ΠΑΝΕΠΙΣΤΗΜΙΟ ΠΕΙΡΑΙΩΣ

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Mediation in Energy Disputes (Oil and Gas Sector)

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20 February 2020

Athens, Greece

Discourage litigation.
Persuade your neighbors to compromise wherever you can.
Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.

Abraham Lincoln

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Abstract

This dissertation addresses mediation as an alternative dispute resolution (ADR) mechanism, focusing on Oil and Gas (energy) disputes. This industry involves activities such as exploration, drilling and production of Oil and Gas, which are complicated, costly and risky. Thus, disputes should be resolved in a very effective, delicate and non-time-consuming way. The dissertation begins with the meaning of mediation and its differences to judicial dispute resolution (i.e. litigation) and to arbitration (the most frequently used type of ADR). Then, it illustrates the areas of conflict that arise in the international Oil and Gas business, which could involve states, companies and individuals as well. Afterwards, there is an extensive analysis of mediation as part of the Energy Charter Treaty (ECT) dispute resolution mechanism. ECT is a legally binding international investment agreement that establishes a multilateral framework for cross-border cooperation in the energy industry, covering all aspects of commercial energy activities including trade, transit, investments and energy efficiency, while at the same time including dispute resolution procedures. Therefore, it is a significant part of this dissertation, since it affects many countries, including Greece, who signed, ratified and still implementing the treaty. Subsequently, a lot of attention is paid to negotiation tactics and strategies, based on the Harvard Negotiation Project's approach, that could be useful on the course of mediation procedure. The last chapter consists of an analysis of the Greek legal status of mediation and the enforcement of international or domestic mediated settlement agreements in Greece.

Key words: energy, mediation, oil, gas, disputes, negotiation.

Vasileios Kamilarakis

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List of main abbreviations

ADR	Alternative Dispute Resolution
BITs	Bilateral Investment Treaties
ECT	Energy Charter Treaty
ICC	International Chamber of Commerce
ICSID	International Center for Settlement of Investment Disputes
IOC	International Oil Company
LOGIC	The Standard Contract for the UK Offshore Industry
NAFTA	North American Free Trade Agreement
RAE	Regulatory Authority for Energy
SCC	Stockholm Chamber of Commerce
UKCS	The United Kingdom Continental Shelf
UNCITRAL	United Nations Commission on International Trade Law

Introduction

Mediation in energy disputes is an alternative to litigation and arbitration. In the area of energy, many states and companies use Alternative Dispute Resolution (ADR) mechanisms to resolve their disputes. Conflicts in this area usually involve large amounts of money, complicated technical issues, more than two parties, and even multiple jurisdictions and regulatory regimes. As a result, taking into consideration that the business sector has -for profound reasons- the necessity to deliver projects, more efficient and faster methods are essential nowadays, due to the structure of the current globalized economy.

This dissertation addresses mediation as an ADR mechanism, focusing on Oil and Gas (energy) disputes. This industry involves activities such as exploration, drilling and production of Oil and Gas, which are complicated, costly and risky. Thus, many disputes arise that should be resolved in a very effective, delicate and efficient manner.

The aim of this dissertation is to illustrate that mediation could be highly effective for parties to solve their energy disputes, maintaining ongoing business relationships after that, without wasting time and money. A lot of attention is paid to negotiation techniques and strategies that could take place in the course of Mediation. Negotiation, in general, is a field that has not so far gained the necessary attention (especially) in Greece. However, an analysis of negotiation techniques and strategies was considered to be useful, since -according to the author's perspective- they could not only assist the parties to disentangle themselves from unproductive disputes, but also to help them approach the matter at stake from a wider perspective. Furthermore, the dissertation aims to follow the initiatives of the Greek state that have been enacted recently to foster the use of mediation in civil and commercial disputes and to highlight the ways (international or domestic) mediated settlement agreements could be enforced in Greece.

This dissertation begins with the meaning of mediation and its differences to litigation and arbitration, which is nowadays the most frequently used type of ADR. It is pointed out that mediation offers a number of reasons that make parties opt for it (e.g., low cost, fast procedures, flexibility, confidentiality, no binding result and the ability to choose a mediator with expertise in the industry). There is also a brief mention of the most common ways according to which international mediated settlement agreements could be implemented globally. Then, the

dissertation illustrates the areas of conflict that can arise in the international Oil and Gas business, which could involve states, companies and individuals as well.

It follows an extensive analysis of mediation as part of the Energy Charter Treaty dispute resolution mechanism (ECT), and in particular the Guide on Investment Mediation that was published by the ECT Secretariat and adopted by the Energy Charter Conference in July 2016, with the purpose of encouraging the parties to consider mediation on a voluntary basis as one of the options at any stage of the dispute to facilitate its amicable solution. ECT is a legally binding international investment agreement that establishes a multilateral framework for cross-border cooperation in the energy industry, covering all aspects of commercial energy activities including trade, transit, investments and energy efficiency, while at the same time including dispute resolution procedures. Therefore, it is a significant part of this dissertation, since it affects many countries including Greece who signed, ratified and are still implementing the treaty.

Subsequently, a lot of attention is paid to negotiation tactics and strategies, based on the Harvard Negotiation Project's approach, that could be useful in the course of mediation procedure. Specifically, the dissertation elaborates on the so called "seven-elements of Negotiation" for understanding and analyzing negotiation, a framework which not only helps the parties to define their goals, but also prepares them to identify and take advantage of opportunities effectively, while at the same time helps them to minimize surprises.

The last chapter consists of an analysis of the Greek legal status of mediation and the enforcement of international or domestic mediated settlement agreements in Greece, since the ability to enforce agreements provides the parties with the expected sense of security, which is an important factor that makes parties opt for the proper dispute resolution mechanism.

1. Mediation

1.1. The meaning of Mediation

Mediation is a process in which a neutral third party, a mediator, meets with the disputing parties and actively assists them in reaching a settlement based on their business interests and risk assessments or policy considerations and not only their legal positions. In this procedure, the mediator facilitates negotiation among the parties:

- to help them identify interests
- develop settlement options
- overcome barriers to settlement.
- take a strategic overview of their positions, even if no settlement is reached.

The process is designed to assist parties in reaching a settlement, with minimum time and cost. The parties have complete control over their dispute and over the content of the agreement. Mediation is a much quicker form of dispute resolution when compared to litigation and arbitration (days or months vs years). The former can complement arbitration, letting the parties resolve a dispute without ultimately having to resort to arbitration.

In mediation, participation is entirely voluntary and the process relies on the cooperation of the parties. A successful mediation results in a settlement agreement, which may result in solutions other than mere compensation. The mediator does not issue any binding decision.

Mediation can be used either at the outset of a dispute, or at any time, and can take place while arbitration is ongoing. The timing when mediation will be a helpful instrument for the disputing parties is sine qua non: the earlier a mediation takes place; the less information parties may have available but can save more on legal costs. For example, there is no provision in the ICSID Convention that would prevent an ICSID Conciliation proceeding once an arbitration proceeding has commenced (Art. 26 of the ICSID Convention envisioned that parties may explicitly agree to pursue another remedy, e.g. conciliation or mediation, alongside ICSID arbitration). Similarly, neither the UNCITRAL Arbitration and Conciliation Rules, nor the SCC Arbitration and Mediation Rules contain any provision preventing mediation/conciliation once the arbitration proceeding has commenced. Almost every case in which negotiation is appropriate, mediation is also suitable for, whether direct negotiations have taken place or arbitration is pending.

1.2. Mediation versus Litigation

The Oil and Gas industry is the industry deemed with the most conflicts, bearing a very high number of disputes. From the early days of its existence, the industry employed different ways of dispute resolution. According to the ICSID, 25% of all recorded disputes, as well as 25% of fresh disputes, stemmed from the Oil and Gas sector[1]. Until the 1970's, most disputes arisen were solved by negotiation. However, with the increased number of IOCs and more importantly creation of OPEC, litigation and arbitration become the main ways of dispute resolution[2]. Significant examples of international arbitration at that time include BP vs Libya[3], Texaco and Calasiatic vs Libya[4], Limaco vs Libya[5] and Kuwait vs Aminoil[6]. In the 70s and 80s litigation was considered the only way of respectful dispute resolution[7].

Nowadays, the parties in dispute are opting for ADR, despite its relatively non-binding nature. As a result, popularity of mediation as an arranged way of dispute resolution in the Oil and Gas industry is rising, not only as a single tool, but also as part of a multi-tier agreed dispute resolution.

When discussing dispute resolution in Oil and Gas industry, industry players prefer arranged dispute resolution and binding methods are mostly favored[8]. Arbitration, (the most popular method of binding dispute resolution), is not as effective as it used to be due to the increasing costs and slower process[9].

1.2.1. Advantages and Disadvantages of Litigation

In the event of a dispute between contractual parties and no path of dispute resolution in place, the dispute under the national jurisdiction is dealt with litigation[10]. There are two main *reasons*

[1] The ICSID Caseload - Statistics (Report, Issue 2, 2012).
[2] Richard Walker Bentham, *Arbitration and Litigation in the Oil Industry,* [1986/87] 2 OGLTR35.
[3] BP vs Libya 53 ILR [1979] 297.
[4] Texaco and Calasiatic vs Libya 53 ILR [1979]389.
[5] Limaco vs Libya XX ILM [1981] 1.
[6] Kuwait vs Aminoil XXILM [1982].
[7] Hew R. Dunas, *Dispute Resolution in the Oil and Gas Industry: An Oilman's Perspectiv*e, (2004) 2 (3) available at https://www.ogel.org/journal-author-articles.asp?key=20 accessed 20 February 2020.
[8] Michael Polkinghorne, Matthew Secomb, *Drafting Oil and Gas Dispute Resolution Clauses: Time to Think More Creatively*, (Report, White &Case LLP, June 2011) available at https://www.ogel.org/article.asp?key=3518 accessed 20 February 2020.
[9] Ugo Ilegbune, *Mediating Community Community /Company Environmental Disputes in Oil and Gas Industry: A Guide for Promoting Environmental Mediation in Emerging Economies - Focus on Nigeria,* (2005) (3) https://www.ogel.org/article.asp?key=1956 accessed 20 February 2020.
[10] Mohammad Alramahi, *Dispute Resolution in the Oil and Gas Contracts,* [2011] IELR 78.

litigation is preferred over ADR by the industry: a) The high stakes, raised by disputes will require court adjourning because of the capital-intensive character of Oil and Gas industry, and b) In cases where parties seek the sturdiness of a court judgment.[11] For example, some LOGIC model contracts contain provisions on litigation as a final tier of dispute resolution after multi-layered negotiation arrangements (Clause 32.2).[12]

In the absence of any agreement being reached on a particular dispute either party may take appropriate action in the Courts to resolve the dispute at any time. Choosing of ADR over litigation is still permitted under the principle of freedom for parties'[13]. Taking into account the Oil and Gas participants close collaboration, litigation can damage business relationships built over years[14]. Only if the case could not be solved by ADR, it then would be submitted to the court[15].

When considering litigation, the following *issues* should be taken into account: parties will be bound by applicable laws and court rules[16], the judge will be appointed as a neutral and; lawyers will be the only ones who will be able to make appointment with disputing party,[17] consequently; parties will not be able to set the pace of their dispute.

Litigation is the slowest mode of dispute resolution, where considerable amount of time elapses between initiation of court proceedings and verdict. For example, in Shell Petroleum Development Company v. Farah case[18] where, due to the oil spill, which occurred at one of the Shell oil fields in 1970 in Niger Delta, the company was sued in the high court in 1989 after lengthy negotiation. After Shell had lost the case at the court of Appeal in 1995, the company appealed to High Court - 25 years after the actual oil spill!

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[11] Hew R. Dunas, *Dispute Resolution in the Oil and Gas Industry: An Oilman's Perspective,* (2004) 2 (3) https://www.ogel.org/journal-author-articles.asp?key=20 accessed 20 February 2020.

[12] Leading Oil and Gas Industry Competitiveness (LOGIC) *General Conditions of Subcontract (including Guidance Notes) for Small/Medium Enterprises (SME) Services*, (2nd edn. March 2001).

[13] Greg Gordon, John Paterson, *Oil and Gas Law: Current Practice and Emerging Trends* (Dundee University Press 2007) 454.

[14] LOGIC, *General Conditions of Contract (including Guidance Notes) for Purchase Order Terms and Conditions,* (2nd end. December 2005).

[15] Thomas Walde, *Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective*, (2003) 2 OGEL www.ogel.org/article.asp?kev=65 accessed 20 February 2020.

[16] Hew R. Dunas, *Dispute Resolution in the Oil and Gas Industry: An Oilman's Perspective*, (2004) 2 (3) https://www.ogel.org/journal-author-articles.asp?key=20 accessed 20 February 2020.

[17] Nicolas Maulet, *Adjudication of Oil and Gas Disputes,* (Lecture Notes, Robert Gordon University 2014).

[18] Shell Petroleum Development Company v. Farah [1995] 3 N.W.L.R (Part 382) pg. 148.

Furthermore, litigation costs can rise very highly due to the lengthy proceedings, disputed sum and international entities involvement. For instance, in the case of Amoco (UK) Exploration Co. vs. Teesside Gas Transportation Ltd[19] final litigation cost amounted to £12m. In another Amoco (UK) Exploration Company V. British American Offshore case, final litigation cost amounted £15m[20]. Furthermore, enforcement of a judgment can be extremely intricate, especially in cases of international judgment where, only bilateral agreements can be relied on to enforce decisions[21]. Finally, litigation may create xenophobic climate in IOCs due to problems with foreign courts, law system and language of the proceeding[22]. In 2009 Chevron went to arbitration against the government of Ecuador and its judicial system on the ground of breaching the United States - Ecuador Treaty and investment agreement, in an ongoing lawsuit against Chevron in Ecuador. On 4 March 2014, the U.S District Court of New York held that the holding of Ecuadorian court was a fraud and hence unenforceable [23, 24].

1.2.2. Advantages and Disadvantages of Mediation

Oil and Gas contracts frequently provide negotiation clauses as a first step before proceeding to arbitration or court due to the fact that mediation is the newest and most unknown tool[25]. Mediation itself is identified as: "*a flexible settlement technique, conducted privately and confidentially, in which a mediator acts as a neutral facilitator to help the parties try to arrive at a negotiated settlement of their dispute*" [26].

The speed of dispute resolution and the relatively low costs, sets mediation as a very favorable tool towards Oil and Gas disputes. One of the main features of mediation is flexibility, achieved

[19] Amoco (UK) Exploration Co. v. Teesside Gas Transportation Ltd. [2001] UKHL 18; [2001] 1 A11E.R. (Comm) 865.
[20] Amoco (UK) Exploration Company v. British American Offshore Ltd. [2001] EWHC48 (Comm).
[21] Nicolas Maulet, *Adjudication of Oil and Gas Disputes,* (Lecture Notes, Robert Gordon University 2014).
[22] Mohammad Alramahi, *Dispute Resolution in the Oil and Gas Contracts*, [2011] IELR 78 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159702 accessed 20 February 2020.
[23] Hewitt Pate, *Chevron's vice president on International Arbitration Against the Government of Ecuador* (Chevron, 23 September 2009) https://www.chevron.com/stories/chevron-files-international-arbitration-againstthe-governmentof-ecuador-over-violationsofthe-united-states-ecuador-bilateral-investment-treaty accessed 20 February 2020.
[24] Chevron corp v. Steven Donziger [2014] 11 Civ. 0691 (LAK).
[25] Michael Polkinghorne, Matthew Secomb, Dra*fting Oil and Gas Dispute Resolution Clauses: Time to Think More Creatively*, (Report, White&Case LLP, June 2011) available at https://www.ogel.org/article.asp?key=3518 accessed 20 February 2020.
[26] ICC 2014 Mediation Guidance Notes '*What is Mediation?*' https://iccwbo.org/publication/icc-2014-mediation-guidance-notes accessed 20 February 2020.

by the absence of many rules applicable to this process[27]. For instance, in accordance with new ICC Mediation rules and Article 4, rules can be adjusted according to parties' needs; to provide more flexibility for the parties, to the extent that changes still align with the ICC Rules[28]. Consequently, parties stay in control over the process.

Another advantage of mediation is the confidentiality of the process. Under the model contract - the proceeding and settlement agreement between parties shall be kept confidential, except otherwise agreed by the parties, party right to disclosure, or under requirement by applicable law[29]. In the mediation process one can find two tiers of confidentiality. The first one is the standard procedure where the mediator and other parties are obliged to undisclose any information, obtained via mediation. The second tier of non-disclosure relates to the mediator's obligation to undisclose the information to another party[30].

Last but not least is the distinctive business concept of mediation, with the fundamental principle of concentration on parties' interests rather than rights[31]. This concept broadens the scope of mediation, because it will not only allow the parties to claim right under the law, but also keeps business interests in mind, consequently maintaining ongoing business relationships[32].

However, mediation has *disadvantages* as well. One striking disadvantage is that the court may have difficulty enforcing a settlement agreement, claiming uncertainty and vague wording. For example, in Sulamerica CIA Nacional De Seguros SA vs Enesa Engenharia SA case, the court held that mediation clause was vague and did not clearly invite parties to mediate. Nevertheless, refusal of mediation was not an obstacle in proceeding with arbitration[33]. Moreover, mediation,

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[27] Main terms of mediation agreement should contain: 1) Place and time of proceeding; 2) attendees; 3) what document should be produced; 4) information on identity of the mediator (William F. Fox, 'The Wisdom of International and Commercial Mediation and Conciliation' (2012) 10(1) https://www.transnational-dispute-management.com/article.asp?key=1778 accessed 20 February 2020.

[28] Article 4 of ICC Mediation Rules 2014.

[29] Article 9(1) of ICC Mediation Rules 2014.

[30] William F. Fox, *The Wisdom of International and Commercial Mediation and Conciliation*, (2012) 10 (1) available at https://www.transnational-dispute-management.com/article.asp?key=1778 accessed 20 February 2020.

[31] Thomas Walde, *Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective*, (2003) 2 OGEL available https://www.ogel.org/article.asp?key=65 accessed 20 February 2020.

[32] Ugo Ilegbune, *Mediating Community/Company Environmental Disputes in Oil and gas Industry: A Guide for Promoting Environmental Mediation in Emerging Economies - Focus on Nigeria,* (2005) (3) https://www.ogel.org/article.asp?key=1956 accessed 20 February 2020.

[33] Sulamerica CIA National De Seguros SA v Enesa Engenharia SA [2012] EWHC 42 (Comm).

is likely to be unsuccessful when large sums are claimed, which requires court judgment[34], due to highly commercial nature of the case and clear winner-takes-all situation. Furthermore, the outcome of mediation is often hard to predict, in which case parties may proceed to litigation if no consensus is reached during mediation. Last but not least there is a lack of mediators with deep knowledge to the Oil and Gas disputes who are even more essential in the case of evaluative mediation[35, 36].

1.3. Mediation versus Arbitration

The most important aspect of arbitration is its binding rule. In an arbitration, the arbitrator pays attention to the legal rights of a dispute and makes a decision. When the arbitrator arrives at a decision, it is binding on parties despite their personal consent. The decision of an arbitral tribunal is similar to a court case that is decided by a judge, apart from the fact that the process does not take place in a court room, and it is not open to the public. Similar to a court case, there is often a winning and a losing party in an arbitration.

On the other hand, on mediation, the mediator, essentially, helps parties to settle their disputes by a process of discussion and bridging differences. The mediator facilitates the parties to arrive at a both agreed solution. The mediator does not decide the dispute. A successful mediation results in an agreement signed by the parties, whereas a contested arbitration results in a decision by the arbitrator himself/herself without the agreement of the parties. Therefore, there are no losers or winners.

1.4. Implementing Mediation internationally

Bearing in mind that the Oil and Gas industry is solely business oriented, mediation can be very favorable for the disputants, allowing the parties to resolve their disputes without risking commercial relationships and leading to win-win situations. When opting for mediation,

[34] Hew R. Dunas, *Dispute Resolution in the Oil and Gas Industry: An Oilman's Perspective,* (2004) 2 (3) https://www.ogel.org/journal-author-articles.asp?key=20 accessed 20 February 2020.

[35] LexisNexis Legal Newsroom Staff, *Mediation in Oil and Gas Industry*, (Lexis Nexis, December 2013) https://www.lexisnexis.com/legalnewsroom/energy/b/oil-gas-energy/posts/mediation-in-oil-and-gas-law-disputes accessed 20 February 2020

[36] Evaluative mediation is considered to be the mediation during which the mediator is expected to assess the strengths and weaknesses of the parties and offer their opinion based on law, technology or the industry practice. On the other hand, facilitative mediation is considered to be the mediation during which the mediator takes for granted that the parties are intelligent enough and capable of understanding the situation and the matters at stake, while at the same time they try to enhance communication between the parties.

however, issues with its power of enforcement, especially at international level through bilateral agreements, may be deficits for industry players.

There are two main routes to enforce international mediation agreements. Firstly, the New York Convention[37] can perhaps be applicable as a ground to enforce international commercial agreements[38]. Secondly, a conversion as an arbitration award, by appointing the mediator as a sole arbitrator[39].

Singapore Convention on Mediation[40]

A step Adopted in December 2018, the United Nations Convention on International Settlement Agreements[41] resulting from Mediation, also known as the "Singapore Convention on Mediation" (the "Convention") applies to international settlement agreements resulting from mediation ("settlement agreement"). It establishes a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement. The aim of the Convention is to implement an international regime for the enforcement of settlement agreements reached through mediation, broadly akin to the 1958 New York Convention for the enforcement of arbitral awards.

The Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. Being a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation, thereby contributing to the Sustainable Development Goals (SDG), mainly the SDG 16.

The Convention was signed on 7 August 2019 in Singapore by 46 countries[42] – a record number of first-day signatories for a UN trade convention. While not including the UK or any EU

[37] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 available at http://www.newyorkconvention.org/english accessed 20 February 2020.
[38] William F. Fox, *The Wisdom of International and Commercial Mediation and Conciliation,* (2012) 10 (1)
[39] Thomas Walde, *Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective*, (2003) 2 OGEL available at https://www.ogel.org/article.asp?key=65 accessed 20 February 2020.
[40] See https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements accessed 20 February2020.
[41] The settlement agreement is "international" – meaning either: (i) at least two parties have their place of business in different countries or (ii) the country where the settlement agreement is to be performed, or the country with which the agreement is most closely connected, is different to the parties' place of business.
[42] Afghanistan (Islamic Republic of), Belarus, Benin, Brunei Darussalam, Chile, China (People's Republic of), Colombia, Congo, Democratic Republic of Congo (the), Eswatini (Kingdom of), Fiji, Georgia, Grenada, Haiti,

countries, the signatories do include the world's two largest economies, China and the US. The Convention is open for signature by States and regional economic integration organizations (referred to as "Parties") at the United Nations headquarters in New York.

The main provisions of the Singapore Convention are the following:

Article 1 provides that the Convention applies to international settlement agreements resulting from mediation, concluded in writing by parties to resolve a commercial dispute. Article 1 also lists the exclusions from the scope of the Convention, namely, settlement agreements concluded by a consumer for personal, family or household purposes, or relating to family, inheritance or employment law. A settlement agreement that is enforceable as a judgment or as an arbitral award is also excluded from the scope of the Convention in order to avoid possible overlap with existing and future conventions, namely the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Convention on Choice of Court Agreements (2005) and the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019).

Further, Article 3 addresses the key obligations of the Parties to the Convention with respect to both enforcement of settlement agreements and the right of a disputing party to invoke a settlement agreement covered by the Convention. Each Party to the Convention may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement. Article 4 covers the formalities for relying on a settlement agreement, namely, the disputing party shall supply to the competent authority the settlement agreement signed by them and evidence that the settlement agreement results from mediation. The competent authority may require any necessary document in order to verify that the requirements of the Convention are complied with.

The Convention defines in Article 5 the grounds upon which a court may refuse to grant relief at the request of the disputing party against whom it is invoked. These grounds can be grouped into three main categories, namely in relation to the disputing parties, the settlement agreement and the mediation procedure. Article 5 includes two additional grounds upon which the court

Honduras, India, Iran (Islamic Republic of), Israel, Jamaica, Jordan (Hashemite Kingdom of), Kazakhstan, Laos (Peoples Democratic Republic of), Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, Palau, Paraguay, the Philippines, Qatar, Republic of Korea, Samoa, Saudi Arabia (Kingdom of), Serbia, Sierra Leone, Singapore, Sri Lanka (Democratic Socialist Republic of), Timor-Leste (Democratic Republic of), Turkey, Uganda, Ukraine, United States of America, Uruguay, Venezuela (Bolivarian Republic of) are the 46 States that signed the Convention at this ceremony, which was attended by delegations from more than 70 States.

may, on its own motion, refuse to grant relief. Those grounds relate to public policy and the fact that the subject matter of the dispute cannot be settled by mediation. With the aim to provide for the application of the most favorable framework for settlement agreements, Article 7 foresees the application of the more favorable law or treaty.

Article 8 includes reservations. A first reservation permits a Party to the Convention to exclude from the application of the Convention settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration. A second reservation permits a Party to the Convention to declare that it will apply the Convention only to the extent that the disputing parties have agreed to its application.

The Convention and any reservations thereto apply prospectively, to settlement agreements which have been concluded after the entry into force of the Convention for the Party concerned, as provided in Article 9.

The Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements resulting from Mediation (2018). This approach is intended to provide States with the flexibility to adopt either the Convention, the Model Law as a standalone text or both the Convention and the Model Law as complementary instruments of a comprehensive legal framework on mediation.

2. Types of disputes in the international Oil and Gas business

There are mainly four types of disputes that arise in the international Oil and Gas business[43]. They are:

2.1. State versus state disputes

First of all, there are boundary disputes regarding Oil and Gas fields crossing international borders, which are located mainly in maritime waters. These types of disputes involve only governments due to the reason that states are those who are able to claim sovereign title and resolve boundary disputes with their neighboring states. However, Oil and Gas companies still get involved in these types of disputes –even in an indirect way- when they are granted concessions that affect disputed boundary lines. Developing nations quite often ask from companies not only to fund the dispute costs, but also to offer their legal expertise and data, in order to resolve the boundary dispute. As a result, it is essential for the companies to be aware of these disputes and skillful enough to manage them in a productive and effective way, once they found themselves in the middle of one.

2.2. Company versus state disputes

This type of disputes is usually called investor–state or state investment disputes. By saying "investor", in this case, we refer to an Oil and Gas company or a consortium of Oil and Gas companies. These disputes arise either when governments change the terms of the original deal or when they nationalize or expropriate an investment. The investor's claim can be based on its investment contract, for instance a Production Sharing Contract, or on an investment treaty, or even on both. It is a fact that, most of the treaty claims are made under bilateral investment treaties (BITs), which are negotiated and ratified by two sovereign states (around 2,500 BITs affect nowadays about 180 countries worldwide). Furthermore, the investor's claim can be based on the Energy Charter Treaty, a multilateral treaty which is essential to the Oil and Gas industry[44].

Therefore, it is important for companies to structure their investments and negotiate the contracts with their host governments in a beneficial way for their interests. This could happen

[43] See A. Timothy Martin, *Dispute resolution in the international energy sector: an overview*, Journal of World Energy Law and Business, 2011, Vol. 4, No.4 for further analysis. Available at http://timmartin.ca/wp-content/uploads/2016/02/Dispute-Resolution-in-Int-Energy-Sector-JWELB-Martin2011.pdf accessed 20 February 2020.

[44] See "http://www.encharter.org" for more details.

when companies are taking advantage of the investment protection provided by the aforementioned treaties. At the same time, it is significant for the companies to have access to the facilities of the International Centre for the Settlement of Investment Disputes (ICSID) as the forum of choice for any dispute that could arise with a sovereign state. This could be accomplished when companies incorporate their investing company and managing their business out of a jurisdiction that has a strong BIT with the host country and, at the same time, include an ICSID dispute resolution clause in their host government contract.

Despite the fact that this type of disputes is quite rare to international oil companies (IOCs), we should take into consideration that when they do occur, they involve large amount of money, and as a result could affect the financial perspective of a company. As a result, companies should pay a lot of attention in these issues.

2.3. Company versus company disputes

This type of disputes is usually called international commercial disputes. There are two sub-categories of disputes taking place among energy companies. The first one is between joint venture participants in contracts for the following kinds of agreements:

- Unitization Agreements
- Joint Operating Agreements
- Area of Mutual Interest Agreements
- Farmout Agreements
- Sale and Purchase Agreements
- Study and Bid Agreement
- Confidentiality Agreements.

The second sub-category of disputes is among operators and service contractors such as:

- Seismic Contracts
- Drilling and Well Service Agreements
- Construction Contracts
- Transportation and Processing Contracts.
- Equipment and Facilities Contracts

These are the most common disputes in which Oil and Gas companies may interfere in terms of size, complexity and financial significance.

2.4. Individual versus company disputes

In many occasions, individuals are those who initiate claims against Oil and Gas companies. This type of dispute could take place when an individual suffers a personal injury and initiate a tort claim against a company. Despite the fact that these disputes are mainly common in the USA, they are increasingly happening to other counties as well. Foreign claims are often started in local courts, however sometimes they can be filed in US courts using the Alien Tort Statute[45]. This type of dispute could also take place when promoters of Oil and Gas deals allege, they have an interest in a host government contract and the accompanying joint operating agreement, usually in the context of a claim of tortious interference by a third party. Finally, this type of dispute could also take place when agents or consultants ask for payment based on their agent agreements for winning a government contract for a company. A lot of arbitrations have taken place over the last 50 years, since companies have denied to pay their agent due to corruption allegations after securing the host government contract.[46]

45 For more details on these claims worldwide, see J. Drimmer, *Human Rights and the Extractive Industries: Litigation and Compliance Trends*, (2010) 3 Journal of World Energy Law & Business.

46 See A. Timothy Martin, *International Arbitration and Corruption: An Evolving Standard,* (2009) 20th Annual Institute for Transnational Arbitration. Available at http://www.timmartin.ca/qualifications/publications accessed 20 February 2020.

3. Energy Charter Treaty

3.1. Mediation as Part of the ECT Dispute Resolution Mechanisms

The Energy Charter Treaty (ECT) encourages the resolution of investment disputes in an amicable way, while at the same time allows parties to an investment dispute to resort to mediation at any point in time. This has been also verified by the endorsement of the Guide on Investment Mediation from the Energy Charter Conference that launched in 2016 for the aforementioned reason [47].

During the three months cooling-off period

Article 26.1 of the Energy Charter Treaty states that investment disputes related to breaches of obligations under Part III of the treaty should, be settled amicably if possible. There is no specific constraint as to which mechanisms could be used under the 'amicable settlement' process within the aforementioned period. Therefore, parties are free to agree to use: *good offices*, [48], *structured negotiation*,[49] , *mediation* or *conciliation* using existing mechanisms[50], or a tailor-made mechanism[51]. However as mentioned by Art. 26.2 of the ECT, one of the parties should 'request' amicable settlement to the dispute before proceeding towards domestic or international arbitration.

After the three months cooling-off period

In Art. 26.3 of the ECT Conciliation is mentioned, as one of the options the investor may choose in case the dispute is not settled amicably within the three months cooling-off period. Art. 26.4.a refers (among other options) to the ICSID Convention and ICSID Additional Facility Rules; an express reference to ICSID Conciliation. According to the former Art. 26.3

[47] For further analysis see Energy Charter Secretariat, CCDEC2016/12INV, "*Adoption by correspondence of the Guide on Investment Mediation*" available at:
https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf
accessed 20 February 2020.

[48] A trusted third party facilitates parties in a dispute to establish contact and to begin to explore ways to reach an amicable settlement. This is usually a preliminary mechanism that could lead to a structured negotiation or to mediation.

[49]Typically, no third party is involved. Instead, both sides collaborate closely as a team to solve a problem.

[50] See section 7 of the Guide.

[51] See also Gourgourinis A., *Διαιτητική επίλυση διαφορών μεταξύ κράτους – παραχωρησιούχου*, in Farantouris N. and Kosmidis T. (Editors), Hydrocarbon Law, Nomiki Vivliothiki, 2015 p.97-98, and Gourgourinis A., *Προστασία ξένων επενδύσεων στον τομέα της θαλάσσιας μεταφοράς ενεργειακών πόρων και δικαιοδοσία διαιτητικών επενδυτικών δικαστηρίων της Συνθήκης για τον Χάρτη Ενέργειας*, in Farantouris N. (Editor), Energy: Shipping and Maritime transports, Nomiki Vivliothiki, 2013, p.647-649.

of the ECT: *i)* the investor has to choose whether or not to opt for conciliation;[52] *ii)* the aforementioned abides to the 'unconditional' consent by the Contracting Party: the drafts do not provide a definition of 'unconditional' consent, but imply an obligation on the part of the Contracting Party. *iii)* if an Investor chooses to submit the dispute to conciliation but there is no final agreement, the investor is not barred from pursuing arbitration. *iv)* The "fork in the road" (Art. 26.3.b.i ECT) refers only to domestic proceedings or previously agreed dispute resolution mechanisms and applies only in relation to domestic proceedings or other previously agreed mechanisms.

Settlement agreements reached in ECT investment cases

Based on publicly available information, there has been a settlement agreement in eight investment cases: *i) ČEZ vs. Albania* (2013)[53], *ii) Slovak Gas Holding BV et al vs. Slovak Republic* (2012)[54], *iii) Türkiye Petrolleri Anonim Ortaklığı vs. Kazakhstan* (2011)[55], *iv) EVN AG vs. The Former Yugoslav Republic of Macedonia* (2010)[56], *v) Vattenfall vs. Germany* (2011)[57], vi) *Barmek Holding A.S. vs. Azerbaijan* (2006)[58]; *vii) Alstom Power Italia SpA, Alstom SpA vs. Mongolia* (2004), *viii) AES Summit Generation Ltd. (UK subsidiary of US-based AES Corporation) vs. Hungary* (2002). In these cases, the arbitration proceedings were discontinued due to the later settlement entered into by the parties. At least three settlements were embodied in an award and are available to the public.

3.2. Proposing Mediation

Mediation can be used in any type of dispute, especially when several parties are involved. Any party may propose the use of mediation to the opposing party directly or through a neutral

[52] Since draft BA 10, of 19 March 1992, it is expressly stated that '*... the dispute [shall] at the request of the investor concerned be submitted to international arbitration or conciliation*.' Although the final drafting eliminates such wording, Art. 26.2 and 4 ECT still refers to the investor's choice.

[53] See https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/522/-ez-v-albania accessed 20 February 2020.

[54] See https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/497/slovak-gas-v-slovakia accessed 20 February 2020.

[55] See https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/439/tpao-v-kazakhstan accessed 20 February 2020.

[56] See https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/342/evn-v-macedonia accessed 20 February 2020.

[57] See https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/329/vattenfall-v-germany-i- accessed 20 February 2020.

[58] See https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/236/barmek-v-azerbaijan accessed 20 February 2020.

third party (including the Energy Charter Secretariat) to an investment dispute arising under the Energy Charter Treaty.

The Energy Charter Conference in 2014 underlined the potential assistance of the Secretariat with good offices, mediation and conciliation as an example of how to endorse amicable investment dispute settlement.[59] In 2016 the Conference further encouraged ECT Contracting Parties voluntarily using mediation at any stage of the dispute to facilitate an amicable solution. During the last years, the Energy Charter Secretariat has provided its good offices prior to the investor resorting to international arbitration (sometimes the Secretariat was copied in the triggering letter) and after the initial stages of arbitration. Investors and governments are encouraged to involve the Secretariat before the triggering letter is sent to facilitate discussion at the relevant level before the dispute escalates. The Energy Charter Secretariat, can play an important role in proposing and helping to secure the agreement of parties to explore/start mediation proceedings; and sometimes help the parties to overcome initial procedural hurdles.

3.3. Assessing Mediation

In order to assess the usefulness of mediation for a particular dispute, parties could consider whether: *i)* both parties prefer to keep control over the cost of the dispute, *ii)* matters of fundamental principle are not at stake, *iii)* the resolution should be fast, *iv)* the substantive outcome is not as crucial as the maintenance of a relationship, *v)* there is no distrust or personal hostility between the parties, *vi)* parties do not just seek quantum or technical issue or require interim relief, and *vii)* parties can involve their respective decision-making authorities; for example, an apology, a public statement or acknowledgment to third parties.

In addition to dispute prevention strategies, states establish conflict management systems to facilitate governmental assessment on whether they should opt for mediation. Such systems consist of the following: *i)* effective channels of communication among different ministries and governmental agencies dealing with investments, as well as between them and foreign investors; *ii)* double checking compatibility of obligations under ECT and BITs when enacting laws and implementing policy measures; *iii)* maintaining a list of potential areas where disputes with investors may arise; *iv)* early response to controversies; *v)* facilitating the budgeting for mediation costs (a lengthy approval process may hinder the decision to go to mediation), *vi)* training of relevant government officials, *vii)* clarifying the process for formal approval of the

[59] CCDEC2014 (06), Point 5.

government consent to a settlement agreement, *viii)* empowering a specific agency/department to coordinate with relevant governmental bodies and negotiate disputes with investors.

3.4. Preparing for Mediation

There are various steps that parties should undertake to prepare for the mediation once they have all agreed:

Step one: Logistics

Some technical considerations are the following: *i)* issues or disputes intended to be resolved, *ii)* use a service provider or set the mediation up by the parties, *iii)* costs of the mediation and how parties share these costs, *iv)* length of mediation, language of the process and extend of confidentiality, *v)* choice of venue and mediator, *vi)* what will be the outcome of the proceedings and nature of a potential settlement agreement, *vii)* accepting the rules of mediation procedure and the agreement.

Step two: Documents

Each party needs to prepare a case summary and the supporting documents. It is normal for a written mediation case summary to be prepared by each party, to be circulated to the mediator and all other parties. The summary should be a brief explanation of what the dispute is about and should aim to provide the mediator with the necessary background to the dispute in order to facilitate a discussion, a perspective of the dispute to the other parties, link to supporting documentation and clarification of the respective positions of the parties and their involvement in the mediation process. As far the supporting documents is concerned, critical evidence principle is to provide core documentation that adds to the mediation case summary. Some of these are *i)* key correspondence, contracts & agreements, *ii)* photographs, charts and diagrams that help understanding, *iii)* relevant and important extracts from expert reports, *iv)* spreadsheets to highlight quantum elements.

Step three: Team Preparation

A rule of thumb is to maintain a minimalist team in order to maximize engagement. The optimum scenario is the party representative with the maximum degree of authority to reach an agreement should be able attend. The issue of authority is particularly crucial for the state party. Parties and their teams should work together to develop a clear strategy for engaging in the mediation process. These could be the following: i) reviewing objectives and considering

the other party's objectives, ii) reviewing issues and factual context, iii) reviewing legal context and likely costs of this route to resolution, iv) adding value in the mediation, v) having a clear sense of alternatives to not settling in mediation, vi) developing a clear negotiation strategy considering the starting point for your offers, concessions and 'walk away' points. It is not always necessary to have a legal advisor (in-house counsel, external counsel or combination) in the team since mediation is interests oriented. It is however useful to have an initial legal assessment of the potential outcome of the dispute if taken to arbitration/court.

3.5. Mediation Rules and the Role of Institutions

Investors and Contracting Parties are free to choose any mediation or conciliation rules under Art. 26.1 of the ECT such as those of: i) PCA – Permanent Court of Arbitration, ii) ICC - International Chamber of Commerce, iii) ICSID - International Centre for Settlement of Investment Disputes, iv) SCC - Stockholm Chamber of Commerce, v) IBA – International Bar Association, vi) UNCITRAL – United Nations Commission on International Trade Law.

Moreover, the Energy Charter Secretariat and institutions (PCA, ICC, ICSID, SCC, CEDR) may: *i)* administer the proceedings and secure the agreement between participants, *ii)* inform on costs for parties to secure the necessary funding on time, *iii)* identify candidates well qualified to serve as mediator in the particular dispute, secure the agreement of all parties towards the candidate, arrange recruitment and payment, *iv)* help to overcome initial procedural difficulties, for example agreeing on the place of the meeting, language of the proceeding.

3.6. The Role of the Party and Legal Representatives

In case a party decides to involve legal representatives, they have to function as a team because they are the most likely to embrace creative solutions. Each representative should be a decision maker with the authority and skill to negotiate, enter into or recommend a settlement. A party needs to be represented by someone who can be relatively objective (has a thorough knowledge of the facts) and unemotional; does not feel a need to defend past actions.

Legal representatives offer in two different directions. Firstly, in preparation and counseling, and secondly, in participation in the mediation proceedings. As far as the preparation and counseling is concerned, representatives are able to: *i)* ensure the confidentiality of the process, *ii)* counsel on the advisability of settlement and mediation, management or suspension of arbitration, iii) persuade parties to agree to the mediation process and help each party think through goals for the process, iv) help select a mediator or mediation provider, design or adapt

the mediation procedure, v) educate the party about the mediation process and the legal issues and vi) draft statements for submission to the mediator. As far as the participation in the mediation proceedings is concerned, representatives are able to: i) listen carefully to the other side's statements, so as to understand their interests, ask and answer questions, ii) advocate in a non-confrontational manner but in the same time avoid compromise of the client's legal position should the mediation fail, iii) give guidelines for the settlement agreement and ensure enforceability, iv) help the client articulate business concerns and formulate proposals, discuss settlement options as the mediation progresses, inform regarding legal ramifications of possible solutions and options.

3.7. Selecting the Mediator(s)

A single mediator is suitable in most cases, however in complex or politically sensitive cases co-mediation is more suitable; two mediators can be appointed, representing different disciplines, technical expertise or cultural backgrounds. The styles, personalities and orientation of mediators vary. The size and complexity of the case could influence the selection of the mediator. It is worth noting that, each party may appoint one of the co-mediators.

The most important aspect for a mediator is to inspire confidence to both parties. Furthermore, as a good mediator is considered someone who: i) is trained and has experience as a mediator, with a thorough understanding of the negotiation process, ii) is impartial, independent and inspires trust, iii) is an active listener, articulate and persuasive, grasping people’s motivations, iv) is available to timely conduct the mediation process, iv) is able to analyze complex problems and get to the core, v) is a problem solver; creative and imaginative in developing proposals and knows when to make them, vi) is capable of understanding the facts of a dispute, including surrounding circumstances, even if he/she is not a specialist in the substantive field of the investment at issue, vii) has regional or international reputation, giving more credibility to the outcome of the process, viii) has experience in investment dispute resolution proceedings and, ix) has government or dealing with governments experience.

Where the parties have opted for specific mediation rules, a procedure for the appointment of the mediators will be deployed. In some cases, the parties may request the Secretary General of the ECS to act as an appointing authority.

The mediator's fees are decided in advance. Those and any other costs of the process, will be shared equally by the parties unless otherwise agreed. If a party withdraws from a multiparty

mediation, the withdrawing party will not be liable for any costs incurred after its withdrawal. Shared costs will not include costs that each party incurs in preparing their cases, instructing representatives and attending meetings.

Prior to the mediation, the mediator should assure the parties regarding the expeditious conduct of the proceeding and should sign a declaration of independence, confidentiality and impartiality. The parties and the mediator should enter a mediation agreement to cover the basic aspects of the process and their relation.

3.8. Rules and Principles - Basic rules and proceedings

There is not any mandatory procedure under which mediation should be conducted. However, there are some basic rules and proceedings, that should be mentioned and could be applied to all mediations. It should be noted, that the parties and the mediator are able to change or modify these rules upon agreement. The basic rules are the following: *i)* The mediator does not issue a binding decision. The process is voluntary and in conjunction with the collaboration of the parties, *ii)* Each party may withdraw at any time by written notice to all the sides, *iii)* this applies also for the mediator, who is able to withdraw at any time by written notice to the parties. A new mediator will then be appointed, *iv)* The mediator is in control of all mediation and is neutral, independent and impartial. The parties cooperate fully with the mediator. Therefore, the mediator is free to meet and communicate separately with each party, to decide on the language in which the mediation is to be conducted and if documents translations are needed -unless otherwise agreed by the parties-, and to consult with the parties when to hold joint meetings and when to hold separate meetings. He/she sets the time and place of each session and its agenda after discussing with the parties. Formal rules of evidence or procedure do not apply. *v)* Every representative should have a written authorization, legally effective according to the laws of the jurisdiction where the party is domiciled. However, the mediator may limit the number of persons representing each party.*vi)* The mediator is not allowed to transmit information received in confidence from any party to any other party or any third party, unless authorized in writing, or unless ordered by a competent jurisdiction court, *vii)* If the dispute goes into arbitration, the mediator is not allowed to serve as an arbitrator, unless the parties agree otherwise, *viii)* Each representative takes full responsibility to be available for meetings, *ix)* The mediator and any other person assisting the mediator are not allowed to be witness, consultant or expert in any pending of future investigation, action or proceeding, that is related to the subject matter, unless the applicable law to the proceedings provided otherwise.

3.9. Preliminary Matters

Initial Consultation with the Mediator

Initially, the parties and the mediator should discuss preliminary matters (ground rules, place and time of meetings, and each party's need for documents or other information). This consultation may be a physical meeting between the parties and the mediator or teleconference.

The aforementioned procedure serves several purposes: *i)* The parties are able to make an assessment on the mediator who will discuss the entire mediation process, including the ground rules, with the parties. The former may agree on modifications. *ii)* The mediator and the parties will discuss the role(s) the mediator will have in the parties' negotiations; a mediation agreement and the meeting schedule. *iii)* The parties will begin to familiarize the mediator with the dispute and talk to each other in a manner appropriate to their joint goal of reaching an accommodation. *iv)* The mediator assures that the parties have a genuine interest in resolving their dispute and engages through the mediation process. *v)* There will be discussion of who will represent the parties at future sessions, and the extent of their authority, also the exchange of certain information may be discussed. If the stakes are large, each negotiator should have authority to negotiate a settlement, and their authority should be comparable.

Exchange of Information

Prior to the first mediation meeting, each party normally submits to the mediator a written statement with the past and present status of the dispute and other material helpful to acclimatize the mediator with the dispute. The parties may also agree to submit other materials. The mediator: *i)* May request any party to provide clarification and additional information and limit the length of written statements and supporting material, *ii)* Directs the parties to exchange concise written statements and other materials they submit to the mediator to further each party's understanding of the other party's viewpoints, *iii)* Should consent in written form to keep confidential any materials or information received, iv) Returns to that party all written materials and information which that party had provided to the him/her, at the conclusion of the mediation process.

Confidentiality of the Process

The entire mediation process is confidential when the parties agree that the mediation process, all negotiations, statements and documents expressly prepared for the purposes of the

mediation shall be ‘without prejudice.’. Unless agreed among all the parties or required by law or ordered by the Court, the parties and the mediator may not disclose to any person any information regarding the process, and settlement terms or outcome of the proceedings. It may be politically difficult for governments to keep confidential the fact that a mediation is taking place and even the terms of the settlement agreement. Parties may agree to disclose the fact that the mediation is taking place and the main aspects of the settlement. A single spokesperson should be designated to deal with media and an internal document with the basic facts of the case and Frequently Asked Questions should be distributed to the agencies involved.

Length of Proceedings

The length of mediation proceedings depends on the complexity of the case, the number and availability of the parties and the urgency, and the difficulty of reaching agreement on the facts and on settlement terms. The mediator informs the parties the likely length of time required for each phase of the proceeding.

The Seat of Mediation

The seat of Mediation is critical for any subsequent application of the local mediation law for procedural and enforcement issues, in the case which the parties have not signed any specific relevant clause. Furthermore, the seat of mediation could also influence the application on an international scale. As far as the logistics, a neutral site is preferred with space for joint sessions and separate meetings. Some meetings can also be performed online.

3.10. The Mediation Process

The Opening

The mediation begins with some form of opening meeting where the parties outline their perspectives and the mediator explains the process and principles of mediation. The parties are asked to submit written materials and a statement summarizing the background and status of the dispute. If arbitration is pending, briefs may be submitted.

Joint Sessions and Caucus *(separate meetings with each party)*

After the first step, a session is usually scheduled with the mediator, the parties and their advisors attending. The mediator will set the sequence of presentations, ask clarifying questions and control the time of the procedure.

Following the first session, the mediator may caucus in a private meeting with each party in order for the parties to be more honest in the knowledge that any confidential information shared with the mediator will be respected and not disclosed without their specific consent. During and after these sessions, the mediator has to understand the case fully from each side's perspective and assure that each side better understands how the case looks from the other side's viewpoint. Moreover, the mediator has to avoid expressing views on legal issues and in the same time to be kept fully informed of all developments. Additionally, the mediator may conclude at any stage that it is preferable to keep the parties apart and be able to control dialogue between the parties.

Negotiation of settlement terms – The mediator's point of view

Negotiation is most efficient when the parties focus on their real crystal-clear interests. The mediator is the one who will set the grounds for the parties to develop a more cooperative approach; understand each other's interests. Moreover, the mediator: *i)* can help each party to generate ideas, options and proposals towards a mutually acceptable solution, even if such is unorthodox, *ii)* must take care to state that position accurately, when conveying one party's position to the other, *iii)* may decide to meet with the principals of the parties, separately or together, without the presence of lawyers, *iv)* may submit a settlement proposal, *v)* may give the parties an evaluation of the likely outcome of the case.

3.11. Settlement

Upon completion, the parties' representatives draft a settlement agreement including all settlement terms, such as mutual general releases from or discharges of all liability relating to the subject matter of the dispute. The draft is circulated among the parties and the mediator, amended and formally executed. In some cases, a preliminary memorandum of understanding may be prepared and executed by the parties; stating clearly whether it is intended to be binding or not. The settlement agreement should aim on all claims each party has against the other. Sometimes, a settlement agreement will only cover part of the dispute. The mediation settlement leads the way for the following issues to rise: *i)* Common agreement on the facts of the dispute and who will draft it. *ii)* How the settlement agreement is recorded (private document, authenticated by witness or public Notary). It is important to comply with the legal formalities of the defendant state and of the country in which the agreement is signed. *iii)* Law applicable to the settlement agreement, *iv)* Press releases vs. non-disclosure clauses and arbitration clause in case of breach of the settlement agreement, *v)* Who is authorized to bind

each party, *vi)* What are the specific requirements in the legal system of the defending state for the enforcement of private agreements (notarization, full determination of the payable amount, *vii)* Monitoring requirements, such as the requirement of a bank guarantee to secure compliance with the settlement agreement and/or liquidated damages, *viii)* Lump-sum payments or instalments on specific deadlines or according to the terms of the initial contract, *ix)* Inclusion of the amount (and the corresponding taxes) to be paid in the state's budget to secure its payment.

3.12. Enforcement of the Settlement Agreement

Settlement agreements are binding contracts and must be complied by both parties. Where arbitration proceedings have been commenced according to ECT, the settlement may provide that the parties will request the arbitral tribunal to incorporate such settlement agreement into the award. Some mediation rules allow the parties, subject to the consent of the mediator, to agree to appoint the mediator as an arbitrator and request him/her to confirm the settlement agreement in an arbitral award although no arbitration proceedings had commenced. A different way to secure future enforcement of the settlement is requesting a first demand bank guarantee and/or liquidated damages along with a dispute resolution clause, in the settlement agreement.

3.13. Barriers to Settlement

Common barriers to settlement are the following. They should be identified and addressed in a mediation proceeding, and be surpassed with the assistance of a mediator.

Differing Perceptions

Perceptions can differ about a number of issues, all of which are able to affect a settlement. Among other things, the parties might have different views regarding the facts or how the law will be applied. It is important for the mediator to clarify if there is any disagreement to what proposition the facts prove and if this disagreement is related to the party's limited information. Furthermore, it is essential for the mediator to examine whether the foreign investor has full knowledge and information of the activities carried out by local subsidiaries through which the investment was carried out. It may also be the case that the parties have different views of what is at stake.

Extrinsic Pressures, Linkage

In some cases, extrinsic pressures, such as pressures working on one or more parties may slow down prompt settlement. Additionally, a resolution of this dispute may link to other similar disputes, pending or contemplated. Time constraints may also operate differently on the parties. However, there could also be 'strategic' considerations to avoid settlement.

Process Failures

Process failures could also affect the process of a settlement. Communication problems between the lawyers and the parties and lawyers having different incentives than the clients' interests, could be some of them. Or even the negotiation process may not have enough opportunities to devise and explore settlement options.

Delay Considered Advantageous

A trained and experienced mediator will be keen to protect the mediation process from unnecessary delay, caused by likely advantages to all parties in having the matter resolved in a timely manner

Parties

Non-disputants with a stake should be invited to participate, in some cases.

Information

Parties may consider they cannot assess both their and the other side's position until, the disclosure of documents, statements of witnesses or reports of experts.

Fear of potential allegations of corruption

The fear of potential allegations of corruption towards government authorities representing the state in such mediation, could also be a matter that could prevent a settlement. In this case, an internal monitoring mechanism and transparency of the process will facilitate to ease fears of potential allegations of corruption or abuse of powers towards the government authorities representing the state. Moreover, administrating the mediation process by a neutral institution compliant with national anti-corruption or bribery laws can diminish corruption allegations.

4. Negotiations in the course of Mediation procedures

Negotiation is one of the most basic forms of interaction; a back-and-forth communication designed to reach a settlement between two or more parties with shared interests or conflicts, thus to problem solving and dispute resolution.[60] Negotiation is an important aspect of the procedure of mediation, since the parties negotiate either face to face or through the mediator, while at the same time the latter should be able to identify and analyze what are the real interests of the parties. Therefore, not only the parties, but also the mediator should be aware of the principles and the strategies of effective and productive negotiations.

Interests
- What are our interests? What might theirs be?
- Are there third parties whose interests should be considered?
- Which interests are shared, which are just different, and which conflict?

Alternatives
- What is our BATNA? What might theirs be?
- Can we improve our BATNA? Can we worsen theirs?
- How could potentially unrealistic expectations be tested?

Options
- What possible agreements or pieces of an agreement might satisfy both sides' interests?
- What are some ways to use differing interests to create value?

Legitimacy
- What external criteria might plausibly be relevant?
- What standards might a judge apply? What "ought" to govern an agreement?
- What will they argue? Do we have a good response, one that accepts their point, then adds to it?
- What will each of us need to be able to justify an outcome to our constituents?

Commitments
- What is our authority? What is theirs?
- What are some illustrative, well-crafted commitments?
- What would be good products of this meeting?
- What are mechanisms for changing commitments over time? What are mechanisms for resolving disputes?

Relationship
- Which relationships matter? How is each now? How would we like it to be?
- What can we do to bridge the gap at low cost and risk? How should we start off?

Communication
- What do we want to learn from them? How can we improve our listening?
- What do we want to communicate? How can we do so most persuasively?
- What are our agenda and plan for the negotiation?
- What negotiation process approach would we like to use?
- How should we handle inevitable disagreements?

[60] This definition differs slightly from that in R. Fisher, W. Ury, and B. Patton, *Getting to YES: Negotiating Agreement Without Giving In*, (2nd ed.) (New York: Penguin, 1991), p. xvii, first by including explicitly the possibility of differing—but not conflicting—interests, and second by requiring only the possibility of conflict. The strategic challenges in managing disclosure and other aspects of negotiation process are similar whether there is merely a possibility that interests conflict or they are known (or assumed) to do so.

Figure: Systemic Seven-Element Checklist for Preparation[61]

4.1. Seven elements of Negotiation

The framework shown above helps parties to define their goals, prepare themselves to identify and take advantage of opportunities effectively, and to minimize surprises. The Harvard Negotiation Project developed the seven-elements framework for understanding and analyzing negotiation in order to meet these criteria. It is the best way to define comprehensively the procedural tactics or strategies a negotiator may implore. Each of the seven elements - interests, legitimacy, relationship, alternatives, options, commitments, and communication - is described in the following paragraphs.[62]

Interests

Any party's basic needs, wants, and motivations are commonly referred to as its interests and are the core reasons of negotiation. Success in negotiation is measured in how well the interests are met. Often, there are multiple interests at stake in a negotiation, in which case setting priorities is sine qua non. The challenge of negotiation is figuring out how best to reconcile such conflicts and/or finding creative solutions that avoid our having to make such tough choices.

The notion of interests encompasses a wide range of possibilities, from money, deadlines, or guarantees to respect, recognition, feeling fairly treated, or even seeing another person happy. Like with Maslow's basic human needs at the root of a tree of interests, the roots comprise of a wide range of needs and motivations beyond the purely instrumental. [63]

The parties should be always aware of two specific points. Primarily, that several intense conflicts are often fueled by identical interests—both parties want to feel fairly treated. Secondly, that the potential value inherent in shared or differing interests may be as large or larger than the value in dispute.

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[61] Michael L. Moffitt and Robert C. Bordone *The Handbook of Dispute Resolution*, San Francisco, CA: Jossey-Bass 2005, p. 287, figure 18.1.

[62] For more extensive analysis see Michael L. Moffitt and Robert C. Bordone *The Handbook of Dispute Resolution*, San Francisco, CA: Jossey-Bass 2005, Chapter Eighteen.

[63] See C. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, UCLA Law Review, 1984, 31, 754–840; see also C. Menkel-Meadow, *Aha!? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?* , Harvard Negotiation Law Review, 2001, *6,* p. 109, n. 52. For Maslow's framework, see A. Maslow, *Motivation and Personality* (New York: HarperCollins, 1954).

Legitimacy

Legitimacy is one of the most powerful of human motivations, and plays a major role in negotiation, and many times is overlooked. It is not uncommon for negotiations to fail, because the option on the table does not feel fair to one or both parties. People pay to avoid accepting a solution that feels illegitimate. In fact, most people would rather get nothing than approve a split that feels too unfair.[64] Often this keenness in legitimacy and being fairly treated is the main driver in a dispute. Sometimes parties fail to realize what is fair when taking conflicting positions although they both have the same interest. The issues at stake in any given dispute are less important than the precedent set for future dealings.

Relationship

Another important aspect in negotiation is the relationship a negotiator already has or wants to establish with other parties.[65] This encompasses the negotiator's relationship both with those across the table and with anyone else who might affect the negotiation or be affected by the negotiator's reputation coming out of it. Even more important, the conduct and outcome of a negotiation have the potential to either damage or strengthen a relationship in a variety of ways, such as that between a boss and an employee, or between sales and marketing. Maintaining a certain kind of relationship may be a much more important aspect determining the dispute. Finally, a negotiator also has an ongoing interaction with himself/herself that may influence the conduct and outcome of negotiation. Psychological drives to avoid inconsistency ("cognitive dissonance"[66]), to preserve key values that define one's identity,[67] or to "do the right thing" (conscience) may define a negotiator's strategy.

Alternatives and BATNA

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[64] See R. Thaler, *The Winner's Curse: Paradoxes and Anomalies of Economic Life,* New York: Free Press, 1991.

[65] "Relationship" can mean many things: personal affection or antagonism, interdependence, contractual obligations, good teamwork, or an ability to resolve differences efficiently and effectively, among others. For our purposes in robustly describing the terrain of negotiation, the variable of "relationship" could include any of these that matter to one or both negotiators. In contrast, our focus narrows when we seek to advise a negotiator on tactics. A hard bargainer, for example, might be served by a relationship in which the other side feels intimidated and fearful, whereas a collaborative negotiator might seek a working relationship that can resolve differences smoothly and independent of personal affection.

[66] See L. Festinger, *A Theory of Cognitive Dissonanc*e, Palo Alto, Calif.: Stanford University Press, 1957.

[67] For an introductory discussion of the concept of identity, see D. Stone, B. Patton, and S. Heen, *Difficult Conversations: How to Discuss What Matters Most,* New York: Viking/Penguin, 1999.

When a negotiator unable to reach agreement will have to choose one of his or her various alternatives, one will have to choose the one, which would best satisfy that negotiator's interest. This alternative is commonly referred to as the negotiator's Best Alternative to a Negotiated Agreement, or BATNA.[68] A negotiator always has some BATNA, even if he or she has not figured out what it is or even it is not very attractive. The other side also has a BATNA, as well as perceptions of its relative attractiveness, one or the other of which a negotiator may be able to affect.

Options

Options are possible agreements or pieces of a potential agreement upon which negotiators might possibly agree. The most basic form of option is a trade in which a party creates value in negotiation by maximizing the satisfaction of shared interests or by exploiting differences in interests. Options may include substantive terms and conditions, procedures, contingencies, even deliberate omissions or ambiguities anything parties might agree on what might serve their respective interests.

Commitments

A commitment is an agreement, demand, offer, or promise by one or more parties, and any formalization of that agreement. Commitments may take place at any point in a negotiation and include anything from a minor procedural point to final and complete agreement, and anything in between.

Communication

The communication process is the procedure during which parties discuss and deal with the aforementioned six elements of negotiation and thus is considered to be an essential part of it. There are infinite ways to approach the process of negotiation. For instance, some parties start by trading commitments and others by sharing information about interests. There are also parties who communicate each other as adversaries and others who communicate as colleagues. However, not all of them could have predictable effects on the likely outcomes.

To sum up, the seven elements are a proven and useful way to organize the negotiation. However, it is not the only way, and it subsume concepts to which others might give greater prominence. For example, some might include "parties" or "issues" as a fundamental

[68] See Fisher, Ury, and Patton, *Getting to YES,* 1991.

descriptive component of negotiation.[69] Issues are seen as more derivative of the parties' interests than an independent element, while framing is an important aspect of legitimacy and communication.[70] "Perceptions,"[71] "doubts,"[72] and "emotional neediness"[73] have also been considered as important concepts.

A very different descriptive framework has been proposed by Robert Mnookin, Scott Peppet, and Andrew Tulumello. They consider the essential challenges of negotiation are rooted in three "tensions": between: *i)* creating and distributing value, *ii)* empathy and assertiveness and, *iii)* the interests of principals and agents.[74]

4.2. The goal of Negotiation

Primarily the main purpose of negotiation is to meet the interests in an optimum way and at least as well as they would be met by your BATNA. For a sustainable agreement, it should also meet the other side's interests at least as well as their BATNA. The key characteristics of such a solution are the following: *i)* a creative and no-waste solution that captures as much available value as possible—among the best of possible options[75], *ii)* a legitimate solution, in which no one feels taken advantage of, *iii)* a firm, implementable, and sustainable commitment, *iv)* a process that is as efficient as possible and the outcome of good communication and, *v)* a process that helps to establish the kind of relationship we are seeking with this or other parties. It should

[69] The importance of parties as a variable has been emphasized especially by Professors James Laue, Lawrence Susskind, and others who tend to focus on multiparty negotiations and public contexts in which "parties" are often not well-defined.

[70] See Donald Schon, *The Reflective Practitioner*, New York: Basic Books, 1983, for a deep explanation of the concept of framing. See also Michael L. Moffitt and Robert C. Bordone, *The Handbook of Dispute Resolution*, San Francisco, CA: Jossey-Bass 2005, Chapter Ten.

[71] The role of perceptions and cognitive bias in conflict has been a major focus of social psychologists and some economists.

[72] The political consultant Tom Korologos argued at the Program on Negotiation in the early 1980s that the central task of a negotiator is to nurture doubts in the other side about the strength of their arguments.

[73] See, for example, J. Camp, *Start with No,* (New York: Crown Business, 2002), for the latest argument on the importance of not appearing desperate in negotiation. For similar arguments, see also H. Cohen, *You Can Negotiate Anything,* (New York: Bantam, 1980); C. L. Karrass, *Give & Take: The Complete Guide to Negotiating Strategies and Tactics,* New York: Thomas Y. Crowell, 1974 and G. Nierenberg, *The Art of Negotiating,* New York: Hawthorn, 1968.

[74] See R. H. Mnookin, S. R. Peppet, and A. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes,* Boston: Belknap Press of Harvard University Press, 2000.

[75] Technically this is called a *pareto optimal* outcome (after the Italian economist Vilfredo Pareto) and defined as a solution in which neither party can be made better off without making the other party worse off.

be noted that trade-offs may take place. However, these characteristics are helpful, in order to not overlook any possibly significant aspect of our goal.

4.3. Negotiation processes

Trying to use the aforementioned seven variables, while at the same time interacting with the other party, is not an easy task. Theoretically, negotiators have almost limitless options -in the course of interaction- on how to emphasize or ignore (and how to handle) each element. However, in reality, there are four major archetypal approaches to the process of negotiation at the root of most interactions.

Positional Bargaining: The Dance of Concessions

The simplest and most common approach is haggling, or positional bargaining.[76] It happens when each of the two parties makes an extreme offer and then both of them start to bridge the gap, reaching an agreement in the middle. The prevalence of positional bargaining is the focus, primarily, on the element of commitment. And this is easy understandable, taking into consideration that the goal of negotiation is a mutual commitment. However, since negotiation is generally not a subject taught in schools and negotiation analysis is a recent field of study, it is hardly surprising that a relatively simple and manageable approach to negotiation is widespread.

Positional bargaining has the advantages that it is universally understood and frequently expected. At the same time, it is strategically beneficial for those who are able to anchor a position effectively, since they are able to shift the other party's aspirations and reach an agreement closer to the favorable one.

However, the simplicity of positional bargaining and its overwhelming focus on commitments has considerably ineffective aspects, which has to be taken into account. These are the following: *i)* by discouraging the exploration of interests, it makes it difficult to find creative, value- maximizing options. In other words, it is hard to find opportunities for mutual benefit, without knowing the parties' interests. *ii)* it considers to be slow and ineffective. Each party tries to make the smallest concessions possible, and even then, only when necessary to avoid a failed negotiation. And since reaching agreement is often considered unpalatably as "giving in" or "backing down" to the other side, parties want to "hold out" as long as possible. This is

[76] See Fisher, Ury, and Patton, *Getting to YES,* 1991, Chapter One.

even worse in multiparty negotiations. *iii)* it tends to produce arbitrary (and usually considered as unfair) "split-the-difference" results, that are difficult to explain to constituents, and offer no help to set a precedent, which reduces the need for additional (time-consuming) negotiation in the future, iv) it tends to promote an adversarial relationship, by establishing a win-lose frame.

Positional bargaining seems to be more useful in disputes with relatively simple and low-stakes issues, and especially those in which little commitment to the relationship is expected. Furthermore, it is effective when there is a strong market context, that limits irrational outcomes, when there are not any independent measures of fairness, when bargaining is well-established and when both sides want to play this game simply for fun.

Favors and Ledgers

The second archetypal approach to the process of negotiation, is also related to the element of commitment, however an ongoing relationship between the parties is needed to produce more creative and value-maximizing outcomes. The basic idea is to agree to a favor now, in exchange for a mutual "favor" in the future. Parties then keep a "ledger" of who owes whom what. This approach helps them to "expand the pie" by extending the timeframe for trades, deals and dispute resolutions, otherwise impossible.

On the other hand, sometimes it may be difficult to objectify the size of a favor and there is always the risk that the other party will no longer has the power when repayment is expected. Furthermore, favors and ledgers tend to result in arbitrary outcomes. Finally, even if this approach seems to be fair to the negotiators, it sometimes become difficult to explain to constituents, and they tend to set no useful precedent.

Chicken

Chicken game focuses on alternatives. Which party has the better alternative and who is able to make the other party's alternative worse. Chicken game initiates when each party feels frustrated by a lack of progress and blames the other party's stubbornness and irrationality. Someone then issues an ultimatum and/or makes a threat. The other party, responds with a counter ultimatum or counterthreat, rather than a concession, leading to a cycle of escalation. Playing chicken will sometimes pay off, but is considered to be among the riskiest of negotiation strategies. Furthermore, chicken tends to be extremely costly, with significant

resources wasted on the battle instead of on finding a good outcome. [77] Finally, chicken represents lack of skill and perspective on the part of negotiators. However, a negotiator may use it, if it satisfies his/her interests better than the his/her BATNA.

Problem-Solving "Circle of Value" Negotiation

The purpose of problem-solving approach is to overcome the ineffective aspects of traditional positional bargaining. Therefore, it focuses on the parties' underlying interests and not positions, looking for ways to maximize the satisfaction of shared interests and create value by "dovetailing" divergent interests. Moreover, it explicitly postpones all formal commitments to the end. In other words, "Nothing is agreed until everything is agreed." Parties avoid or postpone demands and offers willing to support brainstorming and improving several options to create and distribute value. Furthermore, problem-solving approach usually leads to reasonable and explainable results, which set sustainable precedents. Negotiations who use this approach tend to change the question from what the parties are willing to do to what they should do based on independent standards and principles of fairness. It should also be noted that problem-solving approach helps parties to maintain and build their relationship despite their disagreements since they uncouple the quality of the relationship from the degree of agreement. In other words, since they separate the people from the problem.

The problem-solving method is called the "circle of value" approach to negotiation,[78] because its purpose is to motivate negotiators to explore options in order to create and distribute value by having a collaborative and problem-solving way of thinking. It is most useful for most real-world negotiations, and especially when the stakes are high, when relationships or the precedential value of the outcome are important, when issues are multiple or complex, or when there is a multiparty negotiation.

[77] Firsthand report of interviews conducted in 1975 by Professor Roger Fisher of Harvard Law School (as reported to the author in 1977).

[78] See B. Patton, *Building Relationships and the Bottom Line: The Circle of Value Approach to Negotiation*, *Negotiation,* 2004, *7*(4), 4–7.

5. Mediation in Greece

5.1. An introduction to the Directive 2008/52/EC

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters (the Mediation Directive) is designed to facilitate access to alternative dispute resolution mechanisms and promote the amicable settlement of disputes, while at the same time encouraging the use of mediation. The directive applies to cross-border disputes in civil and commercial matters, including energy law disputes. The directive applies if at least one of the parties is domiciled in an EU Member State. On the contrary, it does not apply to disputes concerning revenue, customs, administrative matters, liability of the State or omissions in the exercise of State authority. It does not either apply to disputes where one or more parties is domiciled or resident in Denmark. The directive, together with Directive 2013/11/EU on alternative dispute resolution and Regulation (EU) No 524/2013 on online dispute resolution, is one of the European legal acts on alternative dispute resolution mechanisms.

Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements[79].

However, mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable[80].

The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognized and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the

[79] See preamble 6 of the Directive 2008/52/EC
[80] See preamble 19 of the Directive 2008/52/EC

basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[81].

Consequently, if the content of an agreement resulting from mediation in an energy law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State[82].

5.2. The Greek legal status of Mediation

Mediation has not yet prevailed as a dispute resolution method in Greece, however it should be stressed that the Greek system of administration of justice is indeed, after years of preparation, ready to adequately support the mediation process for those willing to opt for it. Mediation in its current, modern type has been introduced into the Greek legal order as a tool for resolution of civil and commercial matters following Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on specific aspects of mediation in civil and commercial matters, concerning mediation in cross-border disputes[83].

The Greek Parliament passed the Law no 4640/2019 "Mediation on civil and commercial disputes – Further harmonization of Greek legislation with Directive 2008/52/EC of the European parliament and of the council of 21 May 2008 and other provisions" (the Law), which was published in the Government Official Gazette on 29 November 2019. This new law was drafted in order for the Greek mandatory mediation legislation (law 4512/2018 which was to enter into force the previous year, but was subsequently "frozen") to comply with a Supreme Court opinion that mandatory mediation as construed in that law was preventing the right of access to justice, and also with a decision of the Court of Justice of the European Union finding

[81] See preamble 20 of Directive 2008/52/EC.

[82] See preamble 21 of Directive 2008/52/EC.

[83] According to the preamble 20, for the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which: (a) the parties agree to use mediation after the dispute has arisen; (b) mediation is ordered by a court; (c) an obligation to use mediation arises under national law; or (d) for the purposes of Article 5 an invitation is made to the parties. 2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c). 3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

that the mediation law before that, law 3898/2010, was violating EU law in certain aspects concerning training of mediators and recognition of accreditation of EU mediators. This new mandatory mediation provisions will enter into force in March 15, 2020 for all commercial and civil disputes, apart from those cases whereby one of the parties is the state or regional and local authorities (OTA) or Legal Entities of Public Law (ΝΠΔΔ), which are exempted.

The Law provides for mandatory mediation for all civil and commercial disputes of a monetary claim of 30,000 euros and more, as well as for non – monetary claim disputes (e.g. claims for prohibiting IP infringement). These provisions are not applicable on preliminary injunction petitions[84].

According to the Law[85], an "initial mediation session", in which the mediator informs the parties on the nature of the mediation process, is mandatory before a law suit is heard. If the parties agree to mediate, they may do so at or after this first session.

If the parties are not able to submit to the court evidence that they have been informed of the mediation and the first mediation session, the hearing is adjourned.[86] Furthermore, failure to submit to the court evidence for conducting the first mediation session, shall result to the law suit being dismissed, as inadmissible.

The plaintiff's lawyer shall agree with the other party on the mediator, or submit a request to a mediator of his/her choice. If the parties are unable to agree on the person to be appointed as mediator in the first session, or the mediator appointed by the plaintiff cannot contact the defendant to receive approval or if the defendant does not agree to the mediator appointed, a mediator shall be appointed by the Central Mediation Committee, from the list of accredited mediators of the Ministry of Justice[87], in which also foreign (EU) accredited mediators can be included. It is worth noting that the mediator is a trained professional certified by the Greek Ministry of Justice, included in the national mediation register, and fully qualified to conduct a mediation which, in principle, is based on the facilitative approach.

The first mediation session shall take place within 20 days after the mediation request of the plaintiff to the mediator, if the parties reside in Greece, and 30 days, if any of the parties resides

[84] Law 4640/2019, art. 6 par. 1b.
[85] Law 4640/2019, art. 6.
[86] Law 4640/2019, art. 3 par. 2.
[87] Law 4640/2019, art. 7 par. 1.

abroad. The parties shall be notified by the mediator in writing at least 5 days prior to the scheduled first mediation session. The mediation must be concluded within 40 days after the 20 or 30 days, unless the parties agree on an extension[88]. The parties, as well as their attorneys-at-law, must all appear at the first mandatory session. When a party fails to attend the first mediation session, the Court may impose monetary sanctions on it, however in certain exceptional cases, parties are able to be represented by their attorneys[89].

Therefore, the law provides a solid framework for mediation in civil and commercial matters, whereby any private legal dispute concerning civil and commercial matters may be referred to and resolved by mediation, in case the parties have the power to dispose freely of the subject of the dispute and agree to submit it to a mediator of their choice.

5.3. Enforcement of Mediations held domestically

Perhaps the most important provision from a practical point of view is the one on enforcement of settlement agreements. Under art. 8 of law 4640/2019, a settlement agreement which is signed by all parties to it and the mediator, becomes enforcing title by a mere application of any party to it before the competent court. An exclusive jurisdiction for granting enforcing power to a settlement agreement belongs to the court that would have been competent to hear the case that was settled under a settlement agreement, under the applicable rules of jurisdiction. Depending on the legal nature of a certain case, if a notarial form is necessary, then notarial deeds are required.

5.4. Enforcement of Mediations held abroad

Regarding international enforcement, things are more complicated. To begin with, settlement agreements reached in foreign countries do not seem to be open to the above described enforcement procedure by applying to the competent Greek Court for direct enforcement. This is bound to change once Greece ratifies the recently signed Singapore Convention on enforcement of settlement agreements, under which this type of direct enforcement is allowed. This means that a settlement agreement reached in some other country shall be open to direct enforcement in Greece, without it having to already have an enforcing power in the country of

[88] Law 4640/2019, art. 7 par. 2,3,7.
[89] Law 4640/2019, art. 7 par. 5.

origin. For the moment, this is not possible and a foreign settlement agreement may be enforced in Greece, only if it already has enforcing power in the country of origin.

As far a settlement agreement originating from a non-EU member state is concerned, this can be done by virtue of art. 905 of the Code of Civil Procedure. Under art. 905 of the Code of Civil Procedure, it is required that a foreign settlement agreement must have the binding nature of a title of enforcement in the country of issuance in order for it to be enforceable in Greece. Further, a foreign enforcement title will not be enforced in Greece if it violates the Greek ordre public (art. 905 par. 2).

Cross-border enforcement is also definitely possible under the various recognition and enforcement regulations of the EU, in relation to settlement agreements that already have enforcing power in other member states of the EU, as is mentioned in preamble 20 of the Directive (e.g. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims etc.).

5.5. Enforcement of foreign arbitral awards in Greece

International mediated settlement agreements are usually confirmed in an arbitral award, for enforcing reasons. Foreign awards can be enforced in Greece irrespectively of the country where they have been issued. Article 36 of Law 2735/1999 provides that the recognition and enforcement in Greece of all foreign arbitral awards shall be governed by the provisions of the 1958 New York Convention which has been incorporated into Greek law by virtue of legislative decree 4220/1961. Said provision, albeit indirectly, eliminated articles 903 and 906 CCP, which used to control the recognition and enforcement of foreign arbitral awards outside the scope of the New York Convention. Therefore, a unified legal regime is into place, which applies regardless of the place in which the foreign award was made. The New York Convention will be applicable, either directly, in cases the award was made in a signatory State, or by virtue of said article 36 in all other cases[90].

[90] See also C. Calavros and D. Babiniotis, *Alternative dispute resolution introduction*, Greek Law Digestive, available at: http://www.greeklawdigest.gr/topics/alternative-dispute-resolution-mediation/item/214-alternative-dispute-resolution-introduction accessed 20 February 2020.

It is worth noting that Greece incorporated the UNCITRAL model arbitration law into law 2735/1999 under the title "Law on International Arbitration" which regulates international arbitration conducted in Greece. Under art. 36 of this law, as mentioned above, foreign arbitral awards are to be enforced in Greece under the 1958 New York Convention, which has been incorporated into Greek law by legislative decree 4220/1961. However, domestic arbitration is regulated by articles 867-903 Code of Civil Procedure. Therefore, different provisions apply in respect of purely domestic and international arbitration in Greece, since enforcement of foreign awards is primarily made under the New York Convention.

The main provisions of the New York Convention are the following:

Article III of the New York Convention provides that each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Further, Article IV addresses the key obligations of the Parties who want to recognize arbitral awards as binding and enforceable. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original agreement referred to in article II or a duly certified copy thereof. (par.1). If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent (par. 2).

The New York Convention defines in Article V the grounds upon which a court may refuse to recognize and enforce the arbitral award. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award

was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. (par. 1). Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country. (par. 2)

Article VII (par. 1) of the New York Convention stipulates that the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements[91] concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

[91] It should be noted that in this assignment interpretational questions which may be posed in relation to existing bilateral international conventions between Greece and other States are not addressed. However, it should be mentioned that Greece has already signed around 44 Bilateral Investment Treaties that regulate investment disputes arising between Greece and investing nationals or legal entities of the other contracting State.

6. Conclusions

The present dissertation reaffirms that mediation could be very useful tool for those parties who are willing to opt for this alternative dispute resolution mechanism, given the major advantages compared to litigation (less time-consuming, less costly, no binding result, flexibility, confidentiality etc.). At the same time, mediation could be more effective compared to arbitration, taking into consideration -among others- that mediation is not a zero-sum game with winners and losers and that parties have the chance to maintain ongoing business relationships after that. Moreover, it should not be overlooked that mediation allows parties to craft creative solutions to resolve their legal conflicts, which are often more creative and personalized than litigation and arbitration affords.

Mediation is probably useless to parties already involved in hostile arguments and probably their differences cannot be resolved amicably. It is also unsuitable in cases where certainty of the court judgment is needed, and the case is of high commerciality. However, mediation can be highly effective in resolving Oil and Gas law disputes where the parties are capable of compromise and desire to keep a high level of control and confidentiality. The former can facilitate a swift resolution of a dispute, thereby resulting in speed and cost-savings. Furthermore, mediation is ideal for the resolution of many Oil and Gas disputes for several reasons. In many cases, the dispute will be between parties who have a continuing relationship. Since mediation is less adversarial than litigation or arbitration, it offers the parties the opportunity to forge a settlement of their differences on a mutually acceptable basis. While neither party may be completely happy with the resolution, a mediated agreement may serve to avoid a situation in which one party is so bitter from the outcome of the adjudicative process that the parties' relationship is forever tarnished. This can be clearly illustrated when considering, for instance, operators who have long-standing relationships with landowners with large holdings. Maintaining an amicable relationship in the face of a dispute over one tract is key to preserving business benefits on all holdings. Mediation removes fault from the equation and allows the parties to simply agree to a solution to their dispute that both can live with.

Mediation can be used in a variety of cases involving disputes between states, between investors or even between states and investors, while in rare cases may involve disputes between individuals and companies. At the same time, the endorsement of the guide on investment mediation from the Energy Charter Conference can be really effective to boost the use of mediation as type of alternative dispute resolution in investor -state cases given that it

provides not only a clear analysis of the whole aspects of mediation, but also encourages the Contracting Parties to consider to use mediation on voluntary basis as one of the options at any stage of the dispute to facilitate its amicable solution.

Moreover, the present dissertation highlighted that negotiation techniques and strategies on the course of mediation are able to not only assist the parties to disentangle themselves from unproductive disputes, but also to help them approach the matter at stake from a wider perspective. In this way, mediation could be highly effective for parties to solve their energy disputes, maintaining ongoing business relationships after that, without wasting time and money.

In addition, this dissertation elaborated the ways according to which international and domestic mediated settlement agreements could be enforced in Greece. At the same time, the latest developments of Greek legislator to foster the use of mediation as a dispute resolution mechanism in civil and commercial disputes were pointed out. It is more than obvious that the ratification of international mediated settlement agreements will become easier when Greece (and other countries) ratifies the recently signed Singapore Convention, since a settlement agreement reached in a foreign country shall be open to direct enforcement in Greece, without it having to already have an enforcing power in the country of origin.

In closing, for all the aforementioned reasons, the author expresses the belief that mediation, is a very promising dispute resolution mechanism, that could dominate in the Oil and Gas industry in the foreseeable future.

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