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LL.M. In Transnational and European Commercial Law

and Alternative Dispute Resolution

Med/Arb Models

Dissertation

Under the guidance of Professor Apostolos Anthimos

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### Abbreviations

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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<tr>
<td>AFL- CIO</td>
<td>American Federation of Labor and Congress of Industrial Organizations</td>
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<td>DIS</td>
<td>Deutsche Institution für Schiedsgerichtsbarkeit e.V.</td>
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<tr>
<td>EC</td>
<td>European Commission</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<tr>
<td>IFC</td>
<td>International Finance Corporation</td>
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<tr>
<td>O.Reg.</td>
<td>Ontario Regulation</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UAA</td>
<td>Uniform Arbitration Act</td>
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<td>USA</td>
<td>United States of America</td>
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I. Executive Summary

Nowadays, businesses have a very simple and straightforward approach to resolving disputes. They need disputes resolved quickly and efficiently. In the globalized world of commerce, this is not possible because of the legal and procedural complexities surrounding formal dispute resolution. Thus businesses, along with legal experts across the world, have started changing the dispute resolution landscape to accommodate these growing needs by introducing less formal procedures for dispute resolution. These procedures are known as Alternative Dispute Resolution (ADR). The International Finance Corporation (IFC), the key player in private sector development in new and emerging markets, started supporting commercial ADR through a number of projects to accelerate this change worldwide. In particular, the IFC has partnered with local governments, justice ministries, lawyers’ associations, business membership organizations, and international mediation experts.

Globally the formal justice system deals with disputes through litigation, ADR focuses on alternative ways of dealing with disputes. ADR includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement. It is a term for the ways that parties can settle disputes with or without the help of a third party\(^1\). The neutral third party assists the parties in determining the type of ADR process to be used. ADR typically includes early neutral evaluation, negotiation, conciliation, mediation and arbitration. The latter two, mediation and arbitration, are often used in conjunction with one another, in the truest form of Mediation/Arbitration (Med/Arb). Med/Arb is an example of a hybrid process and an increasingly popular alternative ADR mechanism, in which the disputing parties and a neutral third party attempt to reach a voluntary agreement through mediation. In the event that the parties fail to resolve the dispute, the neutral third party will assume the role of arbitrator and determine the outcome of the dispute on behalf of the parties\(^2\). The combination of mediation and arbitration systems is considered an important characteristic of international dispute resolution. Many have praised its advantages, while others consider it to violate the nature of justice and due procedure. This paper analyzes the foundations for the combination of mediation and arbitration, the characteristics of each ADR

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method and their differences, looks into current functions and existent problems of Med/Arb Models, points out the fields where the Med/Arb process has developed, and finally introduces the different forms of these models.

II. Introduction

Historical Development of Med/Arb Models

As early as the 1940s some arbitrators were advocating the use of the Med/Arb process, a dispute resolution mechanism in which disputing parties and a neutral third party attempt to reach a voluntary agreement through mediation and then move to arbitration if they are unsuccessful\(^3\). The advocates of the Med/Arb method believed that the real role of arbitrators in disputes of interests, was to assist disputing parties in completing their bargaining and that in doing so, their first tool should be mediation. Others argued that the processes and techniques of the two methods were fundamentally different and incompatible. Critics of the Med/Arb method thought that it was unethical for an arbitrator to attempt to mediate any dispute, and that it was an arbitrator’s duty to decide on matters “entirely” on the basis of the formal record placed before him, including the contract which defines the rights and obligations of the respective parties\(^4\).

Sam Kagel, a San Francisco lawyer and arbitrator, is often credited with developing the Med/Arb process, perhaps because he used the process to settle a very public and controversial nurses’ strike in the 1970s\(^5\). Specifically in 1972, he introduced with John Kagel the hybrid form of dispute resolution “Med/Arb”, the two step process in which a single neutral Med/Arbitrator combined mediation with binding arbitration. Afterwards, the Med/Arb process was actively encouraged in the United States of America (USA) by the Federal Service Impasses Panel. The Panel’s records indicate that it was used in

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approximately twenty cases between 1970 and 1975, but it may actually have been used much more frequently\(^6\). The prevalence of the Med/Arb process continued to increase after Wisconsin became the first state in the USA to formally adopt the Med/Arb process as a dispute settlement procedure on January 1, 1978\(^7\).

Chief Justice Alan Gold is usually credited with the development of the Med/Arb process in Canada. Gold introduced the process between 1968 and 1975, when he was an arbitrator on the ports of St. Lawrence\(^8\).

By the late 1960s and early 1970s the Quebec Department of Labor and the Federal Department of Labor had become interested in the method and it was used to settle on-going disputes in the Quebec construction industry and in the creation of Via Rail\(^9\).

The use of the Med/Arb process continued to increase in the USA and Canada during the 1980s. Statistics from the AFL-CIO arbitrator reporting system and database in 1992 indicated that there was substantial growth in mediated settlements\(^10\) and that the Med/Arb process was being used to settle disputes in diverse fields as nursing, journalism, public utilities, education and commerce. Moreover, a 1994 study of some high profile cases indicated increased use of the process to solve a wide variety of disputes, ranging from commercial to environmental disputes\(^11\). An increase in the use of the Med/Arb process is also evident in Canadian legislation\(^12\).

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Besides the USA and Canada, the combination of mediation and arbitration systems has always been considered a characteristic of Asian dispute resolution. Culture was an important factor in the dispute resolution process. The peculiarities of tradition, culture and legal evolution of society affected the choice of a dispute resolution mechanism in a country such as China. The heightened awareness of theoretical and practical issues found in cross-cultural negotiations and arbitrations and the commercial globalization and economic integration made disputing parties from different cultures, especially in China, face a critical balancing act and weigh the positives and negatives when deciding between mediation and arbitration.

Within the context of cross-cultural commercial dispute resolution, selecting a particular mechanism to resolve a dispute need not be an either-or choice. A blended approach (i.e. combining mediation and arbitration) was a viable option for parties depending always on the nuances of tradition, culture and legal evolution. Such nuances made China’s and Hong Kong’s position regarding the combination of mediation and arbitration so interesting. The existence and share of the same traditions and at the same time, the possession of different histories, allowed them to have established arbitration laws, enabling a mediator also to be the arbitrator in the same dispute.

Despite the continuous development and the increased popularity of the Med/Arb method, over the years, there is always need and demand for the analysis of the functioning and compatibility of mediation and arbitration, as distinct methods of ADR. The characteristics of each method will indicate and mainly provide new evidence and a new perspective on the benefits and problems of the Med/Arb mechanism.

Chapter 1: Mediation

1.1 Mediation-ADR method


Mediation is an efficient, informal, confidential alternative way of resolving legal conflicts without resorting to a trial, consisting of negotiation between disputing parties. The process revolves around engaging a mediator to act as a neutral, impartial, and acceptable third party with no decision-making powers, and help the parties to come to a mutually beneficial, satisfactory agreement which is recorded in an enforceable contract\textsuperscript{15}. It is the new buzz word in commerce in Western Europe, and its use has been welcomed and endorsed by industry. In response to the growth of mediation as a favored ADR technique, the European Commission published a Green Paper on developing commercial mediation within the European Union (EU) in October 1999\textsuperscript{16}. UNCITRAL has also recently produced a draft Model Law relating to mediation and conciliation. Mediation’s success in the fact that the process allows the parties to continue to work together after the mediation hearing has been concluded. What is required is to facilitate a dialogue with all other parties involved in the dispute, to ensure that the dispute does not escalate\textsuperscript{17}. The parties are not simply limited to focusing on their own legal entitlements, but they are encouraged to think outside the problem. For instance, where parties may work together on future projects, some concessions can be made regarding the present dispute, and discounts can be agreed for future projects. This is useful where the relationship between the parties has not broken down irretrievably. One of the underlying philosophies of mediation is that the parties can reach a settlement that does not necessarily conform to legal precedent, but is one which resolves the problem to the satisfaction of the parties. Any settlement reached as a result of the mediation session is written down by the parties and signed by each side. The terms of settlement may be retained in contract form or, if there are court proceedings, the lawyers will obtain the appropriate court order\textsuperscript{18}. In addition to the above, the role of the mediator should be examined.

\textbf{1.2 The Mediator’s Role}


\textsuperscript{18}What is mediation? THE LAW SOCIETY OF NEW SOUTH WALES, Copyright 2009-The Law Society of New South Wales CABN 98 696 304 966, CAN 000 000 699.
The primary role of the mediator is to mediate from a position of impartiality, having no vested interest in the outcome of a dispute between parties. He is not a judge and does not render a decision or impose a solution on any party. Rather the mediator helps those involved in the dispute talk to each other, thereby allowing them to resolve the dispute themselves. The mediator as well as the parties can set the ground rules before the process begins. The ground rules are especially important because they establish and identify the expected behaviors of all parties. The ground rules set the tone for a productive conversation and opportunity to resolve the conflict. Another pivotal role of the mediator is to listen and help the parties identify the underlying causes of the conflict and how they would like to resolve or manage it. The agreements and outcome are decided by the parties. To aid in the discussions, the mediator may ask questions to gain an understanding of the issues, help the parties understand the other person’s point of view, discuss the weaknesses in the arguments of the parties, or make suggestions to solve the conflict. The mediator shares joint responsibility with the parties for protecting and maintaining the confidentiality of the process. They hold all communications in confidence during the mediation process, and will not testify against either party in an arbitration hearing or in a court of law. The mediators that serve the program are trained and certified professionals.

1.3 The Mediation Process

The mediation procedure will generally be flexible, with the mediator determining how the process will be conducted. It is divided into two sessions - a preliminary conference and a mediation session. The purpose of the preliminary conference is to explain the features of the mediation process, to sign an agreement to mediate, to determine the preliminary steps to be taken before the mediation conference, and to set a timetable for the completion of these...
steps before the mediation session. During the mediation conference parties have an opportunity to give a brief opening statement outlining their individual concerns and issues. The mediator then encourages the parties to communicate directly to enable them to clarify their position with the other side and to gain an understanding of the other party’s point of view23. After the parties have met and set out their respective cases to the mediator, it is usual for the parties to move to separate rooms. The mediator moves between the parties discussing the issues with each of the parties. This is often referred to as breakout sessions. In this way, the mediator can discover where the main issues of contention lie, and discuss these with the parties privately. Once this process has concluded, the mediator will then discuss the alternatives to overcome the issues. It is hoped at the end of the process that the parties will reach a settlement. All that time, it will be usual for the parties to set up a summary of their respective cases and any documents which they wish to rely on. Privileged documents can be shown to the mediator, and these will be kept confidential if a party so requests24. Besides the clearer understanding of its functioning, the analysis of the mediation process leads to the need of the analysis of its characteristics.

1.4 Characteristics of the Mediation Process

Being an efficient and alternative way of resolving legal conflicts without resorting to a trial, mediation has several characteristics that make it unique in comparison with the other methods of ADR. Firstly, both parties hire the mediator by their own free will, and they are free to leave the mediation or end the process whenever they desire. Secondly, both parties involved in the dispute share power in the decision-making process. No one can be forced to accept terms they do not agree with. All parties work together to find a solution. Moreover, the process is confidential, and materials assembled for mediation are usually not admissible in court, in case the matter in question comes up again. The mediator always describes the exact terms of confidentiality. Furthermore, the mediator is impartial and does not favor one

party over the other. The decisions are made without bias. Also, mediation is an extremely cost-effective alternative to court proceedings\textsuperscript{25}.

Generally, the mediation process is non-binding, of voluntary nature, confidential, impartial and informal. The fact that the mediator provides relationship-building or procedural assistance, so as the parties can explore alternate possibilities in settling the dispute, are also important\textsuperscript{26}. Besides mediation, another ADR technique must be examined, i.e. arbitration.

**Chapter 2: Arbitration**

2.1 *Arbitration-ADR method*

Arbitration is a private dispute resolution process where parties in conflict hire a neutral third party to hear their stories, look at the facts and make a decision for them on how the dispute will be resolved. It is a technique, either in domestic or international level, ad hoc or through institutional rules e.g. ICC Rules, where the parties in a pursuit of an arbitration agreement, refer it to one or more independent, impartial-chosen by the parties- persons, the arbitrators, whose decision, the arbitral award, is binding, enforceable, and subject to some rights of appeal e.g. public policy\textsuperscript{27}. Arbitration is essentially contractual, and is generally used in a wide range of commercial settings to deal with conflicts that arise under contractual agreements\textsuperscript{28}. The most common settings for arbitration include construction, manufacturing and other commercial branches, international trade, labor-management, employment, public sector and insurance.

The Federal Arbitration Act of 1925 established a national policy in the USA, allowing contractually based private arbitration to take the place of standard court procedure and be judicially enforceable\textsuperscript{29}. The Uniform Arbitration Act, promulgated in 1956 and


\textsuperscript{26} WIPO (WORLD INTELLECTUAL PROPERTY ORGANIZATION), ADR Arbitration and Mediation Center 1, Public Works and Government Services Canada, http://wipo.int/amc/en/mediation, 2013, 1.

\textsuperscript{27} General Characteristics, Dispute Resolution Model 1, Copyright 2004, 1.


revised in 2000, has been adopted in nearly every state to provide guidance on the uses of arbitration and the enforceability of arbitral awards (UAA 2000)\textsuperscript{30}. Finally, a number of international trade agreements, most notably the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted through the United Nations (UN) in 1959, require courts of contracting nations to recognize and give effect to private arbitration agreements and enforce arbitral awards\textsuperscript{31}. Taking into consideration the above, the analysis of the role of the arbitrator is important for a better understanding of arbitration.

\subsection{2.2 The Arbitrator’s Role}

First of all the arbitrators (also called the arbitral tribunal), determine the outcome of the dispute. The composition of the arbitral tribunal can vary enormously, with either a sole arbitrator, or two or more arbitrators, and various other combinations. In most jurisdictions, an arbitrator enjoys immunity from liability for anything done or omitted while acting as arbitrator, unless he acts in bad faith. Specifically an arbitrator is performing a function similar to that of a judge or court, such as holding hearings, allowing parties to state their case, evaluating the submissions and evidence of the parties, and making a fair, impartial and binding decision, resolving matters in dispute between the parties\textsuperscript{32}. An arbitrator should uphold the dignity and integrity of the arbitration process. He has a responsibility to the parties, and to other participants in the proceedings. Additionally, an arbitrator should be competent to arbitrate the particular matter. The arbitrator should accept an appointment only if he meets the parties’ stated requirements in the arbitration agreement regarding professional qualifications, and he should be prepared before the proceedings by reviewing any statements or documents submitted by the parties. Furthermore, an arbitrator should maintain confidentiality appropriate to the process, he should endeavor to provide an unbiased process and to treat all parties with respect in all stages of the proceedings. Finally, an arbitrator should make decisions in a just, independent and deliberate manner\textsuperscript{33}. The role of the arbitrator can be even clearer with the extensive development of the arbitration process.

\begin{flushleft}
\textsuperscript{30} Mark Batson Baril and Donald Dickey MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?, 2013, Onyema 411.  \\
\textsuperscript{31} Mark Batson Baril and Donald Dickey MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?, 2013, Onyema 412-413.  \\
\textsuperscript{32} Ontario MINISTRY OF LABOUR, ARBITRATION: FAQ, Content last Reviewed: November 2011, 1.  \\
\textsuperscript{33} JAMS THE RESOLUTION EXPERTS, Arbitrators Ethics Guidelines Copyright 2013 JAMS, 1.
\end{flushleft}
2.3 The Arbitration Process

The arbitration process begins with the submission of an application for arbitration, and with the respondent’s response, regarding the relevant facts and defenses to the statement of claim. Being a voluntary dispute resolution, arbitration is divided into two types: Ad hoc Arbitration and Institutional Arbitration. On ad hoc arbitration, the arbitral tribunal is appointed by the parties or by an appointing authority chosen by the parties, whereas in institutional arbitration, the arbitration will be administered by a professional arbitration institution like ICC Paris, or DIS German Institution of Arbitration, which will be the appointing authority. The arbitration institution has its own rules and procedures, and may be more formal and expensive. After selecting the type of arbitration regarding mainly the arbitral tribunal, the latter hears evidence at a hearing conducted in an office. The rules that the arbitral tribunal applies are those that parties have chosen through their arbitration agreement, unless there is no choice of law rules and the arbitrators will decide the extent to which rules of evidence will be applied and the remedies which are appropriate. Finally, with the conclusion of the hearing, the arbitral tribunal issues a decision, called an arbitral award, which is final, binding and enforceable, and cannot be appealed to any court except to some rights of appeal e.g. public policy. The analysis of the arbitration process indicate that the characteristics of the specific ADR method must also be enumerated.

2.4 Characteristics of the Arbitration Process

As it is pointed out, arbitration is a technique for the resolution of dispute outside the courts, where the parties to a dispute refer it to the arbitral tribunal by whose decision (award) they agree to be bound. The final and binding character of arbitration is one vital characteristic which distinguishes that process from any other method of ADR. It is faster than litigation and more flexible for businesses. Also, it is a highly confidential process due to the fact that usually the arbitral proceedings and the arbitral award are non-public. Furthermore, according to the provisions of the New York Convention 1958, arbitral awards are recognized and can easily be enforced in other nations and much more difficult to be

appealed in comparison with the court judgments. A similar provision is included in Brussels I Regulation. According to this Regulation, a judgment given in an EU country is to be enforced in another EU country when, on application of any interested party, it has been declared enforceable there. The parties may appeal against a decision on an application for a declaration of enforceability. Additionally, the arbitration process entails the minimization of costs and flexibility during the proceedings. The principle of “party autonomy” is a major characteristic of that process, by which the parties have the freedom through their arbitration agreement to set the legal framework of their dispute, by the means that they choose the applicable rules of law and the arbitral tribunal. Finally, the selection of the arbitration method contributes to the preservation of business relationships due to the fact that it helps in solving the disputes and the various problems that come up from the parties’ transaction without harming their relationship.

The above analysis of the two methods of ADR, mediation and arbitration, indicates their basic principles, characteristics and at the same time their contribution to the resolving of the disputes in an easier, more flexible and effective way. Although both of them are forms of ADR, there are significant differences between them that should be pointed out.

Chapter 3: Differences between Mediation and Arbitration

One of the most important differences between mediation and arbitration is the person who ultimately resolves the conflict. Mediation is a voluntary ADR method where all parties must consent to participate in good faith and work toward a mutually agreeable resolution, as is required and will be analyzed further. The mediator and the parties follow a specific set of protocols that require everyone involved to be working together. Moreover, the parties are free to express their own interests and needs through an open dialogue in a less adversarial setting than a courtroom. The mediator is a neutral, impartial third party who acts as a

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“referee”. They play a dual role during the mediation process as facilitators of the parties’ positive relationship, and as evaluators in the examination of the different aspects of the dispute. The process is conducted before a single mediator who does not judge the case but helps and facilitates the discussion. After analyzing a dispute, the mediator can help each side to recognize the legalities involved in their argument, but it is up to each party to agree on a final agreement that is mutually acceptable and will resolve their dispute. On the other hand, arbitration is a non-voluntary ADR process, where the two parties take their cases in front of an independent, impartial and knowledgeable third person, the arbitrator, who will make then a decision very similar to a regular court case. Arbitrators are individuals that possess particular legal skills, knowledge and competence. They act similar to a judge and make decisions about evidence and give written opinions, which can be binding or non-binding. Although arbitration is sometimes conducted with one arbitrator, the most common procedure is for each side to select an arbitrator and for those two arbitrators to select a third arbitrator. The dispute is then presented to the three arbitrators chosen, with a majority of the arbitrators rendering a written decision. Despite the fact that both methods are less expensive and less time consuming, mediation is informal and flexible in terms of evidence. It involves more dialogue between the parties for the sake of the continuity of their business relationship even though they are in dispute. On the contrary, arbitration is a little more formal both in process and presentation of arguments and evidence. In the process of mediation, the mediator will meet both sides individually to hear their sides in private, and then arrange meetings where each side can discuss their case face to face. However, in arbitration, both parties and their attorneys present their case in front of an arbitrator in a formal setting very much like a regular court case. Moreover, a significant importance between the two ADR methods is that an arbitrator makes a final decision on a case, while a mediator does not. During an arbitration proceeding, an arbitrator listens to and considers all relevant information and then decides which party should win. The winning vote is called an Award. On the other hand, a mediator discusses possible settlements and encourages the

40 Arbitrator vs. Mediator”, Diffen, Legal, Dispute Resolution, 2013, 1.
41 What’s the difference?”, FindLaw FOR LEGAL PROFESSIONALS, Copyright 2013 FindLaw, a Thomson Reuters business, Published 2008-03-26, 1.
43 Arbitrator vs. Mediator”, Diffen, Legal, Dispute Resolution, 2013, 2.
44 What’s the difference?”, FindLaw FOR LEGAL PROFESSIONALS, Copyright 2013 FindLaw, a Thomson Reuters business, Published 2008-03-26, 2.
disputing parties to arrive at a decision on their own. In a way, the mediator acts as a sort of middleman that facilitates discussions to get the individual parties to agree on a resolution. When an arbitrator makes a final, enforceable and legally binding decision, both parties must honor it in all courts. Appeals are only accepted under special circumstances. In contrast, mediation settlements are never legally binding unless both parties specifically request binding mediation. The mediator has no power to impose a decision on the parties, issue orders, or pass judgment. In most cases, if disputing parties sign a mediation clause, they participate in the mediation process, but none of the settlements or decisions reached is legally binding⁴⁶. If the parties do not arrive at any settlement agreement as a result of the process, they are always allowed to go to arbitration or litigation, thus, the method does not deprive parties of their right to due process. In contrast to mediation clauses, arbitration clauses are binding. When they are signed by the parties, they are ultimately limiting options and deprive parties of their due process rights under the traditional judicial system⁴⁷. The outcome of a successful mediation is a settlement rather than an enforceable award. After all, to be effective, mediation must be considered by the parties as a tool or instrument so as to help them to manage directly the resolution of their disputes between one another⁴⁸.

Regarding the enforceability of the mediation settlement agreements, there were drafted legal texts both in Greek Law and generally in the European Law. Specifically, the Greek Mediation Act, Law 3898/2010, in Article 9, points out that in the event of a mediation successfully leading to a settlement, the mediator draws up a mediation agreement record which is signed by the mediator, the parties and their lawyers and it is submitted by the mediator unilaterally upon the request of one of the parties to the Secretariat of the Court. One submitted in this manner, the settlement agreement becomes enforceable⁴⁹. Besides the Greek Mediation Act, the European Directive 2008/52/EC has regulated the issue of the mediation settlement agreements’ enforceability. According to Article 6, when the parties request it, a mediation agreement can be enforceable provided that it is in accordance to the law of that Member State. Concerning the foreign judgments and the arbitral awards, the Greek Law incorporated the Article 32 of the Regulation 44/2001 (Brussels I) which provides

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⁴⁷ ICC 1341 paragraph 2 and 1469 paragraph 3


⁴⁹ Dimitra Triantafyllou, Alternative Dispute Resolution- Mediation, 12-11-2013, 1.
that the foreign judgments can be enforced irrespectively of the country where they have been issued as long as they are not contrary to national issues e.g. public policy.\footnote{Dr. Haris Meidanis, Enforcement of: Foreign Judgments And Foreign Arbitral Awards in Greece, GREEK LAW DIGEST The Ultimate Legal Guide to Investing in Greece, 9-01-2012, 1.}

Taking into consideration the differences between mediation and arbitration, it can be concluded that each of ADR processes, provides important benefits to parties and may be seen as complementary to the judicial process.

In recent years, however, arbitration in its traditional form has developed a number of hybrid ADR processes. These proceedings differ significantly from traditional ADR procedures and it has been questioned whether they constitute a separate ADR process. A significant example are Med/Arb models. Med/Arb is a process which is hybrid between mediation and arbitration where it is possible for the parties to agree to mediate first and then arbitrate.\footnote{PART I AN INTRODUCTION TO ADR ALTERNATIVE DISPUTE RESOLUTION, Oxford University Press, 2012 fds.oup.com/www.oup.com/pdf/13/9780199216475.pdf fds.oup.com, icc adr, 24.} Due to their continuous development, the functions of Med/Arb models, their benefits, disadvantages, the fields of law in which these models will be used, and the various forms of the Med/Arb process, should be pointed out and analyzed extensively.

Chapter 4: Med/Arb Models

4.1 Med/ Arb Models- Hybrid ADR Method

There has been much discussion on integrating mediation and other ADR methods into arbitral proceedings, in order to improve the efficiency of dispute resolution. Various combinations have long been practiced, among them the Med/Arb models.\footnote{Gabrielle KAUFMANN-KOHLER and Fan KUN, Integrating Mediation into Arbitration: Why it Works in china, Journal of International Arbitration 25(4): 479, 2008, 2008 Kluwer Law International.} There are many forms of Med/Arb models. Many consider that it is a hybrid process in which the mediator becomes the arbitrator, if the dispute is not settled with mediation, and it is necessary to arbitrate. There are others who viewed the Med/Arb process as a more “blended mechanism”, and believe that the differences between mediation and arbitration are artificial, depending on the degree of decision-making power which the neutral third person may exercise during the process. Some proponents not only agree that the process may move back and forth between mediation and arbitration, but they consider this flexibility to be one of Med/Arb’s main
benefits. Others view Med/Arb as separate sequential processes in which there are two neutral third persons: one serving as the mediator, and the other serving as the arbitrator if it is necessary to conduct arbitration proceedings. A variation on the latter process, known as co-med/arb, allows the mediator and the arbitrator to jointly conduct a fact-finding hearing at the outset of the dispute. The hearing is followed by mediation and then arbitration if the first does not succeed\textsuperscript{53}.

According to the above, it can be pointed out that the Med/Arb process is an efficient process which provides the parties with the best of both types of ADR processes, with a guarantee of closure, while maintaining fairness\textsuperscript{54}. The use of a neutral third party, who acts as a mediator between the parties in an attempt to reach a voluntary agreement, and if it does not work, it switches to arbitration and the neutral third party renders a binding decision, affords the parties the opportunity to engage in the cooperative aspects of mediation, while providing the parties with the certainty of a final decision. It must be noticed that, where the parties choose the Med/Arb process as their ADR mechanism, they prescribe a fixed timeframe during which they will retain control over how the dispute will be resolved, and work towards a voluntary settlement with the other, after which they agree to relinquish control over the outcome and opt for a final determination of the dispute by a neutral third person. So it can be considered that the Med/Arb process strikes a balance between party autonomy and finality in dispute resolution\textsuperscript{55}. Besides the above, the role and characteristics of the Mediator/Arbitrator should be referred.

\textbf{4.2 The Mediator/Arbitrator’s Role}

A neutral person who acts as a mediator in the mediation phase of the Med/Arb process may act as an arbitrator in the arbitration phase of the Med/Arb process, if the first consents and the parties agree\textsuperscript{56}. The success of the Med/Arb process in resolving disputes is


\textsuperscript{54} Martin C. Weisman, MED/ARB- A TIME AND COST EFFECTIVE HYBRID FOR DISPUTE RESOLUTION, 2 Article Published in Michigan Lawyer’s Weekly on October 10, 2011, 1.


highly dependent on the Med/Arbitrator, whose skill and experience are essential. Except being neutral, impartial and independent during the proceedings, the third party should be skilled and experienced in both mediation and arbitration, so as to be able to switch from the requirements and responsibilities of one role to those of the other. The Med/Arbitrator must be able to move from being facilitative and non-judgmental in mediation, to acting as a decision maker in arbitration. Also, the neutral third person must have the ability to disregard failed mediation, and ensure that arbitration is not affected by information learned during mediation. Moreover, as in any ADR method, the Med/Arbitrator should be able to gain and keep the trust of the parties involved, as well as to establish and maintain credibility and faith in the process. These characteristics are perquisites for the Med/Arb process; when they are not present the Med/Arbitrator can be impeached and his decision may be challenged. However, the appointment of the same person to act as mediator, and in case the parties fail to reach a settlement through mediation as arbitrator, is not recommended.

Firstly, a party may during the mediation phase (“med phase”) of the Med/Arb process disclose confidential information to the mediator. The mediator is obliged not to disclose such information to the other party without the consent of the party. If the mediator acts as an arbitrator in the arbitration phase (“arb phase”) of the Med/Arb process, he might be in possession of information that the other party is not been given the opportunity to explain or rebut. If the third person allows himself to be influenced by such information in rendering the decision as an arbitrator, there would be a breach of the rules of natural justice. Secondly, a party may be less open with a mediator during the “med phase” of the Med/Arb process if there is concern that the information provided to the mediator may be relied on by that person subconsciously or not when the latter assumes the role of an arbitrator in the “arb phase” of the Med/Arb process. This could undermine the effectiveness of the “med phase”. Given the fact that a party may challenge the arbitrator or the award on the basis that the arbitrator was influenced by information learned during the “med phase”, the impartiality must seriously be taken into account. Moreover, a party might claim that the mediator prejudged the case during the settlement efforts, while he was offering an evaluation of the case’s merits. Furthermore, there might be complaints that the arbitrator retaliated against the party in the arbitration proceedings for not taking into consideration the latter’s advice during

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settlement discussions. Thus, arbitrators must deal with initiatives that might disqualify them as arbitrators. Consequently, in order to reduce this risk, arbitrators might limit their use of techniques that otherwise would make settlement efforts more effective\textsuperscript{59}.

Generally, the mediator appointed for the “med phase” and the arbitrator appointed for the “arb phase” of the process should be different persons. In any event, a mediator should only consent to act as an arbitrator in the same case only if there is consideration that any confidential or privileged information that one party discloses to this person are not shared with the other party, and will not bear on the latter’s decision as an arbitrator. Besides the important role of the Med/Arbitrator and mainly the vital contribution to the Med/Arb process, the characteristics of that person should also be analyzed.

4.3 The Med/Arb Process

The parties may agree to participate in the Med/Arb process either before or after a dispute arises. Parties who agreed to arbitrate may choose to participate in a prior mediation with the arbitrator serving as mediator. Similarly, parties who agreed to mediate may ask the mediator to become the arbitrator and settle their dispute.

In the Med/Arb process, the parties generally create the methodology to be followed. As an example, the mediation portion of the proceedings may be scheduled for a definitive time period. A complete mediation can be scheduled for half a day, or one or more days, and a separate arbitration can be scheduled for a later time. More commonly, however, the arbitration immediately follows the mediation portion of the process. Thus, in a one-day Med/Arb, a half-day arbitration immediately follows a half-day mediation, in a two-day schedule, the first day is devoted solely to mediation and the second, if necessary, solely to arbitration\textsuperscript{60}. Besides the time framework, some stages are set and followed, and are analyzed below.

4.3.1 The Med/Arb Agreement

The Med/Arb agreement identifies clearly the process to be used as well as the scope of issues to be decided. It should address issues such as confidentiality, how the phases are to


be conducted and concluded, how evidence is to be presented and considered and who is to attend.61

4.3.2 The “Med Phase”

At the start of the Med/Arb process, the Med/arbitrator will be acting as mediator and most likely will start with a joint session in order to determine each party’s perspective on the issues. The Med/Arbitrator will then continue with the “med phase”, using private hearings (caucuses) as appropriate. The Med/Arbitrator has the freedom that mediation allows him in being able to talk to the parties both collectively or privately, as the neutral third person deems it to be appropriate. In the “med phase”, the parties present their case to each other in the hope that they can come to an agreement to settle their dispute. With the assistance of the Med/Arbitrator, the parties try to understand the positions and concerns of the other party, with the expectation that the parties can reach a settlement that is fair and equitable to both parties. At a point where the Med/Arbitrator and both parties feel that they have come to an agreement on as many items possible through the “med phase”, the third person will assist the parties in setting up and signing a Mediation Settlement Agreement to cover the issues upon which the parties have reached agreement. If all issues have been successfully resolved, the Med/Arb process will come to a close. In case there are unresolved matters after the “med phase” has concluded, they would be forwarded to the binding “arb phase” as specified in the Med/Arb agreement.62 Although the “med phase” of the process is conducted much like a traditional mediation, it differs in a number of respects. Firstly, the Med/Arbitrator has the ultimate power to make a binding decision over the ordinary mediator. Secondly, the “med phase” differs from ordinary mediation in that the Med/Arbitrators are less likely to be willing to share their opinion or their case evaluation than ordinary mediators because they may fear reaching a different result based on the evidence that may be presented later. Another difference from traditional mediation is that the parties cannot simply walk away

from the Med/arb process at any time, as they will be committed to the process until the matter is concluded63.

4.3.3 The “Arb Phase”

If an agreement between the parties has not been reached, the parties go to the “arb phase”, where the Med/Arbitrator will render an award. In the “arb phase” during a formal hearing, the parties present their evidence and every other unresolved issue to the arbitrator, that prevented them from making a final Mediation Settlement Agreement. After the hearing and submission of briefs, the Med/arbitrator makes a final, binding decision, the arbitral award. It should be noticed that during the “med phase” of the process, it is likely that the parties may have disclosed confidential information to the Med/Arbitrator, including changes in their position on a particular issue or their underlying interests in settlement. The issue is whether the Med/arbitrator would or should consider such “confidential” statements later during the “arb phase”, if the process goes that far. It has been supported that if the process has been conducted properly, the Med/Arbitrator will not rely on the use of such information64.

4.3.4 The Med/Arb Award

The Med/Arb decision will be as fair and reliable as any other arbitral award because it will be based on reliable evidence obtained in the “arb phase”. It is binding and final because it ensures that the dispute will be resolved65. In rendering the Med/Arb award, the Med/Arbitrator will implement to the extent possible and if requested by the parties, any resolutions reached in the “med phase” and resolve by the award only the matters remaining in dispute66. Concerning the enforcement of the award, it has been pointed out that a mediated agreement shall be as enforceable as an agreement recorded in the arbitral award. A mediated agreement in a “pure” mediation is generally enforceable as a contract. However, it

has been observed that such a settlement is not covered by the New York Convention 1958. Such courts will not give a mediated agreement the same “consideration” they give to an arbitral award. The question, therefore, is whether a mediated settlement in the general Med/Arb process can be enforceable like an arbitral award. If the settlement agreement terminates an arbitration process already in progress, it is generally assumed, that the settlement agreements which are recorded in the award are enforceable under the New York Convention 1958. However, it is supported that the Convention does not cover such settlement agreements and that the enforcement depends on the provisions of national law regarding the recognition and enforcement of such settlements agreements67.

Taking into consideration that a settlement agreement recorded in the award is enforceable under the New York Convention 1958, there should also be referred, regarding the enforceability’s issue, the regulations that took place in Europe. Particularly, the Regulation 44/2001 points out that foreign judgments given in an EU country are to be enforced in any other EU country. The same applies to the Greek Law too. Greece is party at many EU regulations in the field of “judicial cooperation in civil matters”, among them the Regulation 44/2001 of the Council on Jurisdiction and the Recognition and Enforcement in Civil and Commercial matters (Brussels I)68. This means that judgments, like Med/Arb awards, can be enforced in Greece. Particularly, Article 903 of the Greek Code of Civil Procedure refers to the procedure that must be followed for the enforcement of a foreign judgment, always in combination with the Brussels Convention Art.31, the Lugano Convention Art. 31, the Regulation 44/2001, and Article 21 of the Regulation 1347/200069.

The success of the Med/Arb process relies heavily on both parties having full confidence in the Med/Arbitrator and a belief that there will be a privacy and trust between themselves and the Med/Arbitrator. The chance of a total settlement through the “med phase” is greatly increased, if the parties have total trust and confidence in the Med/Arbitrator, without having to worry that information may be used against them in the rendering of the

68 Dr. Haris Meidanis, Enforcement of: Foreign Judgments And Foreign Arbitral Awards in Greece, GREEK LAW DIGEST The Ultimate Legal Guide to Investing in Greece, 9-01-2012, 1.
award. As a result, it is recommended that parties have a separate mediator and arbitrator, so as to secure the integrity and mutual trust.

Chapter 5: Advantages and Disadvantages of Med/Arb Models

From a process perspective, the advantages and disadvantages of Med/Arb depend on the goals and values of the neutral third party. What one party may see as a strength of the process (the power and leverage of the Med/Arbitrator during the “med phase”) may be viewed by another as a flaw (power that too often results in pressure tactics and “coercion” of a mediated settlement)\(^{70}\).

5.1 Advantages of Med/Arb Models

Med/Arb’s most appealing attribute is the certainty that the dispute will come to an end, one way or the other, in a relatively quick fashion. Ideally, the parties will resolve the dispute to their mutual satisfaction during the mediation, making arbitration unnecessary. If agreement does not occur, however, the mediator will put on the arbitrator’s hat and ultimately issue an award, following whatever arbitration procedures the parties have previously agreed upon. The dispute ends at that point, allowing the parties to move on to other business\(^{71}\). This process is an efficient way of reaching an early settlement, avoiding substantive hearings and the significant legal fees, either by bringing the parties closer together or by giving an early indication of the likely outcome of the formal proceedings and thereby encouraging the parties to settle\(^{72}\). As a result, time and money are saved through separate sequential phases of mediation and arbitration in three important respects: Firstly, if settlement is not reached in the “med phase”, the parties and their lawyers have the option not to hire another neutral third person, unfamiliar with the case, and obliged to be prepared from the beginning for the “arb phase”\(^{73}\). Secondly, the Med/Arb process has speed and


\(^{72}\) Herbert Smith, Japan dispute avoidance newsletter number 113, February 2012 Med-Arb – an Alternative Dispute Resolution practice, 1.

\(^{73}\) Mark Batson Baril and Donald Dickey MED-ARB: The Best of Both Worlds or Just A Limited ADR Option? , 2013, 4.
decisiveness; still, it is not without sacrifices. One such sacrifice relates to confidentiality on the part of the mediator. In the mediation process, any statement made by a party to the neutral mediator is absolutely confidential unless the party has authorized its disclosure. This is a cornerstone of the mediation process. Thirdly, in most jurisdictions, the entire mediation process is cloaked with confidentiality, such that the neutral third person cannot testify what was heard or discussed with either party during mediation. Concern regarding confidentiality in mediation is so great that some jurisdictions are in the process of creating ethical rules for mediators, and there has been some case law on the subject, most of which center around the issue of confidentiality. These rules, if violated, might lead to penalties being inflicted on the neutral. Moreover, the parties are able to estimate their claim which was exactly exercised in the arbitration proceedings, since they have been negotiating in the “med phase”. A research has shown that, with a different neutral third person acting as an arbitrator after the “med phase”, the mediator was less involved and the parties were less creative. Also the presence of the Med/Arbitrator and the threat of an arbitral award create not only the incentive for the parties to mediate successfully their dispute and settle their case, but also the incentive for the parties to participate in the “med phase” in sincerity and good faith. The reason is the knowledge that, in case they fail to reach an agreement, they will immediately lose control over the outcome, therefore the parties are more likely to approach the bargaining table with honest demands. Additionally, the most important attribute of the Med/Arb process is the certainty of a final decision. Knowing the dispute will be resolved brings tremendous benefits to the parties and the process. Regardless of whether the final product of the process results entirely from mediation or both mediation and arbitration, it becomes the entire settlement, which is final, binding and enforceable at law (New York Convention 1958). Finality is the Med/Arb’s process most appealing attribute. The saving of time and money and the manner in which the parties approach the process are due to a large extent to the finality of the process. Furthermore, the Med/Arb method under the facilitative approach can be particularly beneficial, where there is an on-going business relationship which the parties would like to preserve. Indeed, a settlement can cover issues

75 Dr. Klaus Markowitz, PG DiplICA (London) Is merging of arbitration and mediation proceedings an advisable strategy in order to settle disputes? Kostasbeys.gr 2006, 5/11/2013, 1.
76 JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 1.
77 JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 2.
78 Herbert Smith, Japan dispute avoidance newsletter number 113, February 2012 Med-Arb – an Alternative Dispute Resolution practice, 1.
outside the scope of the dispute, and it can therefore have a positive outcome on the relationship between the parties going forward\textsuperscript{79}.

The advantages of the Med/Arb process make it an effective, quick, and low cost way of resolving a dispute. The parties achieve not only the settlement of their dispute but also the maintenance of their business relationship and the possibility of making it stronger and with even more prospects for the future. However, there are also a number of potential disadvantages in combining mediation and arbitration which cause serious concerns about the functioning of the method and its results.

5.2 Disadvantages of Med/Arb Models

The two most important concerns with the Med/Arb process are the potential for “coercion” and the risk that confidential information gained during the “med phase” may affect the Med/Arbitrator’s final decision. The best way to prevent these concerns from being materialized, is to allow each party an “opt-out” right for the same neutral third person to continue after the “med phase” into the “arb phase”\textsuperscript{80}. The potential loss in efficiency (i.e. extra time and money in the “arb phase”) is justified by the protection of each party, and the incentive for the Med/Arbitrator to maintain impartiality\textsuperscript{81}. The second major concern with the Med/Arb process is that confidential information gained during the “med phase” may inappropriately influence or be used by the neutral third person during the “arb phase”\textsuperscript{82}. The real premise of this criticism is that the Med/Arbitrator cannot be completely neutral in the decision making phase, having gained confidentially some, perhaps unfavorable information, in the “med phase”\textsuperscript{83}. It is important to be checked whether the Med/Arbitrator is under any duty (pursuant to the applicable arbitration rules or legislation in the seat of the process) to disclose to the other parties information material in the “arb phase”, which has been exchanged during the “med phase” on a confidential basis. Similarly, there is the possibility

\textsuperscript{79} Herbert Smith, Japan dispute avoidance newsletter number 113, February 2012 Med-Arb – an Alternative Dispute Resolution practice, 2.
\textsuperscript{81} Mark Batson Baril and Donald Dickey MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?, 2013, 4.
\textsuperscript{83} JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 1.
that a party may be reluctant to discuss its position openly with the Med/Arbitrator, if there is influence by earlier mediation discussions, and mainly, if the same third person has the role of mediator and arbitrator. Regarding the last point, it has been pointed out that the third party may lose neutrality, become less vigorous, or be tempted into questionable conduct, i.e. the inability to avoid considering unfavorable information. Another disadvantage of that method is “coercion”. When the power to decide the dispute is vested in the mediator, it gives him the power to coerce the parties into settlement. Unlike the “ordinary” mediator using case evaluation, when the Med/Arbitrator evaluates a case, it is highly suggestive of how legal and factual issues of the case will actually be decided. And when the Med/Arbitrator “makes a settlement suggestion based on legal evaluation, this is basically a pre-decision”. The concern that arises from that fact is that “what appears to be a negotiated resolution may be perceived by the parties as an imposed one, thus diminishing the degree of satisfaction and commitment”. This concern with a “coerced decision” loses force when the parties have made a free and informed choice of the Med/Arb process, a process that explicitly authorizes the neutral third party to impose a final, binding decision. It is in the Med/Arbitrator’s professional interest to gain the parties’ trust during the “med phase”. He should have the skills to support each party’s participation and the ability to handle their reactions during the dealing with legal and factual issues of the case. However, with a properly skilled Med/Arbitrator, these concerns can be minimized so that the parties can benefit from the benefits that the Med/Arb process has to offer, which neither mediation nor arbitration can offer individually. Finally, if mediation does not lead to a settlement, it is possible that a party might seek to challenge the award on public policy grounds, on the basis of some alleged irregularity or lack of due process at the “med phase”. It must also be pointed out that, in case of the dispute not being settled, there is a risk that the parties will use the Med/Arbitrator’s comments on the strengths and weaknesses of parties’ positions to improve

84 Herbert Smith, Japan dispute avoidance newsletter number 113, February 2012 Med-Arb – an Alternative Dispute Resolution practice, 1.
their arguments and submit additional evidence, gaining an advantage they would not otherwise have had.

From the above it can be pointed out that the Med/Arb process enumerates many advantages which can make it a highly effective, flexible and most preferred ADR mechanism for the settlement of the disputes. However, there are concerns expressed about the third person’s neutrality and generally the ability to render an award, irrespective of from opinions and expressed statements before that person. These concerns may be eliminated with continuous participation of the parties in the process, and the expression of their problems, dilemmas and worries that may come up during the proceedings.

Chapter 6: Fields where Med/Arb has developed

During the last decade there has been a complete change in the way disputes have been resolved in various fields of law, e.g. Labor, Family Law etc. Litigation and arbitration were the predominant methods, with many references to expert determination. The main concerns expressed regarding traditional methods were uncertainty as to cost, time and likely outcome. Due to that uncertainty, procedures like the Med/Arb process were introduced and regularly used in the settlement of the disputes with the objective to reduce these concerns. The analysis of the following fields of law will indicate the contribution and change that Med/Arb Models made and continue to make in dispute settlement.

6.1 Labor Disputes

The Med/Arb method is developed in Labor law. Using that process to settle disputes in the public sector helps to equalize the bargaining positions of the parties, which are lost through provisions prohibiting strikes. In Labor law, the Med/Arb process has found great success in resolving disputes (contract negotiating disputes) in cases where a strike is prohibited. However, even proponents of labor Med/Arb process, do not believe it should be

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91 Herbert Smith, Japan dispute avoidance newsletter number 113, February 2012 Med-Arb – an Alternative Dispute Resolution practice, 1.
92 Roger Knowles, CONTEMPORARY DISPUTE RESOLUTION IN THE CONSTRUCTION INDUSTRY, CONTINUING PROFESSIONAL DEVELOPMENT, 2013, 1.
used to resolve every type of labor dispute, and some are questioning whether it is appropriate in private sector labor disputes.  

6.2 Family Disputes

The Med/Arb process is regarded as a new form of arbitration developed in the USA, having a statutory basis in some American jurisdictions but it is also provided for in Canada in family matters. Specifically Section 1 of the Family Arbitration, O.Reg. 134/07 defines as follows: “Med/Arb agreement” means a family arbitration agreement providing that, mediation between the parties is to be conducted before any arbitration is conducted, and if mediation fails, the mediator shall arbitrate the dispute and issue a binding resolution. In Australia, the Med/Arb process operates in the commercial setting. There have been important reforms made to the Australian arbitration legislation, as well as in a number of other areas, such as human rights. It has been reported that the introduction of the Med/Arb method in parenting disputes is giving families an option, i.e. that couples have the choice to agree to that method, and the mediator will render a decision applied to them.

6.3 Corporate Disputes

The Med/Arb method has proven to be effective in certain types of cases between corporate disputants. Proponents believe that the parties’ business relationship is more likely to continue with the use of that method than in any other process. Also, disputes within corporations, such as shareholder conflicts, are proven to be the most suitable for settlement through the Med/Arb process. Combining the cooperative aspects of mediation and the finality of arbitration can be helpful and advantageous. Moreover, negative consequences can be avoided and the Med/Arb will give a chance to the parties to be less hostile, more creative and act in good faith.

93 JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 1.
95 JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 1.
6.4 International Arbitration

The Med/Arb process has been successfully used in international arbitration. The possibilities offered made it a “desirable” method for the settlement of the disputes. Firstly, the neutral third person can be open to possibilities to shape a more effective dispute resolution process, and the Med/Arb process is considered to be an effective tool to identify and isolate disputed facts, allowing the parties to narrow down the issues. Also, the parties can dispose of undisputed issues and resolve more efficiently the disputed ones, thus, saving time and money. For these reasons, many countries like China and Hong Kong have included in their national arbitration law such Med/Arb provisions.96

Generally, there are fields where the Med/Arb method can be an effective means of dispute resolutions. As it is pointed out, it is a tool whose suitability depends on the circumstances and the parties involved in the particular dispute, and mainly it has many possibilities through the years to become an effective and more preferred resolution vehicle. Due to the effectiveness, use and importance of Med/Arb Models, the examination of other forms of Med/Arb and their characteristics are considered important.

Chapter 7: Different Forms of Med/Arb Models

7.1 Med/Arb/Diff

In this model, the mediator and arbitrator are different persons. What distinguishes the process from a traditional mediation followed by a traditional arbitration is that both neutrals would be selected before the process begins, and the “arb phase” would follow the “med phase”. The mediator would convey the reached agreement to the arbitrator who adopts that part of the award and then proceeds to hear and determine the unresolved issues. Sometimes in this process the arbitrator sits in on the opening sessions of the mediation. Med/Arb/Diff,

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96 JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 2.
however, is more costly and time consuming and it forecloses further attempts to mediate once the process reaches arbitration.\(^{97}\)

### 7.2 Med/Arb/Diff/Recommendation

This process is identical to Med/Arb/Diff except that should the participants fail to reach a voluntary agreement during the “med phase”, the mediator submits a recommendation to the arbitrator. It is suggested that the arbitrator usually follows the recommendation.\(^{98}\)

### 7.3 Co-Med/Arb

In this form the mediator and the arbitrator are different persons who jointly conduct a fact-finding hearing which is followed by mediation without the arbitrator. If the mediation does not resolve all issues, the arbitrator takes over and renders a decision.\(^{99}\)

### 7.4 Med/Arb/Opt-Out

This is a modification of the “original Med/Arb” process which provides that once the “med phase” is completed and before the “arb phase” commences, each party is entitled to independently call for a different person to be appointed as arbitrator.\(^{100}\)

### 7.5 Arb/Med

Arb/Med reverses the sequence of Med/Arb in that mediation follows arbitration. There are, however, at least two variations of this process. One view allows the arbitration to conclude, but the award is sealed. The parties then mediate before the same third person. The

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\(^{97}\) JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 1.

\(^{98}\) JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 2.


\(^{100}\) JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 1.
second variation requires an additional process decision to be made in whether the mediator is present throughout the arbitration. The logic of the particular process is difficult to comprehend. In the Med/Arb process, the parties have the opportunity to avoid arbitration by resolving fully their dispute in the “med phase”. In the Arb/Med process not only the parties are deprived of the opportunity to avoid arbitration, the “arb phase” is certain to be more expensive than it would have been in the Med/Arb process\textsuperscript{101}.

### 7.6 MEDALOA

MEDALOA (Mediation and Last Offer Arbitration), is a hybrid process like the original Med/Arb process, where their difference is in the “arb phase”. If the parties do not reach a voluntary settlement through mediation, each party submits a “last offer” to the Med/Arbitrator who must choose between one of two final offers. This process limits the discretion of the arbitrator to decide what he believes to be the most appropriate solution since the award must be limited to one of the offers\textsuperscript{102}.

### 7.7 Shadow Mediation

In “shadow” mediation, the parties agree to have a separate mediator “shadow” in the “arb phase” of the process. The mediator monitors the pre-hearing activities and joins the Med/Arbitrator during the arbitration hearings. In this process, the mediator is available if either party would like to stop the proceedings at any time and mediate any particular issue. This allows the Med/Arbitrator to stay objective and impartial in the event that the case returns to arbitration. Because this process is expensive, it is generally used in multi-party, complex disputes\textsuperscript{103}.

### 7.8 Mediation Windows in Arbitration

\textsuperscript{101} JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 2.

\textsuperscript{102} JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 2.

In this process there is an opportunity to conduct a separate mediation during an ongoing arbitration. It is possible for the mediation to occur at any time during the arbitration i.e. between the hearings. The ability to mediate at different times makes this Med/Arb form flexible and creative especially if the same third person is used, though the parties are free to use a different third person to mediate. The process, however, emphasizes the arbitration and, unlike other forms the parties are not required to mediate but are encouraged to do so\(^\text{104}\).

### III. Conclusions

ADR processes such as mediation and arbitration have proven to provide important benefits to parties, and may be seen as complementary to the judicial process. For many, ADR is a way of resolving disputes that will make existing conventional techniques outmoded. The fact is that they are highly effective in dealing with all types of disputes, particularly those involving complex factual situations, technical issues requiring expert evidence or emotionally charged disputes\(^\text{105}\). There are useful practices to be learnt from ADR (including strict limits upon the extent of disclosure and time limits for hearings) which can be adopted to reduce the time and expense of more conventional methods of resolving disputes\(^\text{106}\). Besides mediation and arbitration, the Med/Arb process has become or is becoming a distinct ADR process with its own advantages, disadvantages, proponents and critics. Although not suitable for every situation, the Med/Arb process can be an effective tool for the resolution of many types of disputes\(^\text{107}\). Given the right circumstances, the Med/Arb method has some enormous advantages over mediation and arbitration alone. It also has real and dramatic drawbacks if applied to the wrong conflict. It is up to each conflict resolution professionals to understand the options available to the parties. It is understandable that the choice of a specific model, hybrid or not, must be made according to the nature of the dispute so as for it to fit and work\(^\text{108}\). Additionally, parties often have different expectations.

\(^{104}\) JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 2.


\(^{107}\) JOHN T. BLAKENSHIP, ATTORNEY AT LAW, MED-ARB: A TEMPLATE FOR ADAPTIVE ADR, BLAKENSHIP 2009 John T. Blakenship, 2.

\(^{108}\) Mark Batson Baril and Donald Dickey MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?, 2013, 7.
regarding the processes by which their disputes should be resolved, depending on their cultural and legal backgrounds. It has been noticed that parties have reservations about the concept of the Med/Arb process and its impact on parallel arbitration or litigation proceedings. Due to these facts, and mainly in order to ensure that the Med/Arb process is an effective process that is less likely to be challenged by a dissatisfied party, it is important for the parties to think reasonably regarding the choice of the specific ADR model for the achievement of an agreement and settlement of their dispute. Despite criticism and various concerns, the Med/Arb process is generally a developing ADR method which combines flexibility, effectiveness, low costs, and mainly the merging of two important ADR processes, mediation and arbitration. In many countries it is a popular and most preferred process, while in others, lawyers and experts try to find new ways and strategize about how to use, interpret and improvise on the rules, the role of the Med/Arbitrator and the procedure to be followed during this process. Only in that way, will it be possible to make an even more solid ground for the development of these models, and help the persons involved in the procedure to settle their dispute and at the same time retain and make their business relationship stronger.

109 Herbert Smith, Japan dispute avoidance newsletter number 113, February 2012 Med-Arb – an Alternative Dispute Resolution practice, 1.
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