For further information see Coombe, *supra* note 8, at 17-25.

²⁷ For detailed information see M. Scott Donahey, *Dispute Resolution in Cyberspace*, 15 *J.Int.Arb.* 4, 127, at 164 (stating that “The CyberTribunal has elected not to adopt rules of procedure of procedure in order to give the maximum freedom to the mediator in the conduct of the mediation, due to the special nature of online mediation. An online mediation module, which includes forms for the initiation of mediation, provides a basic framework for the conduct of the mediation. The framework is designed to enhance, rather than retard, the flexibility of the procedure. The framework exists to encourage the parties to take maximum advantage of the electronic medium.”)

²⁸ See for a similar statement Richard Hill, *MED-ARB: New Coke or Swatch?*, (1997) 13 *Arbitration International* 105 (stating that “Mediation followed by arbitration is an alternative dispute resolution (ADR) method favored by some US practitioners. [...] Many of these methods owe their recent visibility and popularity to their apparently successful use in the US. Some methods even appear to have been invented, [...], in the US quite recently.”); see Jay E. Grenig, *West’s Legal Forms Alternative Dispute Resolutions*, § 2.80 (stating that “Mediation-arbitration is used most commonly in labor-management disputes.”)

²⁹ See Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, (1998) 14 *Arbitration International* 162 & n.6 (stating the advantages of med-arb as “It offers the following real or perceived advantages: first, that the process will, in one way or another, produce a resolution; second, that parties may perhaps try harder to be reasonable and to resolve the matter during the mediation phase; and third, that if an adjudication is required, there will be no loss of time or cost in having to re-acquaint a new neutral with the facts of the case and the issues between the parties. It may have two negative consequences in comparison with mediation. Initially if the parties in med-arb feel that a settlement has been imposed upon them -rather than voluntarily agreed to- they may be less willing to comply with the same. Additionally, if the parties focus primarily on persuading the mediator that they are right rather than on seeking an accommodation with

compromise Asian and Western cultures. That is to say that "Asian cultures prefer non-confrontational forms of dispute resolution that allow for 'face-saving' and mutually agreeable compromises, [whereas] Western cultures tend to prefer procedural processes with awards proclaiming one party's rights."³⁰ In this context, med-arb compromises both cultures through giving the parties the opportunity to reach a solution through mediation and to have a backup resolution through arbitration. One can argue that med-arb is advantageous than other ADR types in particular disputes³¹ that it gives "the neutral more leverage in the mediation process since the parties know a solution will be imposed upon them if they do not come up with one of their own."³²

There are different definitions with regard to med-arb. In this context, a med-arb is a "(1) facilitative mediation, followed by; (2) binding arbitration, perhaps before the same neutral."³³ According to this definition, the mediator does not evaluate the case, but try to facilitate the parties, and the mediator of the facilitative mediation might or might not be the arbitrator. It should be indicated that "in med-arb, the mediation phase should be facilitative."³⁴ This is due to the reason that mediators try to find the business interests of the parties that shapes their positions.³⁵ However, it can be argued that it is unusual that judges or arbitrators ask questions beyond the issues that are submitted in the briefs of the parties. In this connection, practitioners tend to adopt evaluative approach instead of facilitative approach,³⁶ thus "asking a party how it plans to prove a particular point."³⁷

the other party, they will not improve their ability to resolve disputes without resort to outside decision-maker.")

³⁰ See Deborah L. Holland, Comment: Drafting a Dispute Resolution Provision in International Commercial Contracts, 7 *Tulsa J. Comp. & Int'l L.* 451, 455 (2000); see also Steven J. Burton, Combining Conciliation with Arbitration of International Commercial Disputes, 18 *Hastings Int'l & Comp. L. Rev.* 637-38 (1995)

³¹ See Grenig, *supra* note 28, such as labor-management disputes.

³² See Grenig, *supra* note 28.

³³ For the definition given by Tom Arnold "A Vocabulary of Alternative Dispute Resolution Procedures" see Hill, *supra* note 28, at 105-06 & n.3; but see Jean-Claude Goldsmith, ICC Working Group Report on ADR, (1993) 4 *American Review of International Arbitration* 4, at 413 (stating that "In this formula, which falls between mediation and arbitration, the parties agree in advance that the mediator will sit as an arbitrator in the event that mediation fails.")

³⁴ See Hill, *supra* note 28, at 106; for the definitions of facilitative and evaluative mediation see *infra* Chapter III, part A.

³⁵ For a similar statement see Hill, *supra* note 28, at 106 stating that "most facilitative mediators will probe for the true business interests that underlie stated positions."

³⁶ For a similar statement see Hill, *supra* note 28, at 106.

³⁷ See Hill, *supra* note 28, at 106.

Furthermore, in a med-arb procedure, the mediator might be a different person than the mediator.³⁸ With regard to the mediator and arbitrator, there are two main variations. If the mediator acts as the arbitrator then this method is called as “the blended method”³⁹, which “offers flexibility and efficiency.”⁴⁰ If the mediator does not act as arbitrator, in other words, if the parties select two neutral, one for mediation and the other for arbitration, then this method is called as “the conjoined method.”⁴¹

This issue presents some advantages and disadvantages. It should be indicated that parties have the freedom to select a new arbitrator or reject the mediator to act as an arbitrator on the grounds that “the mediator might have been tainted by some confidential information.”⁴² It is argued that “this allows the parties to disclose sensitive information to the mediator with the knowledge that it cannot influence the judgment of the arbitrator, since the mediator will not be the arbitrator unless both parties agree that this would be the best approach.”⁴³ On the other hand, one can argue that from the aspects of time effectiveness and re-acquaintance of a new neutral with the case, a mediator who will act as an arbitrator does not have to reinvest time and effort on the case and, therefore, make a quick and binding decision during the arbitration. In this connection, one can argue that admitting the neutral mediator to act as the arbitrator depends on the circumstances of the dispute and the trusts of the parties on the mediator regarding his neutrality during the arbitration process that

³⁸ See Cremades, *supra* note 29, at 162 & n.8 (stating that “... One school of thought sees no difficulty in the transformation of an arbitrator into a mediator and, if necessary, being reincarnated as an arbitrator in the same dispute. Another school of thought has difficulty with this role-changing and feels that settlement negotiations in the nature of a mediation ought to be facilitated by a person different from the arbitrator, so that the arbitrator retains complete independence from the private considerations of each party as to settlement possibilities. Still another school sees no difficulty in the arbitrator becoming a mediator, but feels that, once the mediator role has been assumed, it is not possible for the same person to be born again as an arbitrator required to make an adjudication of the dispute.”)

³⁹ See Holland, *supra* note 30, at 456 (stating that “if mediation efforts produce a settlement, the neutral can incorporate it into an enforceable arbitral award, [and] however, if mediation fails, the neutral can act as arbitrator and issue an arbitral award.”).

⁴⁰ See Holland, *supra* note 30, at 456; this method has also disadvantages such as “that it is difficult to find a neutral that is skilled at both arbitration and mediation, that the possibility of later arbitration may interfere with the information exchange between the mediator and a party when they privately consult during mediation efforts, that a neutral may not wish to hold private consultations in order to protect the arbitrator role, and thus render mediation ineffective, and that the blended med-arb can hamper the integrity of the arbitration.”

⁴¹ See Holland, *supra* note 30, at 456.

⁴² See Hill, *supra* note 28, at 107.

⁴³ See Hill, *supra* note 28, at 107.

follows the failed mediation process.⁴⁴

2. Court Annexed Mediation

This type of ADR mechanism is, basically, built upon the mediation system. However, the parties have not, solely, agreed to mediate. Their agreement is that they will, first, refer to a mediator before the court will hear them. In the event that the parties in dispute do not reach an agreement then the case goes to trial. This type of ADR mechanism is generally used in cases involving family matters. Recently, in the European Union, this type of mediation is recommended for family, telecommunications and consumer matters.⁴⁵

3. Fact Finding

This type of ADR technique is also known as advisory arbitration. A neutral third person, who is known as the fact finder, is selected to evaluate and report on the matter in dispute. The fact finder makes a recommended decision to the parties, which is not binding on the parties. In this regard, parties are free to implement or not to implement the decision. In this connection, "the purpose of the fact finding is to help the parties obtain an objective and impartial assessment of the facts from a person whose credentials and standing they have acknowledged in advance."⁴⁶

4. Conciliation

This type of ADR is often used to describe a process similar to facilitated negotiation in that it involves bringing a neutral third party to the negotiation process. Conciliation is the process in which a third party brings the disputing parties together in order for them to begin discussing the issues. The parties appoint a conciliator

⁴⁴ For a similar statement see Hill, *supra* note 28, at 107 (stating that "... the circumstance that some of the unanswered, unchecked, irresponsible statements in private mediation caucuses may influence the arbitration award is worthy of consideration, but its importance is often grossly exaggerated. The assumed difficulty has been found to be grossly overstated on many occasions where the sophistication and neutrality of the neutral [mediator] can be trusted, and where the parties in private caucuses tend towards objective non-slandorous recitations of essentially admitted fact. This gives rise to the question: How much trust do you have in the adversary not to lie in caucus? How much trust do you have in the mediator / arbitrator? If not much, then let the arbitration proceed before a neutral different than the mediator. If the facts are substantially admitted except as to points well presented on both sides in the opening statement and / or if there is a lot of trust, then ask the mediator to base his [or her] conclusion on the formal evidence in the arbitration presentation and proceed to arbitration."); also see Cremades, *supra* note 29, at 163 (stating that "It primarily depends on the will of the parties in conflict and the ethical beliefs of the person whose services are solicited.")

⁴⁵ See for detailed information *infra* Chapter III, subpart IX.

⁴⁶ See Grenig, *supra* note 28, at § 2.85.

through an agreement. A conciliator encourages the parties to negotiate with each other through his recommendations that he deems fair resolution of the dispute. The term conciliation is frequently used interchangeably with mediation. However, one can argue that conciliation refers to a process that is less structured than mediation. That is to say that, "a conciliator does not take part in the process or settlement discussions."⁴⁷ In other words, "the conciliator's primary role is to reduce the parties' inflammatory rhetoric and tension, open channels of communication, and arrange for formal negotiations."⁴⁸ Unlike a mediator, "a conciliator may encourage the parties to accept his recommendations."⁴⁹ Whereas in mediation, "a mediator does not make his own recommendations [and] he assists the parties to negotiate a solution between themselves."⁵⁰ However, like in mediation, in a conciliation process, a conciliator cannot impose an award or compel the parties to reach a settlement.⁵¹ Conciliation may be used "in the courts before trial to avoid a trial and in labor disputes before arbitration."⁵² Mediation differs from conciliation, not only in its more formal structure, but also in its results. Successful conciliation usually results in the reconciliation of the parties and the mending of their relationship. Although maintenance of the relationship is an important factor, resolution of the dispute through mediation will often occur without actual reconciliation of the parties.

Best circumstances for the application of conciliation process can be described as follows:

"Conciliation may be a particularly good choice when emotions are running high, or when ongoing relationships are involved and a major barrier to resolution is the inability or unwillingness to communicate. Conciliation may be inappropriate where one party has a clear legal entitlement or where the parties are of unequal bargaining power or sophistication."⁵³

There are different views with regard to the authorities of a conciliator and a mediator. One view argues that the conciliator only shuttles between the parties in dispute without making his recommendations and the other view argues that mediator draws up and proposes terms of settlement. The mediator is not given any power to

⁴⁷ See Grenig, *supra* note 28, at § 2.20.

⁴⁸ See Grenig, *supra* note 28, at § 2.20.

⁴⁹ See Hunter et al, *supra* note 2, at 65.

⁵⁰ See Hunter et al, *supra* note 2, at 65.

⁵¹ For a similar statement see Hunter et al, *supra* note 2, at 65.

⁵² See Grenig, *supra* note 28, at § 2.20.

⁵³ See Grenig, *supra* note 28, at § 2.20.

impose a settlement. His function is to try to break any impasse and encourage the parties to reach an amicable settlement. In commercial disputes an impasse most often arises from either a lack of trust in the integrity of the other party or a genuine good faith difference of opinion on the facts underlying the dispute or on the probable outcome of the case were it to go to court. The mediator may act as a channel for communication filtering out the emotional elements and allowing the parties to focus on the underlying objectives. He encourages the parties to reach an agreement themselves as opposed to having it imposed upon them.

5. Expert Determination

This type of ADR is a voluntary process in which a neutral third party, who is usually an expert in the field in which the dispute arises, gives a binding determination on the issues in dispute. A dispute may be deferred to expert determination either by means of a term in a pre-existing agreement or on an ad-hoc basis. Unlike an arbitrator an expert has no obligation to act judicially, although he or she must act fairly. The expert is often asked to resolve key issues of fact, rather than to determine the parties' legal rights and liabilities. The expert's decision is generally challengeable only on very limited grounds. Unlike in arbitration, an expert's decision is not enforceable under any treaty. In other words, "under many countries' laws, expert determinations do not enjoy the same ease of enforceability as arbitral awards."⁵⁴ In order to provide an enforceable solution "a contract should provide a mechanism for converting the expert's determination into one that is binding and enforceable as an arbitral award."⁵⁵ There is no doubt that this can be only achieved through the mutual agreement of the parties during the contracting stage.

6. Ombudsperson

This type of ADR is Scandinavian based. It is either called as the ombudsman or the ombudsperson. For convenience, we will refer to this office as ombudsperson. In Scandinavia, "the ombudsperson is a public official appointed to hear citizen complaints and conduct independent fact-finding investigations in order to correct

⁵⁴ See Dana H. Freyer, Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts A US Perspective, 15 J.Int.Arb. 4, 12 (1998); see also John Kendall, Expert Determination, (2nd Ed., FT Law & Tax, London, 1996) at ¶ 14.6.3..

⁵⁵ See Freyer, *supra* note 54, at 12.

abuses of public administration.”⁵⁶ In the USA, “an ombudsperson is a third party who receives and investigates complaints aimed at an institution by its constituents, clients or employees.”⁵⁷ The ombudsperson may be part of the management of a public or private organization. “In 1990, the Administrative Conference of the United States recommended that all federal agencies with significant public dealings consider establishing ombudsperson offices.”⁵⁸ The ombudsperson is considered a neutral member of the corporate structure, outside the normal managerial chain of command, who reports directly to the president of the organization. The ombudsperson's responsibility is to help resolve disputes through informal counseling, mediation, or investigation and recommendations to management such as “bringing an apparent injustice to the attention of high level officials.”⁵⁹ Some ombudspersons deal with customer or client problems, such as patient representatives in hospitals. There are prison ombudsperson, academic ombudsperson, medical ombudsperson, social welfare ombudsperson, and consumer ombudsperson. A strong and well-established system of ombudsperson institution requires special consideration.⁶⁰

⁵⁶ See Grenig, *supra* note 28, § 2.130.

⁵⁷ John J. Cound et al, *Civil Procedure Cases and Materials* 1316 (6th ed. 1993).

⁵⁸ See Grenig, *supra* note 28, § 2.130.

⁵⁹ See Cound et al, *supra* note 57, at 1316.

⁶⁰ See Grenig, *supra* note 28, at § 2.130 (“[It should be maintained that] the person who performs the role of ombudsperson is completely neutral, both in fact and in appearance. The neutrality of the ombudsperson should be protected by the structure of the position. The ombudsperson should have access to all levels and departments, and all non-privileged, relevant records within an organization. The ombudsperson's office should be located in an area that is convenient and accessible to all persons using it, but with low visibility so their privacy can be maintained. There should be secured storage in the office to maintain confidential records and case files. All managers and persons using the ombudsperson should be informed about the opening of the ombudsperson's office. Various means should be used to educate others about the functions and benefits of the ombudsperson, such as notice to employees or customers from the chief executive. Persons using the ombudsperson must be assured of complete privacy and confidentiality of conversations and the ombudsperson's files. A telephone hot line should be installed with 24-hour access to the ombudsperson's office by installing voice mail or an answering machine that only can be accessed by the ombudsperson. The credibility of the ombudsperson office must be maintained so that persons using the office have confidence in the system. This includes support by top management in permitting the ombudsperson to investigate complaints, to talk to anyone in the enterprise to have access to information in order to uncover essential facts and make recommendations to resolve complaints. The ombudsperson should make sure all problems or complaints are answered within a reasonable amount of time. The ombudsperson should help people to help themselves through counseling and problem solving. The ombudsperson should gain the respect and support of line and staff managers while maintaining neutrality. The ombudsperson should keep in contact and maintain a relationship within the various departments of the enterprise.”)

7. Settlement Conferences

A settlement conference, which is another type of ADR, may be voluntary or compulsory. A voluntary settlement conference is "presided over by a settlement officer."⁶¹ It may either take place before a lawsuit is filed or while the litigation is ongoing. When the settlement conference is compulsory then it is "mandated either by statute or court rule."⁶² On the other hand, the voluntary settlement conference provides "a forum for the parties to meet, get feedback from a neutral third party and communicate regarding settlement."⁶³ The settlement officer will normally express opinion about the value of the case, the substantive merits of each party's position and the probable outcome at trial. The settlement officer attempts to persuade the parties to accept a compromise solution. It can be argued that this specialty of settlement conference makes it resemble to facilitative mediation. With regard to advantages of a voluntary settlement, parties can select their own settlement officer; they can obtain an unbiased, expert opinion regarding the legal merits and settlement value of the case; it can be conducted at any time after the dispute arises.

With regard to disadvantages of a voluntary settlement, like mediation, the process is non-binding; and the process does not necessarily take into account the parties' underlying interests and finally, like in mediation, arbitration and conciliation, the success depends on the skills and experience of the settlement officer.

Best circumstances for the application of settlement conference process can be described as follows

"A voluntary settlement conference is appropriate where there are genuine differences of opinion over the legal merits of the case and the dispute is over money. It is useful where the parties disagree on the value of injuries or losses. A voluntary settlement conference may be useful where either client is having trouble accepting his or her attorney's realistic evaluation of the merits of the case and the risks of the trial."⁶⁴

8. Private Judging⁶⁵

This type of ADR technique refers to the adjudication of cases outside the court system by third party neutrals who are selected and paid for by the parties and are

⁶¹ See Grenig, *supra* note 28, at § 2.160.

⁶² See Grenig, *supra* note 28, at § 2.160.

⁶³ See Grenig, *supra* note 28, at § 2.160.

⁶⁴ See Grenig, *supra* note 28, at § 2.160.

⁶⁵ For detailed information and discussions on Private Judging see Alan Scott Rau, *On Integrity in Private Judging*, (1998) 14 *Arbitration International* 115.

appointed by a court to serve as temporary judges. Private judging has been developed in the USA. A number of states have laws permitting private judging.⁶⁶ The private judge can be an attorney or a retired judge or a professional with experience in the subject matter of the litigation. After the dispute has arisen and filed in court, if the parties agree to hire a private judge, the court refers the case to the private judge. One can argue that referring the case to private judging depends on the mutual agreement of the parties. The process is more expedited and simplified.

The private judge's decision results in entry of a judgment. Furthermore, "unlike the award of an arbitrator, the decision can be appealed as if the court referring it to the private judge had made its decision itself."⁶⁷ One can say that in this type of ADR, it is ensured that the decision is in accordance with the law, while the trial court is bypassed. That is to say that the judgment is as enforceable and appealable as a court-rendered judgment and this specialty of private judging *i.e.* "the right of full appellate review, distinguishes it from other forms of alternative dispute resolution."⁶⁸ In this regard, one can say that private judging, unlike mediation, results in a binding decision.

There are some potential advantages and disadvantages of private judging system. On one hand, the parties can select the private judge, both parties and the private judge can set the trial date and control the timing of the litigation, the private judge is bound to follow applicable substantive law, the private judge renders a reasoned decision and the parties retain the right to appeal the judgment, whereas, private judging can be more costly than judicial proceedings, the parties' participation cannot be compelled and one side's repeated use of the same private judge may affect his or her impartiality. "Private judging is inappropriate when the jury trial is desired and when the cost outweighs its advantages."⁶⁹

Private judging has been criticized on two basic grounds:

"First, private judging is undesirable as a matter of public policy. Critics suggest that the very existence of private judging harms the public and the courts by removing any pressure for court reform and by discouraging application of

⁶⁶ See Calif. Const. Art. VI, §§ 638-645; Conn. Gen. Stat. Ann. §§ 52-425; Fla. R. Civ. P. 1.830; Kan. R. Civ. P. § 60-253 *et seq.*; Neb. Rev. Stat. §§ 25-1129; N.H. Rev. Stat. Ann. §§ 519-9; N.J. Stat. Ann. § 2A:23 A-1; N.Y. C. v. Prac. L. & R. § 4317; Ohio Rev. Code Ann. § 2701.10; Or. Rev. Stat. §§ 3300-3321; R.I. Gen. Laws §§ 9-15-1 to 9-15-21; S.D. Codified Laws Ann. § 15-13-1; Wash. Rev. Code Ann. §§ 4, 48.010-4.48.130; Wis. Stat. Ann. § 805.06.

⁶⁷ See Cound *et al*, *supra* note 57, at 1315.

⁶⁸ See Grenig, *supra* note 28, § 2.150.

⁶⁹ See Grenig, *supra* note 28, § 2.150.

increased resources to the courts. Some argue that matters of public importance ought to be resolved in public and private judging prevents public access and public knowledge. It has also been argued that private judging is unfair to those who cannot afford to participate in it.”⁷⁰

One cannot concur with the critics on some grounds that even though public courts are open to public access, in ADR procedures public access should be limited. This is due to the reason that parties who apply ADR procedures in most international cases are prominent multinational companies. In this regard, one can argue that they would not desire that their cases and claims be disclosed to public.

With regard to non-affordability criticism, one can argue that recourse to private judging procedure is only available with the mutual agreement of the parties. In other words, if a party cannot afford to participate in it, then the reasonable way would be not to agree for recourse to private judging, and finally they should continue with the trial court procedure.

9. Focus Group

This type of ADR technique is a process involving a panel of citizens selected in a manner agreed upon by the parties. The parties make brief presentations to the focus group. Once the parties make their presentations the focus group deliberates and renders an advisory opinion about how the dispute should be resolved and discusses the opinion with the parties.⁷¹

10. Summary Jury Trial

A summary trial is a trial before a panel composed of a trial judge and “chief executive officers or representatives who have authority to settle.”⁷² A judge issues an order assigning a case to a conditional summary trial when the circumstances are appropriate. The summary jury trial is a court annexed settlement program in which the case is argued to a mock jury. The attorneys give brief presentations of their cases to the mock jury in other words “a panel of six jurors”⁷³, whose members are drawn from the same population as real jurors. One can say that a summary trial is similar to

⁷⁰ See Grenig, *supra* note 28, § 2.150.

⁷¹ For detailed information see Grenig, *supra* note 28, § 2.140.

⁷² See Grenig, *supra* note 28, § 2.120.

⁷³ See Cound et al, *supra* note 57, at 1317.

mini trial, but "it is used for cases ready to be tried before a jury."⁷⁴ The parties may either participate or be compelled to participate in a summary jury trial. The attorneys then make opening and closing arguments combined with narrative statement of the evidence. As far as the length of the presentations are concerned, they "usually last less than a week, and the resulting 'verdict'-although not binding on the parties-provides a basis for settlement."⁷⁵ The judge gives the jury abbreviated instructions on the law. The jury then returns either a consensus verdict or separate individual verdicts that indicate each juror's opinion of liability and damages. The jury has no authority, but its non-binding verdict can aid the parties to better understand their cases and can encourage settlement. Attorneys of both parties should not misstate the evidence, otherwise, the summary jury trial is ineffective. With regard to the advantages of summary jury trial it saves costs; it has an "accurate reflection of jury outcomes after full-blown trials"⁷⁶; and like most of the ADR mechanisms, there is a rate of success in encouraging settlement. Finally, it can be argued that "the summary jury trial has proven to be helpful in cases when each party has a very different view regarding the likely outcome of the case and prior settlement attempts have been unsuccessful."⁷⁷

11. Special Masters and Referees

In this type of ADR, "special masters or referees aid the judge in the performance of special duties, such as assisting the court to obtain the facts and to arrive at a correct result in complicated litigation pending before the court."⁷⁸ When a case involves matters of account or intricate details, requiring minute examination, in other words, that the case requires expertise and for that reason is not fit to be brought before a jury, it is common to refer the whole case or some part of it, to the decision of an auditor, master or referee. A special master aids the judge in the performance of special duties as they may arise in a case; the master does not displace the court. The master has discretion as to the procedure to be used in preparing the findings and

⁷⁴ See Cound et al, *supra* note 57, at 1317.

⁷⁵ See Cound et al, *supra* note 57, at 1317.

⁷⁶ See Donovan Leisure, Newton & Irvine, ADR Practice Book § 20.3 (1990), (stating that summary jury trials have been found to reflect consistently jury outcomes after full-blown trials.)

⁷⁷ See Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: Some Cautionary Observations, 53 U. Chi. L. Rev. 366 (1986); see also Cound et al, *supra* note 73, at 1317-18.

⁷⁸ See Grenig, *supra* note 28, § 2.110.

conclusions. The master's report should be responsive to the reference to the master. If the master is requested to make findings and conclusions, the master must do so. One can argue that special masters and referees system is quite different than the ordinary ADR techniques, that is to say that it resembles more to expert opinion type. In other words, a master can only assist the judge and does not replace him.

12. Appraisal

In this type of ADR mechanism, disinterested persons of suitable qualifications make the estimation of the value of property. In appraisal, expert opinion is used rather than explicit market transactions to ascertain the value of an asset or liability. Appraisal is frequently used in "probate and condemnation proceedings as well as in other disputes involving valuation of property."⁷⁹ Appraisals relate to leases, real estate, losses and damages under insurance policies, and purchase and sale agreements. They concern questions of value, price, amounts and damages and other similar aspects of a dispute. The appraiser is selected or appointed by a competent authority or an interested party to make the appraisal and they are selected for their special knowledge of the subject matter. Appraisals are frequently conducted without formal hearings. The appraiser is permitted to make his own investigation and to establish his own procedures.

When a brief comparison is made with other types of ADR, an appraisal differs from arbitration in that "the decision may be made without notice to or hearing of the parties, unless such notice and hearing is required by an express provision in the agreement between the parties."⁸⁰ In addition, "the appraisal may be made upon such principles as the appraiser may see fit honestly to adopt, or upon such evidence as the appraiser may choose to receive."⁸¹ Unlike the general belief, "a provision in a contract for the appointment of an arbitrator to determine the value of certain property, providing that neither party shall offer any evidence, is not one for arbitration, but is merely an agreement for appraisal."⁸²

⁷⁹ See Grenig, *supra* note 28, § 2.50.

⁸⁰ See *Id.*, § 2.50.

⁸¹ See *Id.*, § 2.50.

⁸² See *Id.*, § 2.50.

13. Negotiation

This type of ADR technique is most frequently used in commercial settings. Parties to a dispute may utilize negotiations to solve their problems and disputes directly and between themselves without the involvement of a third party. In this respect, negotiation differs from mediation.

The negotiation process is voluntary, non-binding and relatively unstructured. It continues as long as the parties are willing to exchange views on settlement. In settling disputes, "negotiation should be considered the first step in attempting to resolve any dispute."⁸³ In negotiation, two or more disputing parties meet together in good faith to identify and discuss the issues at hand, present facts and supporting data, arrive at mutual solutions and abide by the outcome. In this connection, "negotiation implies joint responsibility for making certain decisions."⁸⁴ Since, both parties have the responsibility to lead each other to find a lasting solution to their dispute without the assistance of a neutral. This leads one to the concept of cultural perspectives of the parties, since the success of a negotiation process can be dependent on that concept.⁸⁵ While in mediation, a neutral can balance the cultural perspectives through some strategic maneuvers, in negotiation parties should be careful in addressing their claims and each other. One can argue that negotiation is the least expensive method of resolving disputes and "the most helpful at maintaining the continuing business relationship."⁸⁶

One can argue that in order to reach a successful solution in negotiation, the process should be contractually mandated. This is due to the reason that "a party may perceive tactical advantage by utilizing a more expensive and adversarial dispute resolution mechanism."⁸⁷ One can say that a negotiation process, which is contractually mandated, can help avoid the problems that are set above. A provision for a contractually mandated negotiation process should provide for "good faith negotiations within a specified length of time, usually 30 or 60 days, in the event of dispute [and also] a binding dispute resolution mechanism in the event that

⁸³ See *Id.*, § 2.10.

⁸⁴ See *Id.*, § 2.10.

⁸⁵ For a similar statement see Holland, *supra* note 30, at 453 (stating that "... its success can be dependent on the cultural perspectives of the parties involved.")

⁸⁶ See Holland, *supra* note 30, at 453; see also Freyer, *supra* note 54, at 9.

⁸⁷ See Holland, *supra* note 30, at 453.

negotiations fail to solve the dispute.”⁸⁸ A contractually mandated negotiation may be multi-step or multi-tier. In this context, parties may mutually designate two officials, one for each party, to negotiate resolve the dispute at a designated period, and if they fail to resolve the dispute then their supervisors can be given the task to negotiate at a given period. That process may ascend to the highest level officers of the parties. If their negotiation fails, this multi-tier negotiation provision can provide an arbitration or litigation.⁸⁹ Contractually mandated negotiation process is generally preferred by the professionals due to the reason that “the ability of the multi-step clause to harness corporate dynamics by giving operational managers the opportunity to avoid the embarrassment of having a project for which they are responsible deteriorate and end up on the desks of their superiors.”⁹⁰ One can argue that beside the many advantages of contractually mandated negotiation, the avoidance of a disadvantage of that mechanism requires careful drafting of the dispute resolution provision in a contract. The disadvantage is that contractually mandated negotiation delays the commencement of any binding procedure such as arbitration and litigation. The drafter may avoid the disadvantage through shortening the negotiation periods.

14. Mini Trial

Mini trial is another type of hybrid dispute resolution mechanisms. It is popular mainly in the US and Europe and was developed in the corporate setting⁹¹. Mini trial is a structured and non-binding settlement process in which senior executives of the companies involved to meet in the presence of an impartial third person who after hearing truncated presentations of the merits of each side of the dispute, attempts to formulate a voluntary settlement.⁹² In this structure, it can be resembled to facilitated negotiation. Normally, parties exchange information before a panel. Parties may use ad hoc rules of their own or institutional mini trial rules as procedural rules. There are decision-makers from each side and a neutral advisor presides at the proceedings.

⁸⁸ See Holland, *supra* note 30, at 453.

⁸⁹ For detailed information see Freyer, *supra* note 54, at 9.

⁹⁰ See Freyer, *supra* note 54, at 9.

⁹¹ “Mini trials are used most often in business disputes when the parties are at a negotiation impasse because of: a good faith disagreement about the likely outcome if the dispute is litigated; or the existence of psychological barriers to resolution caused by the parties’ personal antagonism.” See Freyer, *supra* note 54, at 13.

⁹² For a detailed information and similar statement see Şanlı, *supra* note 8, at 374.

Once the presentations⁹³ are made by both parties, “the neutral gives the opinion of what would happen if the matter were litigated.”⁹⁴ This enables the parties to reconsider their will to submit their case to litigation. Following that process, the decision-makers commence to negotiate a settlement. The neutral may or may not join the negotiation process and sometimes the neutral does not render an opinion in the event that the decision-makers reach an agreement. Mini trials are mostly preferred to resolve disputes, which would otherwise be the subject of lengthy litigation. The recommended use of mini trials are the early stages of disputes in order to “maximize savings of costs [and] it is unlikely to be effective until after at least an initial exchange of pleadings and disclosure of documents.”⁹⁵ One can argue that mini trial type is most useful when parties are at a deadlock point in their negotiations and seeking to preserve a business relationship. This is due to the fact that they share confidential information during the process and this makes parties realize that it is in their best interests to settle and not to recourse to litigation which may maximize costs. On the other hand, mini trials are inappropriate “when one side has clear legal entitlement, the bargaining power of the parties is unequal, or a key factor is the credibility of witnesses.”⁹⁶

15. Early Neutral Evaluation

Early neutral evaluation is a court annexed settlement program. The parties are first required to recourse to early neutral evaluation process before bringing their dispute before the court. It is used to aid the parties in developing an approach to the litigation that focuses on key issues and necessary discovery. The neutral evaluator may be hired by the parties or may be appointed by the court. Early neutral evaluator, for instance, can be an attorney who has a high experience with the subject in dispute in order to conduct a review of the matter in dispute. The evaluator’s duty is to appraise the merits of the dispute and to make suggestions for conducting discovery

⁹³ “The presentations to the panel normally take from one to six hours per side, depending on the complexity of the issues involved, and may, but usually do not, include live expert or fact witnesses.” See Freyer, *supra* note 54, at 13.

⁹⁴ See Grenig, *supra* note 28, § 2.90, for a similar statement see Şanlı, *supra* note 8, at 374, see also Hunter et al, *supra* note 2, at 65 (stating that “The chairman of the panel may simply ensure fair play, or may intervene to help the parties to resolve the problem. If the latter approach is adopted, the process is sometimes referred to as ‘moderation.’”)

⁹⁵ See Hunter et al, *supra* note 2, at 65.

⁹⁶ See Grenig, *supra* note 28, § 2.90.

and obtaining legal rulings to resolve the case as efficiently as possible. In this type of mechanism, "the evaluator helps the parties identify areas of agreement, assess the strengths and weaknesses of their contentions and the evidence, and devise a plan for sharing important information and conducting key discovery."⁹⁷ The neutral evaluator's report may also aid the parties in reaching a settlement, because this report enables them to see the strength of their claims and eventually allows them to reconsider a peaceful negotiation or a litigation. In the event that the parties cannot reach a settlement, then the evaluator assists the parties to simplify and adapt the case for more expeditious handling in trial.

16. Conflict System Design

Conflict system design is "a process for designing or redesigning the system by which conflict is managed in a particular environment."⁹⁸ In conflict system design, a more suitable way to deal with the conflict is sought. The designer works with the parties to understand the present system and tries to develop a more effective system for the present case. In this connection, "the resultant system combines facilitative mediation, evaluative mediation, fast-track arbitration, expert opinions, and other methods in ways designed to minimize the cost and delay of resolving disputes."⁹⁹

Conflict system design has two premises. These are "conflicts are an unavoidable feature of human relations, especially in large projects and complex commercial situations, and conflict is not bad per se; conflicts may have negative consequences if they are poorly managed, but well-managed conflicts may actually have positive effects."¹⁰⁰ Conflict system design can be informal¹⁰¹ or formal.¹⁰²

⁹⁷ See Grenig, *supra* note 28, § 2.100.

⁹⁸ Richard Hill, *The Theoretical Basis of Mediation and Other Forms of ADR*, (1998) 14 *Arbitration International* 183; the best example for Conflict system design is the Dispute Resolution adviser used in the construction industry in the Far Eastern countries especially in Hong Kong, *see* Hill, at 183-84.

⁹⁹ *See Id.*, at 183.

¹⁰⁰ *See* Hill, *supra* note 98, at 183.

¹⁰¹ "Informal conflict system design is pervasive; its results are used on a daily basis by spouses, parents and children, supervisors and employees, citizens and the police and so forth.", *see* Hill, *supra* note 98, at 183.

¹⁰² "Examples include the ombudsman system, the differentiated court procedures that apply to different types of disputes in many jurisdictions, labor grievance systems in many US companies, the FIDIC engineer and the Dispute Resolution Boards used in many construction contracts.", *see* Hill, *supra* note 98, at 183 & nn.24-25.

17. Partnering

This is a process, used especially in the construction industry, that brings together all parties – i.e. owners, architects, contractors, subcontractors, engineers and project managers, lawyers - before the commencement of the project, with the goal of avoiding disputes once the work commences and proceeds. One can say that partnering is a dispute avoidance system in order to reduce possible risks to a minimum degree. In this context, “instead of drafting a dispute resolution clause by working backward from potential litigation, a dispute avoidance system is created by working forwards from the nature and detail of the contract and the project.”¹⁰³ The parties may agree on different types of dispute resolution mechanisms as a dispute avoidance system. The bottom line of partnering is cooperation of the parties with each other.

18. Baseball (Last-Offer) Arbitration

This process has different names such as ‘last offer arbitration’, ‘arbitration limited to arbitrator’s choice’ or ‘baseball arbitration. Parties negotiate to the point of impasse, then respectively submit a final offer to an arbitrator. This process is similar to the arbitration process. However, the arbitrator's award is limited to one of the two final offers submitted by the parties, that is the reason why this process is named as the arbitration limited to arbitrator’s choice.¹⁰⁴ In other words, in this type of arbitration, the award is not limited to the offers submitted by the parties, rather arbitrator’s offer carries importance.

19. Pre-Arbitral Referee

This mechanism is mostly used during the process of performance of international investment contracts. In order to avoid disputes arising out of legal, financial and technical matters in these types of contracts, contracting parties interfere to the contract. The parties set out and fix the rights and obligations of each other, preserve

¹⁰³ See Hill, *supra* note 98, at 182, “Partnering is a way of doing business (a management philosophy) that emphasizes an environment of trust, teamwork, and cooperation among various parties and groups of parties. It is generally considered as a means of avoiding, minimizing and managing disputes rather than merely a method of alternative dispute resolution. The concept is to establish working relations among the parties through a mutually developed, formal strategy of commitment and communication where trust and teamwork prevent disputes, create a cooperative bond, and facilitate the completion of a successful project.”

the evidence, and settle the dispute through amicable way. During that process parties may demand protective and provisional measures from the courts of the country where the project is done. However, most of the time it is thought that this procedure of recourse to courts irritates the ongoing relationship between the parties. In this context, once the dispute arises during the performance stage of an international contract which requires an immediate interference, parties refer to an arbitrator who settles the dispute temporarily. This neutral is called as the pre-arbitral referee. Since most of the time these types of disputes are settled through amicable way by the pre-arbitral referees, recourse to arbitration is not needed.

The difference between an arbitrator and a pre-arbitral referee is clear that a pre-arbitral referee only interferes to the disputes, which arise during the pre-arbitration or pre-litigation. Furthermore, a pre-arbitral referee only settles the dispute temporarily. In doing these, the functions of a pre-arbitral referee may resemble to a judge or an arbitrator.¹⁰⁵ ICC has also rules regulating pre-arbitral procedure.¹⁰⁶

20. Non-Binding Arbitration

This type of ADR process is sometimes referred to as "trial-run" arbitration or adjudication. The bottom line of this process is that "an arbitrator appointed by the parties may make a finding on a particular aspect of the case, or make a reasoned award based on a limited review of documents submitted by the parties and other evidence."¹⁰⁷ Although the decision of the arbitrator is not binding, the parties initially ask for the advice of the arbitrator and may agree to accept it. In this connection, one can argue that the parties mutually agree beforehand that the decision of the arbitrator will not be binding upon them.

21. Dispute Review Boards

This type of ADR process is generally used in joint venture and construction agreements. It has a contractual basis. The parties decide to set up a board comprised of, generally, three members selected by the parties i.e. the owner and contractor. The board is set up after a contract is awarded but before disputes arise. The board

¹⁰⁴ For similar statement see Şanlı, *supra* note 8, at 375.

¹⁰⁵ For a detailed information see Şanlı, *supra* note 8, at 367-69.

¹⁰⁶ For the rules ICC, see ICC Pre-Arbitral Referee Procedure (Rules in force as of January 1, 1990), ICC publication.

reviews the work of the joint venture and construction, observes problems and receives information on a regular basis and in the event a dispute arises, since it has a full knowledge of the background of the events, offer immediate solutions at the job site. The bottom line of this process is that "this 'real time' dispute resolution process allows on-site experts - who visit the job site regularly and are advised regarding the project's progress - to recommend settlements quickly, before adversarial attitudes can grow and harden."¹⁰⁸ Since the board visits the construction site and receives full information regularly, its function differs from a mediator.¹⁰⁹

22. Technical Expertise

In this type of ADR process, a technical expert determines a technical matter at hand and submits his expert report. One of the biggest differences between technical expertise and other types of ADR processes is that a technical expert does not render a decision like an arbitrator or a judge. The parties may or may not agree to accept the report of the technical expert. Even in the event that the parties decide that the report is binding upon them the report of the expert does not carry the characteristic of an arbitral award. This is due to the reason that the technical experts' reports can only determine a specific technical matter. However, it is true that if the parties decide to litigate or to arbitrate, the report of the technical expert shortens the process and minimizes the costs of litigation and arbitration.¹¹⁰

In Turkish law, technical expertise has been regulated under the Turkish Civil Procedure Law ("HUMK") Article 287. In this connection, technical expertise has been accepted on the basis of evidence agreements. According to HUMK Article 287(2), parties may mutually agree upon an issue that with what kind of evidence they will prove a specific matter. To this end, technical expertise constitutes a clear example of evidence agreements according to Article 287.¹¹¹

¹⁰⁷ See Hunter et al, *supra* note 2, at 66.

¹⁰⁸ See Practising Law Institute Litigation and Administrative Practice Course Handbook Series Litigation, Introduction to the Terminology of Dispute Avoidance and Resolution Definitions, 605 PLI/Lit.13

¹⁰⁹ For a similar statement see Akıncı, *supra* note 20, at 106.

¹¹⁰ For detailed information see Şanlı, *supra* note 8, at 359-62.

¹¹¹ For detailed information see Şanlı, *supra* note 8, at 361 & n. 340.

ICC has rules regulating technical expertise process.¹¹² In general, unless the parties decide otherwise, reports of the technical experts are non-binding upon the parties. However, the parties may subsequently decide that the technical expert's report will be binding before the arbitration tribunals or courts during the future hearings. In this case, as a bottom line, one can argue that, notwithstanding the non-binding characteristic of this type of ADR process, technical expert's report will be treated as direct evidence.

23. Adjudication

This type of ADR is mostly used in the construction industry. In this process, an adjudicator gives a decision on disputes once they arise in the course of a construction contract. The parties have the option of rejecting the decision and proceeding for arbitration within a certain time period and/or after completion of the contract. In England, "there is statutory provision under the Housing Grants Construction and Regeneration Act 1996 (Part II) for adjudication of disputes arising in construction contracts."¹¹³

24. MEDALOA

This is a relatively new concept, originated in the USA. It is the abbreviation of Mediation and Last Offer Arbitration. In the event, at the end of mediation a substantial difference persists over monetary issues, mediators may encourage the parties to make a final effort in order to bridge the gap, then the mediator may choose a monetary award between the last demand of the claimant and the last offer of the respondent.¹¹⁴

¹¹² The Rules of Technical Expertise of the ICC (New Rules in force as of January 1, 1993), ICC Publication No. 520, Paris 1993.

¹¹³ For further information see www.cedr.org

¹¹⁴ For further information see The European Telecommunications Platform Report, Inventory of Dispute Resolution Mechanisms, p. 86.

CHAPTER III

MEDIATION: AN EFFICIENT ALTERNATIVE WAY OF RESOLVING DISPUTES

I. WHAT IS MEDIATION?

Mediation is an alternative dispute resolution procedure, which has grown dramatically in recent years and whose origins go back to ancient practices.¹¹⁵ The intervention of third parties' in disputes derives from religious tradition. Although not always appreciated due to the protection of criminal, the use of churches as places of sanctuary evidences the place of mediation in the Western Culture. In more recent times, the work of the Quakers in the field of international peace negotiations such as mediating settlements between disputing parties draws attention. Rabbis and rabbinical courts have always provided a means of resolving disputes between members of Jewish faith, this often being connected with rabbinical interpretation of the Torah. In the Islamic culture, mediation is a preferred approach of the Prophet and the tradition is particularly apparent in the role of the *quadis*, specialized intermediaries who interpret and apply shari'a law, often attempting to preserve social harmony by reaching an agreed upon solution to a dispute. In the Chinese and other Far Eastern cultures, both Confucian and Buddhist traditions encourage dispute resolution through compromise rather than coercion. In these cultures litigation is seen as a last resort which involve considerable loss of face. In Japan mediation is embedded in the business culture, where intermediaries as used as introducers, *shokai-sha*, and as mediators, *chukai-sha*, to smooth business relationships.¹¹⁶

In general terms, mediation is a type of negotiation in which a mediator, a neutral third party who is a person with no direct stake in the dispute, assists the parties to reach a settlement through defining and clarifying the issues, considering options, overcoming

¹¹⁵ For a similar statement see Carroll & Mackie, *supra* note 24, at 5 (stating that "The wassit as facilitator in Arab business relations, the community elder as mediator in Chinese society, the judge with a duty to promote settlement in Swiss, German and Japanese practice – all of these attest globally to long recognized benefits of third party facilitation as an alternative to adjudication in defusing unnecessary conflict and overcoming deadlock.")

¹¹⁶ For detailed information see www.adrgroup.co.uk

barriers to communication and exploring alternative ways of settling their dispute. Another definition has been given as “the intervention in a negotiation or conflict of an acceptable third party who has limited or no authoritative decision making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.”¹¹⁷ One of the most important features of this process is that a mediator is used as a facilitator.

It is true to say that ADR, and in particular mediation, is today at the epicenter of the dispute resolution revolution. Different cultural approaches give different value to mediation. For instance, “Americans might value its commercial flexibility and deal making character, [on the other hand] Japanese its amicable settlement emphasis and face saving avoidance of imposed decision.”¹¹⁸ If successful, mediation has an enormous speed and cost advantage over litigation and arbitration. One can argue that the effectiveness of mediation depends on the strategy employed.¹¹⁹ Mediation can be utilized for the resolution of all types of private commercial disputes arising in investment and trade, construction, employment, financial services, franchising, intellectual property, manufacturing, oil and gas, family law and many other areas. However, one can also argue that mediation is not suitable for all kinds of disputes.¹²⁰

In the private law aspect, mediation has been first promoted for domestic disputes, then it was found vital for international business situations. Especially, in the common law jurisdictions in order to avoid the costs and delay of the adversarial legal system, mediation has become the core of practical experience, in some types of disputes, of commercial and civil litigation actions. In mediation some disputes that may seem intractable, can be settled within a few days at a less expensive cost than going to court.¹²¹ The mediator’s skills and experience help the parties to move away from trying to demonstrate that they are right to working out how they can resolve the problem. To this end, the mediator helps the parties to achieve a settlement by focusing on what is to be done rather than on who is at fault. A mediator brings the skills for managing the critical process, such as “the ability to diagnose an impasse as

¹¹⁷ See Christopher W. Moore, *The Mediation Process*, Jossey – Bass, 1996; see also www.adrgroup.co.uk

¹¹⁸ See Carroll & Mackie, *supra* note 24, at 93.

¹¹⁹ For detailed information on strategies, purpose and preparation see Staci M. Yandle, *Strategies in Mediation*, WINTER 2001, ATLA-CLE 205 (2001).

¹²⁰ For detailed information see *infra subpart D*.

¹²¹ It is stated that the success rates around 90 % in mediation see Maggie Kennedy, *Mediation-A Worthy Alternative*, Croner. CCH Care Home Briefing, 1 June 2000.

the structured negotiation unfolds.”¹²² The skills of a mediator are crucial in that “[he] guides the disputants by posing open-ended and focused questions, re-framing issues and using strategies to defuse tensions and overcome impasses.”¹²³ A very classic example of how mediation works can be given as;

“Two cooks need the only orange in the kitchen. One cook wants orange juice for a fruit drink and the other needs orange rind for cake icing. The mediator helps them get beyond their stated position (need of orange) to discover their real interests (orange juice and orange rind). The problem can be re-framed into ‘who gets the orange at what time’ If the second cook gets the orange after the juice has been squeezed out, both can satisfy their real interests.”¹²⁴

In mediation process “the parties can agree on whether or not the mediator is to consult with them separately, or only to conduct joint negotiations.”¹²⁵ The mediator listens the parties either in joint sessions or in private meetings. It is the term caucus, which a mediator and a party privately meet during the mediation process. It is decided by the mediator whether to caucus, “when emotions are high or there is a need to privately discuss difficult concerns.”¹²⁶ The mediator may also choose at any time during the process to caucus and generally mediators hold caucuses with each party to emphasize neutrality and to give each party an equal chance to talk individually. This will help mediation proceed more effectively and permit the mediator to speak more openly, question each person about options and identify the obstacles to agreement. Through this way, with the help of mediator each party can determine their position more realistically and reveal important information in private sessions. If the parties or the mediator do not wish to meet at caucus sessions, they may meet at plenary sessions where the business representatives and usually their lawyers come together to explain their cases. Usually, they have met before privately with the mediator.

The mediation would not exist without a dispute. It is not a mediator’s duty to find fault or apportion blame. In this context, the mediator’s role is to show the parties in dispute that they understand how and why a dispute has arisen. Therefore, a

¹²² Harold I. Abramson, Time to try Mediation of International Commercial Disputes, 4 *ILSA J. Int’l & Comp. L.* 323 (1998).

¹²³ See Abramson, *id.*, at 324.

¹²⁴ See Allyson Weir, *Mediation a Consumer’s Guide*, American Bar Association (ABA), p.2, 1995.

¹²⁵ See Hunter et al., *supra* note 2, at 65.

¹²⁶ See Weir, *supra* note 124, p. 6.

mediator should be utmost careful when reviewing the case at hand and distinguish the terms conflict and dispute.¹²⁷ At this point, it would be helpful to explore what the theoretical bases of mediation are. These are "(1) information exchange without leakage, (2) interweaving of information exchange, (3) characteristic matching, (4) de-conflicting, (5) solutions that are not bounded by judicial constraints."¹²⁸

The mediator¹²⁹ generally functions as a channel of communication between the parties. He does not make judgments on the merits of the case. In other words, he gives trust to each party about themselves to disclose information without weakening their bargaining power. This type of exchange of information can be either positive¹³⁰ or negative¹³¹. Information exchange through a mediator facilitates the parties' efforts to reach a solution. Otherwise, "if they negotiate directly one will have to reveal the information first thus helping the other party, which is not desirable."¹³² In this regard, one can argue that as long as the parties have trust to each other the result of mediation will always be positive. The exchange of information in litigation, arbitration and mediation differs.¹³³ In this connection, one can argue that the duty of a mediator is more difficult than an arbitrator or a judge. This is because, a mediator has to expose information from the parties by asking questions, meeting separately and therefore, facilitating communication between them. Eventually, it is the

¹²⁷ For discussion on the terms and information see www.adrgroup.co.uk

¹²⁸ See Hill, *supra* note 98, at 176.

¹²⁹ For the general qualities of a mediator see Carroll & Mackie, *supra* note 24, at 38 (stating that "There are a number of general qualities, some have been referred to, that one would look for: (1) background and status, (2) track record, (3) style of approach, (4) credibility, (5) humility, (6) diplomatic approach, (7) intellectual rigor, (8) integrity, (9) patience, (10) persistence, (11) energy."); see also Michael Pryles, *Assessing Dispute Resolution Procedures*, 7 *Am. Rev. Int'l Arb.* 267, 277-8 (1996) (summarizing the skills of a mediator as "listening, observing non-verbal communications, helping parties to hear, questioning, summarizing, acknowledging, mutualizing, re-framing, managing conflict and venting emotions, managing the process, lateral thinking, encouraging a problem-solving mode, centering, being silent, constructive facilitation.")

¹³⁰ For detailed information, see Hill, *supra* note 98, at 177 (stating that "positive: the parties inform each other of the true business interests underlying their negotiating positions: this approach is typical of facilitative mediation.")

¹³¹ For detailed information, see Hill, *supra* note 98, at 177 (stating that "negative: the parties obtain information on the weakness of their cases; this approach is typical of evaluative mediation.")

¹³² See Hill, *supra* note 98, at 177.

¹³³ See Hill, *supra* note 98, at 178 (stating that "The exchange of information in litigation follows a fixed procedure, either specified by the law (in the case of court proceedings), or agreed by the parties or specified by the arbitral tribunal (in the case of arbitration). In almost all cases, information exchanges of writings (briefs or pleadings), documents and witness statements. By contrast, the exchange of information in mediation is similar to that of negotiation: one party informally provides the other with a small piece of information and proceeds only after the other party has responded, either by itself providing some other information. The process of information exchange is highly dynamic and develops, under the guidance of the mediator, on the basis of the parties' mutually developing confidence in the possibility of finding a negotiated solution.")

mediator's role to gather correct and unrevealed information from the parties and reach a solution agreeable for them. In mediation it is also important to match each party's needs with the other's needs. In this context, when there is strong emotional involvement in a dispute, a compromise by a party in form of an apology may help the parties to solve the dispute. Furthermore, in these types of disputes the mediator should identify the differing interests in order to reach a workable solution. In complex disputes a mediator acquires information from both parties and matches their characteristic.¹³⁴ Another theoretical base of mediation is a military jargon of de-conflicting.¹³⁵ In mediation, the meaning of de-conflicting is "changing the frame of reference of the dispute from a zero-sum, 'I win, you lose' situation to a positive sum, 'I win, you win' situation."¹³⁶ To this end, in de-conflicting parties try to convince each other of the mutual benefit of a workable and agreeable solution rather than to convince the mediator of their just cause. This situation is also called as the 'win-win' situation. Another feature of mediation is that a mediator is not bound by the judicial constraints. In this context, a mediator may reach a decision that go beyond what the parties asked for.

The time of the use of mediation is crucial. It is sometimes argued that mediation can only be used before the beginning of litigation or arbitration.¹³⁷ However, one can argue that mediation can be used either before the process of litigation or arbitration or mostly, in the course of litigation.¹³⁸ This is because the basis of mediation is to facilitate the communication between the parties; therefore it should be used at the earliest stages of litigation or arbitration.

There are three main ways in which mediators assist parties in reaching their own decision which correspond to three types or models of mediation practiced throughout the world. Generally, a mediator evaluates the cases in a broad sense, in other words, they "assume that if the mediation goes beyond the narrow issues that normally define

¹³⁴ For detailed information on Characteristic Matching see Hill, *supra* note 98, at 179-80.

¹³⁵ "In the US Air Force usage, it refers to the process of planning flight paths so as to avoid mid-air collisions." See Hill, *supra* note 98, at 176 & n.13; see also for a similar concept 'empowerment' Robert Baruch A. Bush, 'Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation', 41 Fl. L. Rev. 252 (1998).

¹³⁶ See Hill, *supra* note 98, at 180.

¹³⁷ See Hill, *supra* note 4.

¹³⁸ For a similar view, see Hill, *supra* note 4. (stating that "While mediation can, at times, help to resolve disputes before they are litigated, mediation is often used to resolve them during the course of litigation, before the final award is rendered.")

legal disputes.”¹³⁹ One can argue that this nature of mediation is the most important point that makes the difference between other types of dispute resolution and mediation.

A. Facilitative mediation

The mediator endeavors to facilitate communication between the parties and to help each side to understand the other’s perspective, position and interests in relation to the dispute. The mediator assumes that the parties may develop better approaches and solutions through communication, therefore, he enhances and clarifies communication between the parties in order to help them to decide what to do. Facilitative mediation is a mediation in which the mediator does not evaluate the validity of each party’s position, but helps the parties to find common interests and a mutually beneficial solution. There are two strategies in facilitative mediation that a mediator should pursue either of them.

a. Facilitative-Narrow

It is the strategy of a facilitative mediator that he plans to assist the parties to be more realistic in their claims and litigation situations. In this strategy, the mediator does not use his assessments, predictions, and proposals and does not apply pressure. The mediator “believes that the burden of decision should rest with the parties”¹⁴⁰, therefore, he only assists the parties to realize via asking questions preferably in private caucuses, their legal positions, and eventually the consequences of a possible non-settlement such as recourse to courts and the time needed in getting a decision from a court.

b. Facilitative Broad

Unlike facilitative narrow strategy, in facilitative broad strategy the mediator helps the parties define their problems, understand and resolve them. In this strategy the mediator encourages them to consider underlying interests rather than positions and assists them generate and assess proposals designed to accommodate those interests.¹⁴¹

¹³⁹ See Leonard Riskin, *Mediator Orientations, Strategies, and Techniques*, 12 *Alternatives to High Cost Litig.* 111 (1994).

¹⁴⁰ See Riskin, *id.*, at 112.

¹⁴¹ For detailed information see Riskin, *id.*, at 113.

B. Evaluative mediation

The mediator provides a non-binding assessment or evaluation of the dispute. Then the parties are free to accept or reject this assessment as the settlement of the dispute.¹⁴²

The mediator evaluates the validity of each party's position, and claims in joint sessions or mostly in private sessions *i.e.* the caucuses. He provides direction as to the appropriate grounds for settlement. After the evaluation of the parties' positions the assessment of the mediator changes a party's perceived power, that is, the perceived strength of the party's rights. This is because both parties and the mediator realize the situation and the rights of the parties.

a. Evaluative Narrow

In this strategy the mediator carefully reviews the documents of the parties. Then the mediator helps the parties to understand the strengths and weaknesses of their claims. One can argue that due to the background education, experiences, training, many mediators, mostly judges, prefer an evaluative narrow orientation. One can also argue that this is because in litigation, mostly, judges do not decide beyond the demands of the parties set in their briefs.

b. Evaluative Broad

In evaluative broad strategy, after reviewing the documents of the parties, the mediator assists the parties understand their positions and options. The mediator proposes solutions designed to accommodate the interests of the parties. In addition to these, the mediator drafts the agreement. This strategy differs from facilitative narrow strategy in a way that "in the mediation of a contract dispute between two corporations, for instance, while the facilitative narrow mediator might propose a strictly monetary settlement, the evaluative broad mediator might suggest new ways for the firms to collaborate."¹⁴³

C. De-Conflict¹⁴⁴

This type is sometimes called as non-adversarial mediation. Its bottom-line is to change the situation from conflicting to an equal winning situation. In other words, the mediator "changes the frame of reference of the dispute from a zero-sum 'I win,

¹⁴² For further information see www.wipo.int/mediation

¹⁴³ See Riskin, *supra* note 139, at 113.

¹⁴⁴ For detailed information, see Hill, *supra* note 4.

you lose' situation to a positive-sum, 'I win, you win.'"¹⁴⁵ This type is distinguished from other types of mediation. In other words, the mediator "does not come up with a compromise proposal and then attempt to sell it to the parties, [rather] tries to help the parties themselves to find imaginative/often unforeseen/alternatives for resolving the dispute."¹⁴⁶ In this context, one can argue that de-conflict or non-adversarial mediation differs from evaluative mediation on the grounds that the mediator only encourages, not impose a solution on, the parties to find a solution by themselves in the presence of a mediator. In this connection, a mediator should integrate to bargain in order to balance the competing interests of cooperation and competition.¹⁴⁷ To this end, both parties seek to convince each other, not the mediator, to reach a solution mutually beneficial for themselves.

II. HOW DOES MEDIATION RELATE TO THE LAW?

Mediation does not rely on specific points of law. People solve their own problems by looking to the future and considering their ongoing business or personal relationships instead of finding fault or blame. Unlike mediation, courts make judgments based upon the rules of law and rules may limit what can be considered. In mediation, a mediator goes beyond the issues what parties' point in order to resolve the impasse. Courts may be unable to address the genuine issues in a dispute and may not focus on individual circumstances. One of the benefits of a court order, the enforceability, can be achieved through a written agreement indicating that it is intended to be legally binding and then be filed in court.

¹⁴⁵ See Hill, *supra* note 4.

¹⁴⁶ See Hill, *supra* note 4, (According to Hill a non-adversarial mediator should have the following skills: "Listening, reading body language, drawing distinction between questions for clarification and substantive comments, breaking disputes into manageable chunks and resolving each chunk separately, postponing discussion of very tough issues to late in the mediation session, being fair and impartial, keeping the discussion focused on the issues, restating points in appropriate language to help each party understand the other's point of view, encouraging the parties to explore changes in the shape of an emerging consensus, restating in neutral language those points on which the parties appear to agree, insisting that any agreements be captured, using humor to bring people together.") .

¹⁴⁷ See *infra* note 171, at 12 (stating that "Integrative bargaining is a more cooperative form of negotiation because it places greater emphasis on the parties' interests thereby creating a "win-win" situation. Distributive bargaining, in contrast, is a more competitive form of negotiation because it focuses on distributing a preexisting sum of resources, thereby creating a "win-lose" situation. Dispute resolution appears easier through integrative bargaining because it provides more means of reaching a resolution. The introduction of mediation may shift the bargaining from distributive to integrative and make resolution more feasible. Even though integrative bargaining often leads to resolution, agreements are not guaranteed. When the parties cannot reach a resolution, the mediator performs several functions to break the stalemate. The mediator may gather and provide information, increase

Mediation if successful, results in a resolution by an agreement of the parties. This may not be the correct decision or a decision according to the law but the resolution will in general be fair because it will be consented to by both parties. "The mediation is less hemmed-in by rules of procedure or substantive law and certain assumptions that dominate the adversary process."¹⁴⁸ In mediation ultimate authority resides with the disputants not with the rule of law or mediator. The conflict is seen as unique and therefore less subject to solution by application of some general principle. No precedent governs the procedure. In this regard, "whatever a party deems relevant is relevant."¹⁴⁹

III. WHAT ARE THE CHARACTERISTICS OF MEDIATION?

Although these characteristics are similar in every ADR mechanisms, it is possible to make a general observation only of mediation. Mediation is a voluntary and non-binding process. It requires agreement and advance planning in that no party can be forced to mediate whereas it can be forced to litigate. The non-binding, voluntary and non-threatening nature of mediation enables each party to be more open to new ideas, more creative in their approach and more willing to consider compromises. Mediation is informal, cost efficient, confidential, voluntary, and non-binding and "gives the parties control over the outcome of the process."¹⁵⁰ Mediation is an interaction between people. In this regard, the communication between the parties should be pure crystallized during the process. For an effective and fruitful mediation "the presence of party representatives with the authority to negotiate a settlement [and] the willingness of the parties to find a solution outside the courtroom"¹⁵¹ are vital.

Confidentiality and privacy are the key aspects of mediation. Although, confidentiality is an advantage of mediation, it is also a unique characteristic of it. Nothing said in the mediation and no documents can be disclosed outside the mediation process.¹⁵² In other words, these cannot be referred to in evidence in

communication between the parties, monitor the negotiations and offer new and creative ideas for settlement options.")

¹⁴⁸ See Leonard Riskin, *Lawyers and Mediation*, 43 *Ohio St. L.J.* 29, 34 (1982).

¹⁴⁹ See *Id.*, at 35.

¹⁵⁰ See Abramson, *supra* note 122, at 325.

¹⁵¹ See Hill, *supra* note 4.

¹⁵² For confidentiality and mediation communication see David A. Ruiz, *Asserting a Comprehensive Approach for Defining Mediation*, 15 *Ohio St. J. on Disp. Resol.* 851, 882 (2000).

litigation or arbitration. This confidentiality allows the parties to trust the mediator so they can discuss openly all aspects of their case. It has two distinct but related categories. One of them is that the confidentiality of matters disclosed to the mediator, which relies upon the mediator's professionalism and training. The other is the entire process of being confidential. That is to say that the meeting is essentially without prejudice and it is important that all participants understand and respect this principle. In its use in the US legal system, this is regulated by the Federal Rules of Evidence. In this context, "the rule of evidence giving a limited privilege status to offers of compromise provides some protection for written statements in advance of mediation or oral statements made during settlement negotiations."¹⁵³ However, it is argued that "this rule may not necessarily protect statements made during mediation from being used for impeachment purposes or from being used in proceedings where mediation participants were merely witnesses in later litigation."¹⁵⁴ Protection of the statements may occur under client-attorney privilege, however, the presence of other persons during mediation caucuses may constitute a waiver of this privilege.¹⁵⁵ In mediation proceedings, it is always suggested that parties should enter confidentiality agreements¹⁵⁶ in order to avoid uncertainties. However, it is also argued that the enforceability of the agreements is still not assured through those agreements.¹⁵⁷

¹⁵³ See Grenig, *supra* note 28, § 2.36.

¹⁵⁴ See Donovan Leisure Newton & Irvine, *supra* note 76, § 7.22.

¹⁵⁵ For detailed information see Grenig, *supra* note 28, § 2.36; see also Donovan Leisure Newton & Irvine, *supra* note 76, § 7.23.

¹⁵⁶ A Confidentiality provision—Comprehensive form

"(1) Mediation sessions shall be private. (2) All records, reports or other documents considered by the mediator shall be confidential. (3) The disputants agree that the provisions of [statute] shall apply to any mediation conducted hereunder. (4) The disputants agree that the mediator shall not be compelled to divulge confidential materials or to testify about the mediation in any adversary proceeding or judicial forum. (5) The disputants agree to maintain the confidentiality of the mediation and shall not rely on , or introduce as evidence in any arbitration, judicial, or other proceeding: (a) views expresses or suggestions made by the other party with respect to a possible settlement of the dispute; (b) admissions made by the other party during the mediation proceedings; (c) proposals made or views expressed by the mediator; or (d) the fact that the other party had or had not indicated willingness to accept a proposal for settlement made by the mediator. (6) Paragraphs 3 through 5 shall apply to anything said, done or occurring in the course of the mediation, including any private caucus or discussions between the mediator and any party or counsel before or after the joint mediation session. There shall be no stenographic record of the mediation process, except to memorialize a settlement record. (7) The mediation process is to be considered settlement negotiation for the purpose of all state and federal rules protecting disclosures made during such conferences from later discovery or use in evidence. All conduct, statements, promises, offers, views and opinions, oral or written, made during the mediation by any party or a party's agent, employee, or attorney are confidential and, where appropriate, are to be considered work product and privileged. Such conduct statements, promises, offers, views and opinions shall not be subject to discovery or admissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties. Provided, however, that evidence otherwise subject to discovery or admissible is not excluded from discovery or

Mediation process is voluntary. With the increasing demand on fast and sound resolution of business disputes, in most commercial contracts it is stipulated that mediation is to be attempted first in the event of a dispute. One can argue that parties can work out their problems by a healed and expanded business relationship rather than a severed one. Any of the parties may leave the process at any time and recourse to litigation or arbitration. Although rarely seen, the mediator has also the right and the authority to terminate the process. However, parties should consider that unless there is a real belief that going to litigation is a preferable option to the mediation process, grand gestures should be avoided.

Mediation also forces the disputing parties to cooperate with each other and also with the mediator. Therefore, it has a collaborative nature. Parties are encouraged to work together to solve their problems and to reach what they perceive to be their best agreement.

“ADR and, naturally, mediation does not provide a mechanism to obtain a binding result if it did it would no longer be ADR but arbitration.”¹⁵⁸ The mediator has no authority to impose his decision on the parties. The mediator assists the parties to reach a mutually beneficial, workable and agreeable solution for themselves that is whether to settle and on what terms. Its role is advisory and resolution of the dispute rests with the parties themselves, that is to say that, unless the parties agree otherwise, the decision of the mediator does not bind the parties. In other words, unless formulated in formal agreement, the mediated settlement is non-binding. If any party is not satisfied with the result, that party may not sign a settlement agreement and recourse to binding forms of dispute resolution. “Where authorized by court rules and applicable law, mediation agreements achieved during pending litigation may be entered as court judgments.”¹⁵⁹ Furthermore, “if the mediation concludes in an agreement, that agreement, if it meets otherwise applicable law concerning the enforceability of contracts, is as enforceable as a contractual agreement.”¹⁶⁰ In other words, traditional contract principles control. In this connection, even though mediation is a non-binding procedure, in the event that the parties mutually agree to

admission in evidence simply as a result of it having been used in connection with this settlement.” See Grenig, *supra* note 28, § 2.37.

¹⁵⁷ For detailed discussion see Donovan Leisure Newton & Irvine, *supra* note 76, § 7.25.

¹⁵⁸ See Hunter et al, *supra* note 2, at 7.

¹⁵⁹ See Carrie Menkel-Meadow, The Silences of the Restatement of the Law Governing Lawyers: Lawyering as only Adversary Practice, 10 Geo. J. Legal Ethics 631, 662 (1997).

¹⁶⁰ See Meadow, *Id.*, at 662.

bind themselves with the final decision, then this agreement i.e. the decision is as enforceable as a contractual agreement. Finally, parties who agreed and signed the settlement agreement are bound to honor the said agreement and both parties have the right to bring an action for breach of this agreement in the event of non-performance by either side. A mediation settlement agreement can take two forms (i) binding commercial agreement, or (ii) consent award/court order.¹⁶¹ First form is the most common outcome. It can be enforced through resorting to litigation or arbitration. Second is rarely seen. If the dispute is already in arbitration or litigation, the parties may bale to return to that tribunal to seek the consent of judgment/award on the terms of the mediation settlement. One can argue that at the stage of agreement each party to the mediation must understand the outcome of the mediation process and follow all the conditions in good faith.

IV. WHEN IS MEDIATION APPROPRIATE?

The use of mediation in different areas enables many people such as businessmen, family members, neighbors, and students to resolve their disputes in a more peaceful way than the other dispute resolution techniques. However, not all of the disputes are appropriate to be resolved through mediation. Since mediation requires cooperation of both side cases involving deliberate, bad faith counterfeiting or piracy are unlikely to be appropriate. In this connection, mediation will be of limited value for an effective outcome of disputes where there is an urgent or unilateral rights protection.¹⁶² Also mediation will be of limited value where there is "legal or industry precedent or signal required from a decision e.g. over an important clause of an international franchise contract, [and where there is] formal legal proceedings need to be initiated before limitation period expire."¹⁶³ This is because mediation agreements do not establish who is right or wrong and a legal precedent cannot be set in mediation, to this end, it is rather set in litigation or arbitration. In this regard, one can argue that if a party wants to get the whole amount he is asking for from the adversary and in the event that there is no ongoing relationship, bypassing mediation and referring the case to court or arbitration is the best choice.

¹⁶¹ For detailed information see Carroll & Mackie, *supra* note 24, at 87-8.

¹⁶² "Urgent or unilateral rights protection. Where rapid protective action is required to protect assets, evidence or reputation e.g. abuse of intellectual property rights." see Carroll & Mackie, *supra* note 24, at 94.

¹⁶³ See Carroll & Mackie, *supra* note 24, at 94.

Mediation is best suited for disputes (1) in which a negotiated settlement is desired, or (2) where there is no requirement to set a legal precedent or example, or (3) where the parties wish to keep the proceedings confidential, or (4) tension and emotions are impeding communication, or (5) time and costs are concern *i.e.* the cost of litigation or arbitration will be high, or (6) when the disputants desire or need to maintain relations and can benefit by continuing to do business together after the dispute is resolved, or (7) when one of the parties wishes to maintain or to enhance its public reputation as a good and reliable business partner, or (8) when there are commercial matters in issue which are more significant than the strictly legal position, or (9) when the dispute centers around complex factual issues, it is much better that the factual issues are negotiated by the business people who are familiar with the industry, or (10) when neither party requires a determination of legal issues, since arbitration or litigation are the appropriate ways to get a determination, and finally (11) when there is difficulty communicating directly and when the parties are reluctant to reveal their real interests and positions to each other.¹⁶⁴

In this connection, business disputes including workplace disputes between partners and co-workers, contract disagreements, insurance claims, real estate disputes¹⁶⁵; community disputes including environmental and land use disputes¹⁶⁶; small claims disputes involving smaller amounts of money and neighborhood disagreements¹⁶⁷; interpersonal arguments, school or university issues and criminal cases¹⁶⁸; when its privacy is considered, due to the emotional specialty of divorce and child custody are also suitable for mediation.¹⁶⁹

¹⁶⁴ For detailed information, see Hill, *supra* note 4.

¹⁶⁵ For further information see Weir, *supra* note 124, at 8.

¹⁶⁶ For further information see Weir, *supra* note 124, at 8.

¹⁶⁷ See Weir, *supra* note 124, at 8.

¹⁶⁸ See Weir, *supra* note 124, at 9.

"Mediation for criminal cases may at first glance seem inappropriate, but even some cases that come into the court system as violent crimes are really disputes that might be solved by mediation. For example, if one neighbor punches another in a dispute and the police are called, the matter might get into the system as an assault, but the underlying issues are not really criminal. Mediation of some minor crimes can help unclog the courts and bring about restitution. Direct communication can be beneficial to both parties if they have an ongoing relationship. Some cases go to mediation after the defendant has been found guilty. Vandalism, passing bad checks, theft, and juvenile cases are sometimes sent to mediation."

¹⁶⁹ See Weir, *supra* note 124, at 8.

V. ADVANTAGES AND DISADVANTAGES

Mediation enables parties to develop a creative outcome. Furthermore, it allows the parties to discuss their concerns candidly, voice their opinion and introduce potential points for settlement. This is because a mediator facilitates their communication and suggests different solutions for their dispute without forcing them to accept his decision. This is simply that “the parties are free to adopt an unlimited range of solutions, and are not restricted to a cash award, so that the chance of reaching a mutually acceptable compromise is enhanced.”¹⁷⁰ One can also argue that interest is attributable to dissatisfaction with the cost, delays and length of litigation in certain jurisdictions. There is rapid settlement in mediation. Furthermore, with the involvement of a neutral expert as a mediator tends to focus the proceedings more clearly, and avoids the risk of encountering third parties who are unfamiliar with the technical and procedural issues. Since the parties will concentrate on the issues and process by themselves and not through their lawyers, the outcome will be much rewarding. Mediation is an informal process where the resolution of a dispute may be quicker and less expensive. Also, parties feel that their concern and positions are heard completely and dealt with fairly, regardless of the outcome. “Mediation may resolve virtually any type of conflict.”¹⁷¹ Mediation creates a “win-win” situation where all the disputing parties mutually agree to a suitable solution for their interests and needs. In this connection, mediation changes an adversarial relationship into a cooperative one, therefore, improving the relationship between the parties. In the event that mediation does not lead to solution, the parties may still take advantage of binding mechanisms such as arbitration or litigation. In this case, one of the advantages of mediation is that it has narrowed the disputed issues and structured the framework for future negotiations. At the same time, even though mediation fails, the disputing parties will have gone some way towards preparing themselves for subsequent proceedings such as arbitration or litigation. Another advantage of mediation is its speed. Disputes referred to mediation are resolved within few days.

¹⁷⁰ See Hunter et al., *supra* note 2, at 71.

¹⁷¹ See Julie Barker, International Mediation – A better Alternative for the Resolution of Commercial Disputes: Guidelines for a US Negotiator Involved in an International Commercial Mediation with Mexicans, 19 Loy. L.A. Int'l & Comp. L.J. 1, 9 & nn.48-9 (1996) (arguing that “conflicts are often based on individuals’ perceptions that their counterparts are not upholding their duties and responsibilities, [b]y imposing a neutral third party, mediation may often dispel and change these perceptions and lead to a quick resolution of the dispute, [o]nce the parties believe that their

Mediation is also much cheaper than litigation and arbitration. Since the process lasts within a few days, the cost is also much cheaper than the adjudicatory type of mechanisms. Mediation is suitable when there is an ongoing relationship between the disputing parties. In this regard, unlike in adjudicatory processes, as an advantage, when the parties refer to mediation, they will eventually maintain their business relationship. This is because the nature of the process comprises of a spirit of compromise and negotiation. Mediation's confidentiality protects the business reputation of the parties.¹⁷²

However, as disadvantage, referring to mediation does "not stop time running for limitation purposes."¹⁷³ Since mediation is a non-binding procedure, in order to make enforceable, parties, in case of agreement should sign a written settlement agreement, which is binding upon the parties. Another disadvantage may be that "under many systems of law, mere agreements to negotiate are not enforceable"¹⁷⁴ it is vitally important to incorporate a specific provision to force the other party to mediate.¹⁷⁵ Another disadvantage of mediation can be when mediation is mandatory. In this case, the parties will be required to pay for the mediation session, and eventually a barrier to access to the courtroom is created if the total cost of going to mediation consumes a significant part of the dispute resolution budgets of either or both parties.¹⁷⁶

An effective mediation clause in certain legal relationships¹⁷⁷, enables the parties to resolve their disputes effectively and in amicable way. One can argue that without a carefully drafted clause the parties are left to the uncertainties of international litigation in foreign courts. Unlike mediation, "international litigation is fraught with uncertainties about procedure, substantive law, and enforcement."¹⁷⁸ Therefore, when considering mediation to be applied to the applicable dispute an affective clause should be drafted. An effective clause should have five provisions. First, in order to avoid cross-cultural misunderstandings the definition of mediation should be given. This is because there are different styles of mediation such as "facilitative, evaluative,

positions have been accurately heard and discussed, tensions often diminish and a new receptivity develops, thus opening the parties' minds to a creative and consensual solution.")

¹⁷² For confidentiality *see supra* part III; for benefits of mediation *see also* Carroll & Mackie, *supra* note 24, at 12-26.

¹⁷³ *See* Hunter et al., *supra* note 2, at 76.

¹⁷⁴ *See* Hunter et al., *supra* note 2, at 76.

¹⁷⁵ "Such as a duty to appoint a mediator within a certain period" *see* Hunter et al., *supra* note 2, at 76.

¹⁷⁶ For more information *see* McEwen & Williams, *supra* note 10, at 872-77.

¹⁷⁷ *See supra* subpart IV.

transformative, bargaining, therapeutic and non-caucus.”¹⁷⁹ Second, “parties should establish a clear obligation to try mediation before resorting to an adjudicatory option such as arbitration”¹⁸⁰ or litigation. Two problems occur when drafting this provision. These problems are that “a reluctant party who is trying to avoid mediation and a party using mediation to unduly delay resorting to adjudication.”¹⁸¹ In this regard, a clear and objective clause, which is easy to comply with by both parties, should be appropriate. Third, parties should set out in the event that mediation fails whether the mediator can also serve as an arbitrator for the same dispute.¹⁸² Fourth, “parties are prudent to study and adapt an off the shelf set of mediation rules to serve the needs of the parties.”¹⁸³ Fifth, a mediation provision should be a part of a broader dispute resolution clause that includes a compulsory back up dispute resolution process, such as arbitration. This is because when mediation fails parties should be able to refer their disputes to a compulsory and binding dispute resolution system. In this connection, one can argue that mediation offers parties full control over both the process to which their dispute will be submitted and the outcome of the process.

VI. WHY IS MEDIATION USED?

Mediation is particularly valuable and desired when one’s dispute involves another party with whom one needs to remain in good terms. This may include family members, co-workers or business partners, landlords, tenants, neighbors, in short with whom you have an ongoing personal and business relationship. Mediation is used because not to run the relationship instead to save the relationships without destroying it. Furthermore, what is said during the mediation process cannot be revealed at a later court hearing or outside the mediation proceedings. This is confidentiality and this also helps people to use mediation. It often works better than traditional court intervention. The direct connection between the parties and the problem-solving process creates greater efficiency, solving the problems of increased transaction costs, delays in the judicial system, and the public perception of an unfair system. Mediation is more efficient because the outcome of any mediation is

¹⁷⁸ See Abramson, *supra* note 122, at 325.

¹⁷⁹ See Abramson, *supra* note 122, at 325.

¹⁸⁰ See Abramson, *supra* note 122, at 326.

¹⁸¹ See Abramson, *supra* note 122, at 326.

¹⁸² For detailed information and arguments see Abramson, *supra* note 122, at 326.

¹⁸³ See Abramson, *supra* note 122, at 326.

controlled by those who have the most complete view of the case. This is the parties themselves. They are inevitably the ones best equipped to resolve the problems created by the case. The parties control how they wish to state their own view of matters, and the mediator provides a safe environment in which to do so. Eliminating the restrictions of formal rules, the mediator encourages an open dialogue that focuses on the forces that have brought the parties into a dispute in the first place. In so doing, the mediator is a catalyst for initiating mutually acceptable solutions. Another ground for the use of mediation can be given as that in mediation the mediator does not follow formal rules of evidence, thus the parties may introduce anything that they deem relevant. This is called as the flexibility. This flexibility enables the parties to focus on their relationship in order to arrive at a true and ever lasting resolution to their dispute. In this regard, mediation allows for a cooperative environment.

A. What Does Mediation Do?

Mediation gives people a fast way to work out their differences while addressing everyone's needs and interests. Mediation is always less expensive than going to trial. Decisions reached in mediation are created by the parties, who are in conflict and not imposed on them by the mediator. In general, mediation encourages direct communication between the parties, helps people decide for themselves, allows for the expression of emotions, defuses anger, explores creative means of solving problems, promotes cooperation, preserves the strengths of an ongoing relationship.

Satisfaction from mediation can be facilitated in three ways. Party expectations,¹⁸⁴ process factors¹⁸⁵ and outcome factors¹⁸⁶. With regard to process factors, mediation gives the parties the opportunity to control the process. In this pattern, the parties have "the opportunity for meaningful participation in determining the outcome of the procedure (whatever it may ultimately be) and the opportunity for

¹⁸⁴ See Chris Guthrie & James Levin, A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute, 13 Ohio St. J. on Disp. Resol. 885, 888-9 (1998) (stating that "a party is likely to report high levels of satisfaction with mediation if it meets or exceeds her prior expectations. A party expecting mediation to save time and money will probably be satisfied with a mediation that results in a prompt and cost-effective settlement.")

¹⁸⁵ See *Id.*, at 889-91 (stating that "the mediator...is not authorized to impose a decision. [T]he mediator is only authorized to oversee a process in which the parties are responsible for developing their own agreement. [I]t is this unique process that is largely responsible for party satisfaction with mediation.")

¹⁸⁶ See *Id.*, at 895-97.

full self-expression.”¹⁸⁷ One can combine the early and recent views of process control in that mediation allows parties to shape substantive outcomes and to participate in the process.

B. What Is The Process Of Mediation?

Mediation is an informal process of dispute resolution with distinct stages. Mediation occurs in many styles, but mostly same process is followed such as intake interview, introduction stage, identifying the issues, exploring solutions, caucus, writing an agreement. Another style can be defined as “exchange of information on impasse, mediator exploration, negotiation, stalemate-entrenchment, breakout-breakthrough, settlement.”¹⁸⁸ First, the mediator gathers background information to assess whether the issues are appropriate for mediation and the parties are ready to mediate. Then the mediator opens the process with a statement comprised of introduction of the parties, explanation of the goals and the rules and an encouragement of parties to work in cooperation. Second, disputants make an opening statement with identifying the issues. At this stage, each party describes the problem and discusses personal goals, needs and interests. In this regard, this stage is different than presenting a case in court. Third, a joint discussion occurs where all the parties discuss the issues, mediator asks questions and focuses on a constructive discussion of the issues. Fourth, if it is needed, mediator discusses issues in private, in caucuses. In these sessions mediator explains the weaknesses and strong points of each party and presents new ideas for settlement. Fifth, after all these private or joint discussions, a joint negotiation occurs where all the parties try to find a final result. This stage is sometimes called “crosstalk.” Sixth, eventually, the process closes either with an agreement or non-settlement. The agreement may include the steps they will take if similar problems come up in the future, such as returning to mediation. At this stage, the mediator advises the parties their options and consequences of their next step. Mediation ends in four occasions. Mediation either ends in settlement, or is ended by a party, or is suspended or is ended by the mediator. When the mediation

¹⁸⁷ See *Id.*, at 890; for discussion between early and recent procedural researchers on process control see *Id.*, at 890-91 (stating that “early procedural researchers argued that parties valued process control primarily because it allowed them to shape substantive outcomes...[whereas] recent procedural researchers argue that process control is valued primarily because it gives parties a chance to have a voice and to participate meaningfully in the process.”)

ends in settlement parties sign an agreement of settlement, which is legally binding. Otherwise, they may recourse the case to either arbitration or litigation. This is possible if the mediation is ended by a party or by the mediator. The mediator ends the mediation if he believes that there is no further progress in mediation or a party is abusing the process. Parties may also suspend the mediation in order to get further information or assistance before passing to the next stage or when settlement is possible and then mediation resumes from the same point.

C. New Mediation Processes

One of the advantages of mediation as a process is its inherent flexibility, which enables an appropriate format for every case. There are variants to deal with these sectors.¹⁸⁹

a. Full mediation

In this type of mediation the process lasts a day, in which all issues of liability, causation and damages are settled at one sitting, at a fixed fee based on the value of the claim and the status of the mediator, with five hours capped preparation time (more if there are three or additional parties)

b. Fast Track Mediation

In this type time is limited to three hours with one-hour preparation time, especially suited for fast track case for a fixed fee including one hour's preparation.

c. Strategic Mediation

This type is for catastrophic cases. Here the mediator is appointed very soon after the accident to act as required during the life of a claim, facilitating discussions between the parties from the earliest stage of the claim on the liability, rehabilitation, settlement of the monetary issues, funding of major costs, enabling proper and efficient communication to minimize the claimant's sense of loss and making the best possible outcome attainable for a series of fixed daily rate fees.

¹⁸⁸ For detailed information on the process of mediation see Carroll & Mackie, *supra* note 24, at 69-81.

¹⁸⁹ For detailed information see <http://www.cedr.org>

VII. INSTITUTIONAL MEDIATION: SOME OF THE IMPORTANT ONES

1. INTERNATIONAL CHAMBER OF COMMERCE (ICC)

ICC is one of the three primary institutions¹⁹⁰ that provides conciliation and mediation services in the international arena. The ICC Arbitration Rules do not require an attempt at conciliation prior to commencing an arbitration and the adoption of the Conciliation Rules does not by itself require the parties to engage in ICC Arbitration if the attempt at conciliation is unsuccessful. ICC Rules are less detailed, however, they do not restrict the mediator go beyond the minimum necessary to ensure a fair process. The rules provide for the appointment by the ICC of a sole conciliator who is free to conduct the conciliation process as he/she thinks fit and who may suggest terms of settlement to the parties. Pursuant to Article 7, the parties may sign a settlement agreement accepting those terms and shall be bound by such agreement, or may choose to reject them. The process is entirely confidential and pursuant to Article 10(1) the conciliator may not act as arbitrator in any subsequent arbitration. Confidentiality is regulated under Article 11. The parties may also wish to include a separate conciliation clause in an agreement, though the recommended ICC Arbitration Clause contains a reference to Conciliation Rules.¹⁹¹

2. WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

By agreeing to submit a dispute to WIPO mediation, the parties adopt the WIPO Mediation Rules as part of their agreement to mediate. Those Rules have the following main functions. According to Articles 13 (a) and 18 (iii) the non-binding nature of the procedure. Article 6 defines the way in which the mediator will be appointed. According to Article 22 the way in which the fee of the mediator is determined. Articles 3 to 5 and 12 guide the parties as to the way in which the mediation can be commenced and the process can be established. Articles 14 to 17

¹⁹⁰ Other notable organizations are UNCITRAL and ICSID. There are also national organizations such as CPR, Netherlands Mediation Institute (NMI) and CEDR.

¹⁹¹ For more information on the procedure of ICC Rules of Optional Conciliation see ICC Publication No. 581, at 46-9 (1997); see also Şanlı, *supra* note 8, at 348-50.

provide the parties with assurances about the confidentiality of the process and the disclosures made during the process. Finally article 24 determines how the costs of the procedure will be borne by the parties.¹⁹²

3. UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

The conciliation rules were adopted by UNCITRAL in 1980. The use conciliation rules is recommended in disputes arising in the context of international commercial relations where the parties seek an amicable settlement. The UNCITRAL Rules are very detailed and complex, on the other hand the parties may modify or exclude any rule by agreement. The rules are not limited to business or international relationships. The parties appoint one or more conciliators by agreement and exchange brief written statements describing the nature of the dispute and the points in issue. The conciliator meets with the parties, either together or separately or both and may make proposals as to settlement at the end of the procedure and submit them to the parties for their observations. These terms may then be reformulated or the parties may use them as a basis for future negotiations. If the process succeeds, the parties will enter into a settlement agreement drawn up with the conciliator's assistance. While the conciliation process proceeds, parties cannot initiate other proceedings.¹⁹³

4. FEDERATION INTERNATIONALE DES INGENIEURS- CONSEILS (FIDIC)

FIDIC was established in 1913 in Lausanne, Switzerland. Generally, parties base their relationships on the standard agreements of FIDIC as general and private conditions and subsequently adapt these conditions to their relationships. World Bank, when financing projects directly or indirectly, generally, advises parties to

¹⁹² For more information on the WIPO mediation process see <http://www.wipo.int>; see 34 I.L.M. 559 (1995) World Intellectual Property Organization: Mediation, Arbitration, and Expedited Arbitration Rules-Recommended contract Clauses and Submission Agreements.

¹⁹³ For more information on the process of UNCITRAL Conciliation Rules see <http://www.uncitral.org>; see also Şanlı, *supra* note 8, at 350-51.

adapt the Rules of FIDIC. Article 67 of FIDIC Standard Agreement regulates the mechanisms for the settlement of disputes.¹⁹⁴

5. INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

In 1967 ICSID adopted Rules of Procedure for Conciliation Proceedings, pursuant to the 1965 Washington Convention. The Rules were substantially revised in 1984 and apply to investment disputes between contracting states and nationals of other contracting states. "Chapter 11 of NAFTA, which governs private investment disputes, refers opposing parties to the ICSID Rules if they are members of the ICSID Convention or to the UNCITRAL Rules upon the parties' election."¹⁹⁵ ICSID rules treat mediation as an option for dispute resolution. In this regard, the parties may use mediation as either a prerequisite or an alternative to arbitration. A tribunal may consist of a sole conciliator or any other uneven number of conciliators. Initially, the conciliator meets with the parties to seek their views on various procedural issues, including the language to be used in the proceedings ; the form of evidence to be produced ; and the time limits for the production of evidence. The parties then each file a written statement of its position, together with supporting documentation. Hearings are held private before the tribunal and witnesses and experts may be examined by the parties, under the control of the conciliator. At any stage in the proceedings, the tribunal may make recommendations to the parties to accept specific terms of settlement, or to refrain from specific acts that might aggravate the dispute. If the parties reach an agreement, the tribunal closes the proceedings and draws up a report of its conclusions. In the event of failure, the tribunal's report will record the position.¹⁹⁶ Turkey is also party to the Convention on the Settlement of Investment Disputes between States and Citizens of Other States. Turkey has ratified this Convention with 1988 dated and 3453 numbered Act .¹⁹⁷ Therefore, according to Articles 28-35, a Turkish party will also have the opportunity to benefit from the

¹⁹⁴ For further information on the Settlement Procedure of FIDIC see Şanlı, *supra* note 8, at 355-59.

¹⁹⁵ See Barker, *supra* note 171, at 16.

¹⁹⁶ See Şanlı, *supra* note 8, at 351-54.

¹⁹⁷ For the full text of the Convention see Official Gazette 6.12.1988 20011.

conciliation services of ICSID.

6. HONG KONG INTERNATIONAL ARBITRATION CENTRE (HKIAC)

Mediation in Hong Kong began in 1982 when the Arbitration Ordinance was amended to make specific reference to conciliation. In 1984, Trial Mediation Scheme was introduced to Hong Kong government as a method to attempt to settle contractual disputes. After the second amendment in the Arbitration Ordinance, it was decided that since the difference unclear between mediation and conciliation, conciliation should include mediation.¹⁹⁸ In 1999, the Hong Kong government prepared a new set of Construction Mediation Rules. This new set of Mediation Rules were published and widely accepted.¹⁹⁹ HKIAC mediation rules first define mediation (article 1) and the scope of application of the rules (article 2). Article 3 and 4 set the initiation procedure and responses. Articles 5 and 6 regulate the appointment and disqualification of a mediator. Articles 7 to 10 regulate the procedure. Confidentiality is regulated under article 12.

7. COMMERCIAL ARBITRATION AND MEDIATION CENTER FOR THE AMERICAS (CAMCA)

CAMCA was created jointly by the American Arbitration Association (the AAA), the British Columbia International Commercial Arbitration Center (BCICAC), the Mexico City National Chamber of Commerce and the Quebec National and International Commercial Arbitration Center. It is a private sector initiative flowing from an international treaty. North American Free Trade Agreement (NAFTA) provides for the encouragement and use of arbitration and other dispute resolution processes as the desirable means of resolving controversies.²⁰⁰ CAMCA procedures have been designed to provide commercial parties involved in the free trade area with

¹⁹⁸ See Arbitration Ordinance, Chapter 341, 2(1) and <http://www.justice.gov.hk>

¹⁹⁹ For more details see Christopher Wing To, Developments of the Hong Kong International Arbitration Centre, (2000) 28 IBL, 508.

²⁰⁰ For detailed information see www.adr.org; The NAFTA Art. 2022 obliges the parties "to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between the parties in the free trade area."

an efficient, international forum for the resolution of disputes and cases can be filed at any of the offices. The Rules address matters of the impartiality and challenge of mediators (articles 5 and 6, confidentiality article 12, privacy article 11), preparation for the mediation and identification of matters in dispute (article 10), termination of mediation (article 14) and expenses (article 18). The services of the Center will be in English, French and Spanish.²⁰¹

8. THE CENTER FOR DISPUTE RESOLUTION (CEDR)

CEDR is an independent and non-profit making institution, also aims to promote and encourage the use of ADR. It was established in 1990 in England. CEDR has links and joint collaboration agreement with the London Court of International Arbitration. According to this collaboration, parties may initially submit their disputes to CEDR and in the event of failure, the parties may refer the case to arbitration under the LCIA rules.²⁰²

9. INTERNATIONAL ARBITRAL CENTER OF THE AUSTRIAN FEDERAL ECONOMIC CHAMBER (WIRTSCHAFTSKAMMER SCHIEDSGERICHT)

The Conciliation Rules of Austrian Federal Economic Chamber have been adopted by the Board of the Austrian Federal Economic Chamber on 3 July 1991 with effect from 1 September 1991. They are not detailed. According to article 1, conciliation proceedings can be conducted where the Center may have jurisdiction as to the subject matter and they are not subject to the existence of a valid arbitration agreement. The request of the opening of conciliation proceedings shall be filed with the Secretariat of the Center. Article 2 regulates the initiation process. Article 3 and 4 regulate the procedure for the conciliation. Article 5 regulate the termination and

²⁰¹ For detailed information on the services of CAMCA see Edward C. Chiasson, QC, *The Commercial Arbitration and Mediation Centre for the Americas: NAFTA's Mandate for the Private Sector*, (1997) 13 *Arbitration International*, 93.

²⁰² For more information on the services of CEDR see <http://www.cedr.org>

settlement of conciliation. Like in ICC Conciliation Optional Rules, the conciliator may not be appointed as an arbitrator in subsequent arbitration proceedings.²⁰³

10.AMERICAN ARBITRATION ASSOCIATION (AAA)

In the US there is AAA, which has Mediation Rules, promulgated in 1987. AAA is one of the oldest and most respected alternative dispute resolution organizations. It has offices throughout the US and headquarters in New York City. AAA offers parties an opportunity to mediate every pending domestic and international arbitration case without the administrative cost. The AAA rules are comprehensive, covering all essential elements of mediation. Much like the ICSID rules, the AAA Rules enable a reputable institution to assist in the mediation process.²⁰⁴

11.CENTER FOR PUBLIC RESOURCES (CPR)

This is a non-profit making ADR body, established specifically for the promotion and encouragement of the use of ADR. It was established in the USA and is known to be the most important and well-established ADR organization. CPR compiles a register of subscriber companies who have adopted the CPR corporate policy statement or the pledge advocating the use of ADR as an alternative to litigation. The Center offers training programs aimed at improving knowledge of and proficiency in ADR procedures. It has formulated rules and model procedures.

12.ISTANBUL CHAMBER OF COMMERCE

Istanbul Chamber of Commerce has arbitration, technical expertise and mediation services for its members. In order to benefit from these services, according to article 2(1), at least one of the disputing parties should be the member of either Istanbul Chamber of Commerce or Istanbul Chamber of Industry or Istanbul Commodity Exchange or Istanbul and Marmara Area Maritime Chamber. Mediation is regulated in articles 6 to 12. Article 6 regulates the initiation process of mediation procedure. Article 7 regulates the response of the adversary. Article 8 regulates the appointment of and challenge to the mediators. Article 10 regulates the process of mediation.

²⁰³ For more information *see* Rules of Arbitration and Conciliation (Vienna Rules), <http://www.wk.or.at/arbitration>

²⁰⁴ For more information on the Mediation process *see* <http://www.aaa.org>

According to that article, a mediator either evaluates the claims on file or listens the parties. Article 11 fixes a period of settlement. According to paragraph (1), a mediator should draft a settlement agreement within one month after his appointment as the mediator. According to paragraph (2), the board of directors may extend this period however, in no way the period of mediation shall not exceed 3 months. According to paragraph (4), in the event that the parties do not agree upon the settlement agreement the duty of mediator shall terminate. Article 12 regulates the confidentiality. According to that article, nothing said or disclosed during the mediation process can be used in the subsequent litigation or arbitration proceedings.²⁰⁵

VIII. OTHER ADR TECHNIQUES AND MEDIATION

1. DIFFERENCES FROM INTERNATIONAL COMMERCIAL ARBITRATION AND LITIGATION

The basic difference between mediation and arbitration is that mediation seeks to help parties achieve their own binding agreement, whereas in arbitration, a binding decision is imposed by an independent third party. A legal precedent can be set in arbitration due its binding nature, whereas in mediation setting a legal or industry precedent is impossible. In arbitration, the outcome is determined in accordance with an objective standard, the applicable law, whereas, in mediation any outcome is determined by the will of the parties. In this regard, it can be argued that mediation is an interest based procedure, since the parties take into account their business interests and arbitration is a rights based procedure.²⁰⁶ In arbitration, a party task is to convince the arbitral tribunal of its case, whereas, in mediation, the outcome must be accepted by both parties and is not decided by the mediator.

With regard to the speed of proceedings, in mediation “the traditional first phase of creating trust in the parties, defusing hostility and distrust, can take a long time if one party is in a position of greater strength and adopts a take-it-or-leave-it

²⁰⁵For the full text of Mediation Rules, see Istanbul Chamber of Commerce [Istanbul Ticaret Odası], Publication [yayın] no. 2000-14 (2000).

²⁰⁶For detailed information see www.wipo.int/mediation/mediation-guide/index.html

approach.”²⁰⁷ One can argue that once the trust between the parties is established, the entire process can proceed smoothly and it can last shorter than the process of arbitration. Affordability is another issue to be dealt with. Although mediation is cheaper than arbitration and litigation, in the institutions where arbitration and mediation services are offered, the cost of mediation is same as the cost of arbitration. Mediation is more flexible than arbitration. With regard to certainty, since most of the institutions offer mediation services under definite rules, there is no radical difference in that matter. The result of mediation is normally just an agreement, an addendum to the existing agreement or a new agreement and the enforcement is binding once the parties agree upon mutually and not reject.²⁰⁸ On the other hand, an arbitral award should be enforced or recognized in the appropriate court through a lawsuit. Like in arbitration, there is confidentiality in mediation. “Mediation aids international business, but a lesser degree than arbitration, [t]hey are not in discouragement of it as is litigation.”²⁰⁹ Like in arbitration, in mediation one proceeding can settle a dispute or several disputes between the same parties even if the dispute spans through several countries.

When mediation is compared to litigation, mediation is fast, confidential and low cost. On the other hand, litigation is a binding procedure and a party may legally force its adversary for the litigation. In litigation, parties lack the control over the outcome, and there is inflexibility and judgmental character, where the blame and fault have been laid upon one of the parties, which in turn, may result to a non-amicable solution. This, naturally, causes a barrier before the preservation of an amicable, long term relationships.²¹⁰ Furthermore, parties have concerns when choosing litigation such as “escalating legal fees, burdensome delays stemming from overcrowded dockets and limited means for resolving a conflict.”²¹¹

²⁰⁷ See Andrew I. Okekeifere, Commercial Arbitration as the Most Effective Dispute Resolution Method Still a Fact or Now a Myth, 15 J.Int. Arb. 4, 81, 101 (1998)

²⁰⁸ For more information see Okekeifere, *supra* note 207, at 103.

²⁰⁹ See Okekeifere, *supra* note 207, at 104.

²¹⁰ For more information on a comparison between litigation and mediation see Barker, *supra* note 171, at 7 *et seq.* (stating that “an apology, a recognition of hurt feelings, or a promise to avoid certain problems in the future may often lead to a resolution. Adjudicative types of processes do not explore parties’ principles and interests because the processes are based on strictly presentations of law and fact. Mediation, however, explores a wider and more practical range of issues and thus is a better alternative method of dispute resolution.”) at 8-9.

²¹¹ See Ruiz, *supra* note 152, at 852.

2. DIFFERENCE BETWEEN INTERNATIONAL DEAL MEDIATION AND MEDIATION

Given the potential power of mediation in resolving disputes, it can well be used at the earliest stages of complex, multiparty negotiations, joint ventures or mergers and acquisitions. A deal mediator is a neutral adviser functioning as an intermediary or facilitator. International deal mediation is mostly used during the “projects for private provision of infrastructure, particularly those involving build-operate-transfer schemes [and] natural resource development projects, particularly those that require underpinning by concession agreements with host governments.”²¹² In those types of deals there are multi-parties, lawyers, different cultures, and disciplines. “Deal mediation is essentially assisted negotiation and the person assisting needs to be a true neutral endowed with facilitative skills of a mediator.”²¹³ In this regard, neutral lawyers with experience in the negotiation of major international commercial transactions employ ADR techniques utilizing the process of deal mediation at the beginning of a negotiation instead of waiting until a dispute arises. The bottom line of deal mediation is to help to break the impasse at the outset of negotiations.²¹⁴

3. DIFFERENT FORMS OF MEDIATION

Since mediation is used in such a variety of circumstances, many forms are available. Mediations can be conducted by a single mediator, or by a panel of two or more. The type of mediation depends on the nature of the conflict, ranging from shuttle mediation consisting almost entirely of separate caucuses to face-to-face dialogues. Attorneys may or may not be present at the sessions. Mediation can be used at any point in the judicial process. A case can be mediated before a suit is filed, as a part of formal court proceedings, or even after a judgment, the parties in child custody, labor and employment discrimination cases have to attempt mediation before the courts will hear their cases.²¹⁵

²¹² See L. Michael Hager & Robert Pritchard, *Lawyers as Deal Mediators: The Value of Neutrality in International Business Negotiations*, (2000) 28 IBL 404.

²¹³ *See Id.*, at 405.

²¹⁴ For detailed information on Deal Mediation *see Id.*, at 405-9.

²¹⁵ For detailed information *see Wier, supra* note 124, at 7-8.

3.1 Executive mediation

In this process legal advisers, following preliminary discussions with the mediator, produce written briefs for the mediation. Only commercial principals with the mediator then attend the mediation.

3.2 Project Mediation

For very complex, multi-party cases mediators can be appointed to work with the parties over a lengthy negotiation project, helping to facilitate or chair a range of meetings, mediate issues of information sharing and party involvement. The goal is to project manage negotiations through to a final conclusion.²¹⁶

3.3 Divorce Mediation

Since the rigidity of court adjudication cannot respond to the emotional dynamics associated with the divorce, “mediation, in the divorce context, offers a more malleable, sensitive process, and promises a more therapeutic resolution to the dissolution of the marriage.”²¹⁷

3.4 Criminal Mediation

Unlike mediation in divorce, criminal mediation receives little attention in criminal system. Its usage is widespread in the USA. The Victim-Offender Mediation (VOM) programs have been successful since 1993. VOM is the most common form of mediation in the criminal system.²¹⁸

3.5 Cyberspace Mediation

In the near future disputes will be resolved electronically, and this will be done through mediation beside other dispute resolution techniques. Experiments about online mediation are made and it is most likely that online mediation will take place in the daily life of businessmen and consumers. Cyberspace seems well suited to a process that allows parties to resolve disputes without resorting to formal law. This is because internet makes direct links of communication available to anyone. Online mediation participants would be connected electronically but remain where they are, unlike a conference center where parties have changed their surroundings and are

²¹⁶ For detailed information see www.cedr.org

²¹⁷ See Terenia Urban Guill, Comment: A Framework for Understanding and Using ADR, 71 Tul. L. Rev. 1313, 1324 (1997).

²¹⁸ For detailed information on VOM programs see Guill, Id., at 1327-28.

often ready to consider a new perspective on their dispute. Communication is different than the oral nature of a telephone conference call. There is textual communication online.²¹⁹

IX. MEDIATION IN THE US, IN EUROPE AND IN TURKEY

1. US UNIFORM MEDIATION ACT

The use of mediation “likely existed in the United States from its beginnings when European colonists attempted to settle their own disputes, organized use of mediation first arose with the labor movement in the late 1800s.”²²⁰ After the creation of the Department of Labor by Congress in 1913, the Secretary of Labor has been appointed as mediator of labor and union disputes. Congress then created the Federal Mediation and Conciliation Service. American Arbitration Association (“AAA”) has been established in 1926 to serve for the resolution of commercial disputes through arbitration and mediation. As of 1960s the use of mediation moved beyond the labor disputes with the new projects of American Arbitration Association such as neighborhood mediation projects, which enables minor disputes to be mediated instead of going to courts.²²¹ States have enacted their own mediation and dispute resolution acts. Many American states have state funded mediation programs while the use of mediation has been extended to cover disputes in almost every conceivable arena, including family, environment law. In the United States mediation has been “utilized to relieve court congestion, provide alternative services that are less costly and time consuming to parties than traditional litigation, and to allow for discussion and settlement of a broader range of issues than the legal system.”²²²

With the need of institutionalization of mediation for its efficiency and cost effectiveness, in January 1998, the National Conference of Commissioners on

²¹⁹ For more information on cyberspace mediation see Joel B. Eisen, Are we Ready for Mediation in Cyberspace?, 1998 B.Y.U.L.Rev. 1305-7 (1998).

²²⁰ Bridget Genteman Hoy, The Draft Uniform Mediation Act in Context: Can It Clear Up the Clutter?, 44 St. Louis U.L.J. 1121, 1126 (2000).

²²¹ For detailed information on the development of mediation see *Id.*, at 1126-27.

²²² See Emily Stewart Haynes, Mediation as an Alternative to Emerging Post Socialist Legal Institutions in Central and Eastern Europe, 15 J. Disp. Resol. 257, 258 (1999).

Uniform State Laws ("NCCUSL")²²³ appointed a committee to draft a proposed uniform mediation act. This committee worked with the ABA section of Dispute Resolution on the project.²²⁴

In the summer of 1999, the American Bar Association ("ABA") and the NCCUSL disseminated for review the first proposed Draft Uniform Mediation Act. "If enacted and adopted uniformly, the Draft Act would replace the hundreds of pages of complex and often conflicting statutes across the country with a few short pages of simple, accessible and helpful rules."²²⁵ The goal of the Draft Act is to provide quality mediation procedures in all the states. The draft Act brings three mediation procedure provisions. According to that, the draft Act requires "that a mediator disclose any

²²³ For detailed information see Henry Gabriel, *The Inapplicability Of The United Nations Convention On The International Sale Of Goods As a Model For The Revision Of Article Two Of The Uniform Commercial Code*, 72 Tul. L. Rev. 1995, 1996 & n.4 (1998) "The purpose of the NCCUSL is to determine what areas of private state law might benefit from uniformity among the states, to prepare statutes or "uniform acts" to carry that object forward, and then to have those statutes enacted in each jurisdiction represented in NCCUSL. NCCUSL was created in 1892, and it consists of representatives (Commissioners) from each state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The Commissioners are appointed by their respective states, either by the state's governor or the legislature of the state. All Commissioners are lawyers, and they serve without compensation. The Commissioners do their work through drafting committees, on which many of them serve, and through an annual meeting lasting eight days each summer. The first step in the NCCUSL process is to form a study committee of Commissioners to examine a suggestion for a uniform statute. Here, suggestions for a Code change may be made by a third party, such as the American Bar Association or American Law Institute or an organization interested in a particular area of law. If the study group recommends that a statute be prepared, then before any drafting begins, the recommendation must be approved by the Scope and Program Committee, as well as by the Executive Committee of NCCUSL. Once the decision to prepare a proposed statute is reached, a drafting committee composed of six to ten Commissioners is appointed, and with this Draft Act, because it is produced with the ABA, one or more ABA members are also appointed to the drafting committee. Each drafting committee has a reporter. The reporter is a legal expert on the subject of the proposed statute and serves to collect information about the subject for the education and use of the members of the drafting committee. The reporter presents the information with policy choices in alternative draft language. The reporter in this sense does not decide what goes in the statute, but simply drafts the statute consistent with the decisions of the members of the drafting committee. The drafting committee determines the particular policy and provisions of the proposed statute based on the work of the reporter, on advice received from various relevant constituencies concerning those policies and provisions, and on the experience of the members in their practice in the various states. Under an agreement with the American Bar Association, each drafting committee has an ABA advisor appointed to work with it. The function of the ABA advisor is to solicit and collect input from every interested constituency within the ABA, and to convey this advice to the drafting committee. The proposed statute is discussed and debated at two annual meetings of NCCUSL and ABA. In these plenary sessions of the two organizations, the work of the drafting committee and the reporter is scrutinized and judged for balance, sensibility, and style. Once the drafting of the Uniform Mediation Act is completed and approved by NCCUSL and the ABA, the Commissioners from the various states are charged with the duty of getting the uniform statute enacted by the legislature in each jurisdiction. For the most part, recent uniform laws have been rapidly and uniformly enacted with limited adjustments made only to address purely local concerns or fundamental differences in policy particular to a state."

²²⁴ For detailed information on the project and working style see Hoy, *supra* note 220, at 1130-31 (stating that "Uniform acts are generally drafted by the NCCUSL to promote uniformity in the law among the several states on subjects as to which uniformity is desirable and practicable.")

²²⁵ See *Id.*, at 1121-22 .

actual or potential conflict of interest, that if requested by a party, there must be disclosure of the mediator's qualifications to mediate the dispute, [and] that the draft Act attempts to ensure quality by upholding a disputant's right to representation during mediation proceedings."²²⁶ Part one of the draft Act regulates the application, construction, scope and definition. Part two regulates the privilege against disclosure, admissibility, discovery, waiver and preclusion of privilege, and exceptions to privilege. Part three regulates mediator disclosure and party accompaniment.²²⁷

2. EUROPE AND EUROPEAN UNION LAW : FAMILY LAW , TELECOMMUNICATIONS AND CONSUMER LAW ASPECTS

In this section both European Union (EU) and non-EU aspects of mediation will be dealt with. Mediation is also increasingly finding its way into the legal structures and practice of organizations, such as NAFTA and the EU. The EU and other regional trade bloc regulations have included mediation process requirements. ADR has not grown as quickly in Europe as it has in the US, but recently there have been signs of increasing acceptance with regard to extra judicial settlement of disputes.²²⁸ In the global era, international disputes between states in regional organizations and their resolutions are complicated than the resolution of domestic disputes between private parties. A number of factors underlie this conclusion. These factors are "the mixed nature of conflicts within regional organizations, ... existence of contrasting legal systems [stemming from] different legal methodologies [and] different ideologies, ... difficulty of viewing justice from a non-national perspective."²²⁹ To this end, one can argue that uniform rules for the resolution of disputes in regional organizations can facilitate the realization of justice faster and safer. National Telecommunication Regulatory Authorities (NRA) have been established in most

²²⁶ *See Id.*, at 1122-23.

²²⁷ *See* National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act, Interim Draft, December 2000.

²²⁸ For detailed information with regard to the latest developments in ADR and Center for Public Resources' (CPR) activities in Europe see CPR Moves into European Market with Mediation and Mini-Trial Procedures, 7 *World Arb. & Mediation Rep.* 129 (1996).

²²⁹ For detailed information see Louis F. Del Duca, Teachings of the European Community Experience for Developing Regional Organizations, 11 *Dick. J. Int'l L.* 485, 546 (1993).

member States of the European Union (EU) according to the Member States' obligations under the EU telecommunication legislation.²³⁰ The NRA has been assigned "tasks regarding disputes related to the regulated services (mediation) and dispute resolution between private parties as well as between private parties and public administrative bodies."²³¹ NRA provides ADR mechanisms alternative to private dispute resolution that are prescribed in EU legislation. With regard to mediation, "some form of mediation or conciliation by the NRA must be provided for in national regulation under EU law."²³² In this connection, the mediation procedure is described in EU law and is implemented in most member states as pre-litigation or pre-arbitration procedure. Usually, mediation process commences when one party requests mediation or through an agreement. However, with regard to NRA "it is unclear whether negotiations must have been carried out and to what level the negotiations must have come before the right to request mediation from the NRA be invoked."²³³ The mediation period is three months but may be extended by the NRA.²³⁴

With the Council Resolution of 25 May 2000 EU has accepted on a Community wide network of national bodies for the extra judicial settlement of consumer disputes.²³⁵ In the Resolution, it is indicated that the rapid development of new forms of marketing of goods and services, in particular through e-commerce, and thereby also an increase in cross border consumer transactions which will be further enhanced through the introduction of the Euro is the main reason of this Resolution. To this

²³⁰ Commission Directive 90/388/EEC Article 7 of Services Directive providing that "A separate regulator must be established and that this regulator must be independent from the owner and operator of the monopoly services."

²³¹ See Inventory of Dispute Resolution Mechanisms, The European Telecommunications Platform (98) 107, p. 27.

²³² See *Id.*, at 27, giving an example that "article 12 of the ONP Leased Line Directive requires that conciliation is available on national level."

²³³ See *Id.*, at 28 & n.24, stating that "some examples show that the NRA has been somewhat pragmatic to this issue and introduced a passive mediation from very early stages of the negotiations."

²³⁴ "Most member States have imposed a duty for the NRA to provide for mediation, especially for interconnection negotiation. It is still unclear, whether regulators where the law does not require the NRA to accept, will act as mediators. There may be several reasons why the NRA will hesitate to mediate. First, it is not easy to conduct a proper mediation, especially if one has not been trained to do so. Secondly, there may not be ample resources to provide for mediation. Thirdly, acceptance of requests for mediation may encourage some market players to use the NRA as a strategic partner. This may harm the regulatory objectives." See *Id.*, at 28; see also for mediation in EU Birgit Feldtman, Hanno von Freyhold, Dr. Franz L. Vial, "The Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market", a report for the European Commission DG XXIV Consumer Policy and Consumer Health Protection Contract No. A0-2600/97/000130, June 1998.

²³⁵ For the full text of Council Resolution see OJ 2000 C155/1.

end, the development of practical, efficient and inexpensive procedures for the extra judicial settlement of consumer disputes should be promoted at national and in an appropriate form, at Community level. It is underlined by the Council of the EU that any initiative should be based on voluntary participation, not deprive the consumer of his right of access to the courts as acknowledged in Article 6(1) of the European Human Rights Convention, no prejudice any other means of administrative or judicial redress, fully take into account of national legal provisions, tradition and practice as well as the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and not prejudge the ongoing discussion on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Prior to this Council Resolution, there was a Commission Recommendation of 98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes. This was an important contribution to the establishment and development of national bodies. In this connection, the Council of the EU has recognized the extra judicial settlement of consumer disputes in Community wide. At this point, it should be pinpointed that according to article 189 of Rome Treaty, Commission has the right to issue recommendations, which are non-binding upon the Member States. On the other hand, decisions are binding upon the Member States and they are issued by European Parliament and European Council or only by European Council.²³⁶ According to 98/257/EC Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes the establishment of minimum principles governing the creation and operation of out-of-court procedures for resolving consumer disputes seems, in these circumstances, necessary at Community level to support and supplement, in an essential area, the initiatives taken by the Member States in order to realize, in accordance with Article 129a of the Treaty, a high level of consumer protection whereas it does not go beyond what is necessary to ensure the smooth operation of out-of-court procedures whereas it is therefore consistent with the principle of subsidiarity.²³⁷

²³⁶ For more information on Decisions and Recommendations see Tekinalp, U. (Tekinalp/Tekinalp) EU Law [AB Hukuku] (1997), §4 N. 19-21, at 58-9.

²³⁷ For the full text of recommendation Official Journal L 115, 17/04/1998 p. 31.

The Committee of Ministers of the Council of Europe²³⁸ adopted Recommendation number (98)1 titled "Family Mediation in Europe" on January 21, 1998. The aforesaid recommendation "reflects the growing universal notion that the use of mediation is the best approach for resolving family controversies."²³⁹ According to the aforesaid recommendation the scope of mediation covers all disputes between members of the same family, whether related by blood or marriage, and to those who are living or have lived in family relationships as defined by national law.²⁴⁰ It was also indicated that states are free to determine the specific issues or cases covered by family mediation.²⁴¹ The recommendation also regulates the status of the mediated agreements.²⁴² Furthermore, the relationship between mediation and proceedings before the judicial or other competent authority has been established.²⁴³

At a global level the WTO's dispute settlement procedures include mediation potential for disputes on economic issues and principles which now transcend national sovereignty. According to Article 1(1) of Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO),²⁴⁴ which is also Community legislation in force in the EU, the rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in appendix 1 to this Understanding. The rules and procedures of this Understanding shall also apply to consultation and settlement of disputes between Members concerning their rights and obligations under the provisions of the

²³⁸ Statute of the Council of Europe, May 5, 1949, art. 1(a) states that "the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles that are common heritage and facilitating their economic and social progress." Republic of Turkey is also member of Council of Europe. www.coe.fr/eng/std/states.htm

²³⁹ See James H. Levin, Family Mediation in Europe: Recommendation No. R. (98)1, 37 Fam. & Conciliation Courts Rev. 257 (1999).

²⁴⁰ See Recommendation (98)1 Principles of Family Mediation I. Scope of Mediation ¶ a.

²⁴¹ See *Id.*, ¶ b.

²⁴² See IV. The Status of Mediated Agreements "States should facilitate the approval of mediated agreements by a judicial authority or other competent authority where parties request it, and provide mechanisms for enforcement of such approved agreements, according to national law."

²⁴³ See V. Relationship Between Mediation and Proceedings Before the Judicial or Other Competent Authority "(a) States should recognize the autonomy of mediation and the possibility that mediation may take place before, during or after legal proceedings. (b) States should set up mechanisms which would (i) enable legal proceedings to be interrupted for mediation to take place; (ii) ensure that in such case the judicial or other competent authority retains the power to make urgent decisions in order to protect the parties and their children or their property (iii) inform the judicial or other competent authority whether or not the parties are continuing with mediation and whether the parties have reached an agreement."

²⁴⁴ See Official Journal L 336, 23/12/1994, pp.0234-0250, Document 294A1223(18) (OJ 1994 L 336/234).

Agreement Establishing the World Trade Organization and of this Understanding taken in isolation or in combination with any other covered agreement. Article 5 of the Understanding regulates the procedure of mediation, conciliation and good offices.

Mediation is also regulated under European Convention on Human Rights (ECHR). According to article 28(1)(b) of ECHR, the Commission shall assist the parties in every manner for the friendly settlement of the case. Article 28(2) states that in the event that an amicable settlement is reached the Commission shall prepare a report on the issue and send it to the States, Council of Europe Committee of Ministers and for publication to the General Secretary of Council of Europe.

3. TURKEY

In continental Europe procedural laws in countries of Germanic origin included an obligation for the judge to facilitate conciliation between the opposing parties throughout the proceedings. In Turkish Civil Procedure Law (“HUMK”) there was a provision with regard to this specialty which was abrogated. According to the abrogated article 494,²⁴⁵ the judge has the duty to settle the dispute in a friendly manner through conciliating the parties in divorce cases. The purpose of the judge was to protect the integrity of the family and to take every measure for the protection of integrity of the family. In practice, the judge was inviting the parties to his office and listening them and trying to resolve the dispute through mediation techniques. However, due to the inconvenience of the courtrooms and the working load of the judges, this article did not function as it was thought to be. In this regard, it was abrogated. According to HUMK article 213(1) the judge has the duty to encourage the parties for a settlement where there is hope that there will be a concrete result. However, this procedure is not usually seen in practice. This is partly due to the reason of fear that the impartiality of the judge may be lost and that there is physical impossibility at the courthouses.²⁴⁶ In this regard, in Turkey, practically, the judge may not facilitate at any stage of the proceedings an amicable settlement of the dispute on any of the contentious issues.

²⁴⁵ Article 494 was abrogated with 26.9.1963 dated and 338 numbered Act.

²⁴⁶ See Rona Aybay, Conflict of Laws Courses (Introduction) [Yasa Çatışması Hukuku Dersleri (Giriş)], 59-60, Istanbul, 1998.

CHAPTER IV

CONCLUSION

Mediation is the dispute resolution technique which has grown dramatically in the recent years. Its use has also grown significantly in the international and national disputes. Some legal systems have made mediation compulsory before referring to litigation. In appropriate cases mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly. It is favored for efficiency reasons. It produces a solution agreeable to everyone due to its requirement of voluntary agreement to settle. It reduces hostility and allow disputing parties to control the outcome rather than leaving the decision to an unrelated party's binding determination. Due to its relatively unstructured and informal nature, parties may find a resolution that suits them where the terms of an agreement are non-legal and beyond the limits of law. A great variety of processes can be followed in a mediation, thus mediation is very flexible and can be specifically designed for the dispute or the parties. Mediation tries to save an ongoing relationship. In mediation a solution with which parties can live with and trust is sought. Only the solution of problems, without imposing legal rules and determining who is right or wrong, is the objective. Agreement of the parties is the main pillar of mediation.

Although, mediation and other forms of dispute resolution are named as alternative, they are forming the compulsory stage in the court process in many US states, Australia, Canada and England. Parties litigate because they know of no better alternative to litigation. However, as the benefits of mediation become more widely recognized, it will become the most utilized dispute resolution mechanism for resolving private disputes in the near future.

As the closing remarks, one should indicate that the success of mediation procedure depends on the trust of the parties to each other and to the neutral third party i.e. mediator and the experience and knowledge of the mediator.

APPENDIX – Model Clauses for Mediation

American Arbitration Association Model Clauses

“If a dispute arises out of or relates to this contract, or the breach thereof, and if the said dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association, before resorting to arbitration, litigation, or some other dispute resolution procedure.”

Centre for Dispute Resolution (CEDR) Model Clauses

Clause 1

This agreement will be governed by the [Laws of England]. The Parties will with the help of the Centre for Dispute Resolution (CEDR) seek to resolve disputes between them by alternative dispute resolution. If the parties fail to agree within [] days of the initiation [commencement] of the procedure the dispute shall be referred to arbitration in accordance with [as appropriate] / or litigation.

Clause 2

1. The parties will attempt in good faith to resolve any dispute or claim arising out of or relating to this Agreement promptly through negotiations between the respective senior executives of the parties who have authority to settle the same.
2. If the matter is not resolved through negotiation, the parties will attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the parties by the Centre for Dispute Resolution.
3. If the matter has not been resolved by an ADR procedure within [] days of the initiation of such procedure, or if either party will not participate in an ADR procedure, the dispute shall be referred to arbitration in accordance with [as appropriate] / or litigation.
4. The construction performance and validity of this Agreement shall in all respects be governed by the [Laws of England].

Center for Public Resources (CPR) Model Clause

The parties will attempt in good faith to resolve any controversy or claim arising out of or relating to this agreement by mediation in accordance with the Center for Public Resources Model Procedure for Mediation of Business Disputes.

If the matter has not been resolved pursuant to the aforesaid mediation procedure within 60 days of the commencement of such procedure (which period may be extended by mutual agreement), or if either party will not participate in a mediation,

[Select one of the following alternatives]

- (i) the controversy shall be settled by arbitration in accordance with the Center for Public Resources Rules for Non-Administered Arbitration of Business Disputes, by [a sole arbitrator] [three arbitrators, of whom each party shall appoint one] [three arbitrators, none of whom shall be appointed by either party]. [Any mediator or arbitrator not appointed by a party shall be selected from the CPR Panels of Distinguished Neutrals]. The arbitration shall be governed by the United States Arbitration Act, 9 U.S.C. #1-16, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof. The place of arbitration shall be _____. The arbitrator[s] [are] [are not] empowered to award damages in excess of actual damages, including punitive damages.
- (ii) Either party may initiate litigation [upon ... days' written notice to the other party.]

International Chamber of Commerce (ICC) Model Clause for Optional Conciliation

All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

International Center for Settlement of Investment Disputes Model Clause for Conciliation (ICSID)

The parties hereto hereby consent to submit to the International Center for Settlement of Investment Disputes any dispute in relation to or arising out of this Agreement for settlement by conciliation pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

The basic clause set forth above assumes that:

- (i) the governmental party to the dispute is the contracting state itself (rather than a constituent subdivision or an agency);
- (ii) the investor is clearly a national of another contracting state;
- (iii) the parties accept the residual choice-of-law rule set forth in Article 42 of the Convention; and
- (iv) they do not wish to derogate from the ICSID Conciliation / Arbitration Rules.

UNCITRAL Conciliation Rules Model Clause

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

Stockholm Chamber of Commerce Model Clause

Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall first be referred to Mediation in accordance with the Rules of the Mediation Institute of the Stockholm Chamber of Commerce, unless one of the parties objects. If one of the parties objects to Mediation or if the Mediation is terminated, the dispute shall be finally resolved by Arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

London Court of International Arbitration (LCIA) Model Clause

In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity, or termination, the parties shall first seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure in force at the date the dispute is referred to mediation.

If the dispute is not settled by mediation within (30 or 60) days of the appointment of the mediator, or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules, which rules are deemed to be incorporated by reference into this clause.

The language to be used in the mediation and in the arbitration shall be specify.

The governing law if the contract shall be substantive law of specify.

In any arbitration commenced pursuant to this clause,

- (i) the number of arbitrators shall be [one / three]; and
- (ii) the seat or legal place of arbitration shall be [city and /or country].

Commercial Arbitration and Mediation Center for the Americas (CAMCA) Model Clause

The parties agree that they will endeavor to settle any dispute, controversy or claim arising out of or relating to this contract, which they are unable to settle through direct discussions, by mediation administered by the Commercial Arbitration and Mediation Center for the Americas under its rules before resorting to arbitration, litigation, or other dispute resolution procedure. The requirement of filing notice of claim with respect to the dispute submitted to mediation shall be suspended until the conclusion of the mediation process.

Hong Kong International Arbitration Centre (HKIAC) Mediation Rules Model Clause

Any dispute or difference arising out of or in connection with this contract shall first be referred to mediation at Hong Kong International Arbitration Centre (HKIAC) and in accordance with its then current Mediation Rules. If the mediation is

abandoned by the mediator or is otherwise concluded without the dispute or difference being resolved, then such dispute or difference shall be referred to and determined by arbitration at HKIAC and in accordance with its Domestic Arbitration Rules.

BIBLIOGRAPHY

TEXT BOOKS

- Auerbach, J.S. (1983) Justice Without Law? New York.
- Aybay, R. (1998) Yasa Çatışması Hukuku Dersleri (Giriş) / Conflict of Laws Courses (Introduction), Istanbul.
- Carroll, E. and Mackie, K. (2000) International Mediation–The Art of Business Diplomacy, Kluwer Law International.
- Cound, J., Friedenthal, J.H., Miller, A.R., Sexton, J.E., (1993) Civil Procedure Cases and Materials, 6th Edition, West Publishing St. Paul-Minnesota.
- Donovan, Leisure, Newton & Irvine (1990) ADR Practice Book, New York.
- Hunter, M., Paulsson, J., Rawding, N., Redfern, A. (1993) The Freshfields Guide to Arbitration and ADR, Kluwer Law International.
- Gönlübol, M. (1993) Uluslararası Politika / International Politics, 4. Baskı / 4th Edition, Ankara.
- Pazarıcı, H. (1992) Uluslararası Hukuk Dersleri / International Law Courses, 1.kitap/ Volume 1, gözden geçirilmiş 3. Baskı /Reviewed 3rd edition, Ankara.
- Şanlı, C. (1996) Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları / Drafting the International Commercial Contracts and Dispute Resolution Systems, Birinci Basım / First Edition, Istanbul
- Tekinalp, Ü. and Tekinalp, G. (1997) Avrupa Birliği Hukuku / European Union Law, 1. Baskı / 1st edition, Istanbul.
- MOORE, C.W. (1996) The Mediation Process, Jossey – Bass, New York.

ARTICLES

- Abramson, H.I. (Spring, 1998) Time to Try Mediation of International Commercial Disputes, ILSA Journal of International and Comparative Law, Volume 4 p.323.

- Akıncı, Z. (Aralık / December 1996) Milletlerarası Ticari Uyuşmazlıkların Alternatif Çözüm Yolları / Alternative Resolution Systems of International Commercial Disputes, *Batider*, Cilt XVIII / Volume XVIII, Sayı 4 / Number 4.
- Barker, J. (1996) International Mediation – A better Alternative for the Resolution of Commercial Disputes: Guidelines for a US Negotiator Involved in an International Commercial Mediation with Mexicans, *Loyola Los Angeles International & Comparative Law Journal*, volume 19, p. 1.
- Burton, S.J. (1995) Combining Conciliation with Arbitration of International Commercial Disputes, *Hastings International & Comparative Law Review*, volume 18, pp.637-638.
- Bush, R.B.A. (1998) 'Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation', *Florida Law Review*, volume 41, p. 252.
- Chiasson, E.C. (1997) The Commercial Arbitration and Mediation Centre for the Americas : NAFTA's Mandate for Private Sector, *Arbitration International*, Volume 13, Number 1, pp. 93-103.
- Coombe Jr., G.W., (1999) The Resolution of Transnational Commercial Disputes: A Perspective From North America, *Annual Survey of International & Comparative Law*, volume 5, pp.13- 20.
- Cremades, B.M. (1998) Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration, *International Arbitration*, volume 14, p. 157.
- Donahey M.S. (1998) Dispute Resolution in Cyberspace, *Journal of International Arbitration*, Volume 15, Number 4.
- Del Duca, L.F. (Spring 1993) Teachings of the European Community Experience for Developing Regional Organizations, *The North American Free Trade Agreement (NAFTA) Symposium*, *Dickinson Journal of International Law*, volume 11, pp. 485-552.
- Eisen, J.B. (1998) Are We Ready for Mediation in Cyberspace?, *Brigham Young University Law Review*, pp. 1305-1307.
- Family and Conciliation Courts Review (April 1999) International Corner, Family Mediation in Europe: Recommendation No. R (98)1, Committee of Ministers to Member States on Family Mediation, volume 37, p. 257.

- Feldtman, B., Freyhold, H.v., Vial, Dr. F.L., (June 1998) “The Cost of Legal Obstacles to the Disadvantage of Consumers in the Single Market”, a report for the European Commission DG XXIV Consumer Policy and Consumer Health Protection Contract No. A0-2600/97/000130.
- Fiss, O.M., (May 1984) Against Settlement, Yale Law Journal, volume 93, p. 1073.
- Freyer, D., (1998) Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts – A US Perspective, Journal of International Arbitration, Volume 15, Number 4.
- Gabriel H. (1998) The Inapplicability Of The United Nations Convention On The International Sale Of Goods As a Model For The Revision Of Article Two Of The Uniform Commercial Code, Tulane Law Review, volume 72, p.1995.
- Goldsmith, J.C. (1993) ICC Working Group Report on ADR, American Review of International Arbitration volume 4, p. 413.
- Grenig, J.E. (1999) Methods of Alternative Dispute Resolution, Mediation, West Legal Forms.
- Guill, T.U. (1997) Comment: A Framework for Understanding and Using ADR, Tulane Law Review, volume 71, pp.1313-1324.
- Guthrie, C. and Levin, J. (1998) A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute, Ohio State Journal on Dispute Resolution, volume 13, p. 885.
- Hager, M. and Pritchard, R. (October 2000) Lawyers as Deal Mediators: The Value of Neutrality in International Business Negotiations, International Business Lawyer, Volume 28, No 9, pp. 404-407.
- Haynes, E.S. (1999) Mediation as an Alternative to Emerging Post Socialist Legal Institutions in Central and Eastern Europe, Journal of Dispute Resolution, Volume 15, pp. 257-258.
- Hill, R. (1998) The Theoretical Basis of Mediation and Other Forms of ADR: Why They Work, Arbitration International, Volume 14, Number 2, pp. 173-184.
- Hill, R. (1995) ‘Non-Adversarial Mediation’, Journal of International Arbitration, Volume 12, Number 4.
- Hill, R. (1997) MED-ARB : New Coke or Swatch?, Arbitration International, Volume 13, Number 1, pp. 105-111.

- Holland, D.L. (2000) Comment: Drafting a Dispute Resolution Provision in International Commercial Contracts, *Tulsa Journal of Comparative & International Law*, volume 7, pp. 451-455.
- Hoy, B.G. (2000) The Draft Uniform Mediation Act in Context: Can It Clear up the Clutter?, *St. Louis University Law Journal*, volume 44, pp. 1123-1126.
- Levin, J.H. (1999) Family Mediation in Europe: Recommendation No. R. (98)1, *Family & Conciliation Courts Review*, volume 37, p. 257.
- McEwen C. and Williams, L. (1998) Legal Policy and Access to Justice Through Courts and Mediation, *Ohio State Journal on Dispute Resolution*, volume 13, p. 865.
- Menkel-Meadow, C. (Summer, 1997), The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice, *Georgetown Journal of Legal Ethics*, volume 10, p. 631.
- Okekeifere, A.I. (1998) Commercial Arbitration as the Most Effective Dispute Resolution Method – Still a Fact or Now a Myth?, *Journal of International Arbitration*, Volume 15, Number 4.
- Pyles, M. (1996) Assessing Dispute Resolution Procedures, *American Review of International Arbitration*, volume 7, pp. 267-278.
- Rau, A.S. (1998) On Integrity in Private Judging, *Arbitration International*, volume 14, p. 115.
- Riskin, L.L. (September 1994) Mediator Orientations, Strategies and Techniques, *Alternatives, Alternatives to High Cost Litigation*, volume 12, p. 111.
- Riskin, L.L. (Spring 1996) Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed, *Harvard Negotiation Law Review*, *Harvard Negotiation Law Review*, volume 1, p. 7.
- Riskin, L.L. (1982) Mediation and Lawyers, *Ohio State Law Journal*, *Ohio State Law Journal*, volume 43, p. 29.
- Rubin, J.Z. and Brown, B.R. (1975) The Social Psychology of Bargaining and Negotiation.
- Ruiz, D.A. (2000) Asserting a Comprehensive Approach for Defining Mediation, *Ohio State Journal On Dispute Resolution*, volume 15, pp. 851-882.
- Wing To, C. (December 2000) Developments of the Hong Kong International Arbitration Centre, *International Business Lawyer*, Volume 28, No 11, pp. 506-514.

- Weir, A. (1995) *Mediation A consumer's Guide*, American Bar Association (ABA).
- *World Arbitration and Mediation Report* (May 1996) *Around the World ADR in Europe*, CPR Moves into European Market with Mediation and Mini-Trial Procedures, Juris Publications.
- Yandle, S.M. (Winter 2001) *Strategies in Mediation*, ATLA Winter Convention Reference Materials, Advocacy Track: Outside the Jury Box: Settlement and Mediation.

RECOMMENDATIONS, RULES, RESOLUTIONS, WEB SITES, ACTS, CONVENTIONS, REPORTS

- Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, Official Journal C 155, 06/06/2000 (Cite as OJ 2000 C 155/1)
- 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes Official Journal L 115, 17/04/1998 (Cite as OJ 1998 L 115/31)
- Uruguay Round of Multilateral Trade Negotiations (1986- 1994) - Annex 2 – Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO) WTO, Official Journal L 336, 23/12/1994 (Cite as OJ 1994 L 336/234)
- Uniform Mediation Act, National Conference of Commissioners on Uniform State Laws (NCCUSL), Interim Draft, December 2000.
- Inventory of Dispute Resolution Mechanisms, The European Telecommunications Platform (ETP) (98) 107, 22.02.2001.
- Istanbul Ticaret Odası Tahkim-Uzlaştırma-Hakem Bilirkişilik Müesseseleri / Istanbul Chamber of Commerce Arbitration-Conciliation-Technical Expertise Services, Yayın No:2000-14 / Publication No: 2000-14, Mayıs 2000 / May 2000.
- Avrupa İnsan Hakları Sözleşmesi / European Convention on Human Rights.
- ICC Rules of Optional Conciliation ICC Publications 581.
- CPR Moves into European Market with Mediation and Mini-Trial Procedures, 7 *World Arb. & Mediation Rep.* 129 (1996).

www.cartercenter.org	DATE : May 5, 2001
www.adrgroup.co.uk	DATE : April 15, 2001
http://www.cpradr.org	DATE : April 15, 2001
http://www.cedr.org	DATE : April 15, 2001
www.coe.fr/eng/std/states.htm	DATE : June 6, 2001
http://www.wk.or.at/arbitration	DATE : March 15, 2001
http://www.aaa.org	DATE : April 16, 2001
www.wipo.int/mediation/mediation-guide/index.html	DATE : April 16,2001
www.adr.org	DATE : April 16, 2001
http://www.uncitral.org	DATE : April 16, 2001
http://www.justice.gov.hk	DATE : April 16, 2001