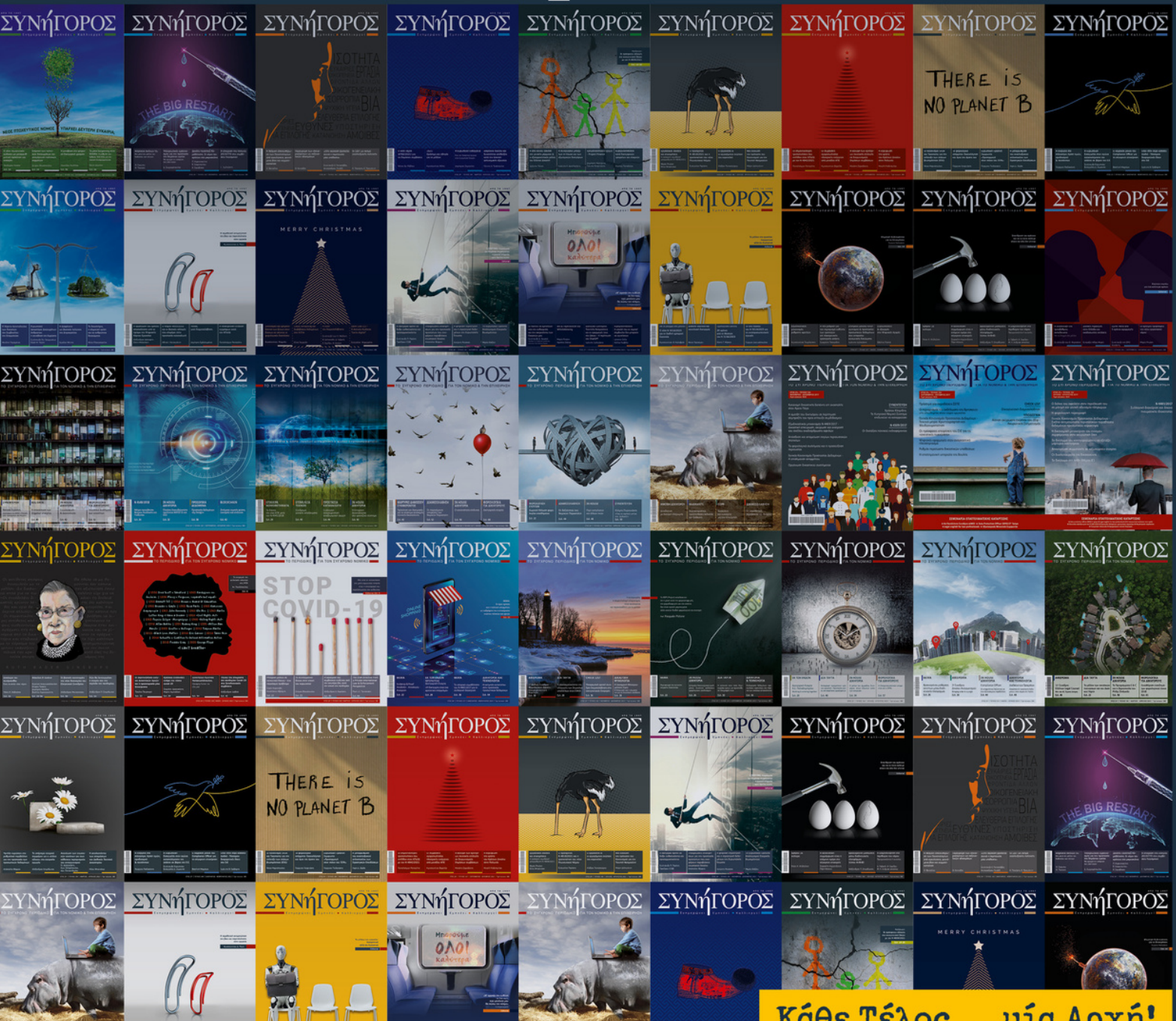
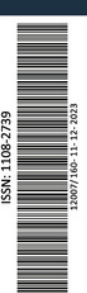


ΣΥΝΗΓΟΡΟΣ

Ενημερώνει Εμπνέει Καλλιεργεί



Κάθε Τέλος ... μία Αρχή!



Να μη γίνει ο φόβος εμπόδιο στη Μεταρρύθμιση

Συνέντευξη Υπ. Δικαιοσύνης Γιώργου Φλωρίδη

Υποχρεώσεις διαχειριστών πιστώσεων και αποτελεσματική δημόσια εποπτεία

Νίκος Παπασπύρου

Ο νέος Ν 5089/2024 για την ισότητα στον πολιτικό γάμο

Μαρία-Ευφραιμία Γερασπούλου

Διαμεσολάβηση Εφαρμογή ESG στην επίλυση διαφορών για βιώσιμες λύσεις

Δημήτρης Εμβαλωμένος

MEDIATION

APPLYING ESG TO THE RESOLUTION OF DISPUTES FOR SUSTAINABLE SOLUTIONS



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Summary of the presentation (without the videos and songs) of 27 June 2023 at the 5th Annual International Mediation and Arbitration Conference organized by NOMIKI BIBLIOTHIKI and EODID Athens Mediation and Arbitration Organization, with the support of O.P.E.M.E.D., Diversity Charter Greece, EODID's Mediators Training Body and the scientific journal "Arbitration & Mediation".

I. The debate

Are ESG criteria important or not? Why is the S at the centre of ESG? Does sustainability play a key role? Can we borrow ideas from Darwin and Aristotle? There are open and closed dispute resolution systems, what is the difference and what is the significance? Is Mediation an open system, as opposed to litigation and arbitration? Does Mediation have the added privilege of immediacy of time and consideration of emotions? Can Mediation lead to sustainable solutions to disputes? Is Mediation therefore an ESG practice?

II. In the end, why opt for Mediation?

1. We find it useful to make a link to the motto we proposed at the 4th Annual International Mediation and Arbitration Conference organised by NOMIKI BIBLIOTHIKI and EODID in 2022, which refers to the distinctness that sets apart the culture of Mediation in dispute resolution, and is "Think Outside the Box"¹:



2. A number of important reasons lead to this motto, such as the largely tailor made Mediation process outside the restrictive framework ("boxes") of the exclusive application of legal rules, with the parties' voluntary choices in its formation, the possibility of alternatives and improvisation, without the imposition of a third party, without binding the parties until they reach a possible agreement, subject to the ultimate boundaries of morality and public order and with the aim of achieving an agreement by the parties themselves or, at least, a better understanding by them of the dispute, with a view to its review.

Can these features of Mediation lead to a sustainable resolution of a dispute and is Mediation an ESG² option?

III. ESG and sustainability

1. The debate on ESG (Environmental, Social and Governance) standards, i.e. criteria for the implementation of Environmental, Social (political) and Corporate (economic) practices, is still relevant and growing. The acronym ESG is known to be an evolution and quantification of CSR (Corporate Social Responsibility), and other such standards have been proposed, such as The Triple Bottom Line (TBL /3BL /3Ps): People, Planet and Profit.

The core of these standards and the reason for their relevance is sustainability, which can be defined, simply put, as the ability of a thing to continue to exist. Sustainability involves and refers to concepts such as Conservation - Survival, Adaptation - Change, Evolution - Selection, Creation.

Is the letter S placed in the middle of ESG and CSR by chance? Probably not, since S, i.e. the social pillar of ESG, ultimately the human being, influences and directs the other two pillars, environment (E) and corporate governance (G).

¹ See "In the end, why opt for mediation?", published in SINIGOROS, vol. 152/2022, pp. 34 et seq.

² See "Sustainability in dispute resolution: Mediation as an ESG practice", Law & Business, Nomiki Bibliothiki and Kathimerini 28.5.2023, pp. 26 et seq.



In this regard, we can refer to the Sophist Protagoras (490 - 420 BC) who introduced the concept of "anthropocentrism" with his famous quote: 'Man is the measure of all things: of the things that are, that they are, of the things that are not, that they are not'.

2. Further, from whom might we draw ideas about the sustainability of beings and disputes? Perhaps from many, but there are two scientists with a global reach of influence that stand out, Darwin and Aristotle. In particular:

2.1 The English naturalist and biologist **Charles Robert Darwin** (1809 - 1882) is the founder of the theory of evolution, probably the most important discovery in the field of biology, and the first to discover and publish the scientific theory of natural selection.

It is now generally accepted that the main mechanism behind the theory of evolution is natural selection, and evolution by natural selection leads to sustainability.

2.2 The Greek philosopher **Aristotle** (384 - 322 BC), formulated - among many others - the concept of entelechy ($\epsilon\nu + \tau\acute{\epsilon}\lambda\omicron\varsigma + \acute{\epsilon}\chi\omega$) as the natural process of creation and evolution of beings, where the formless matter transitions from

potentiality (potentially being) to actuality (actively being) and the being reaches its completion by fulfilling the end, the purpose of its existence, thus achieving its self-realization. According to this thought of Aristotle, all the actions of human beings constitute a set of ends, aiming at a higher end, the "excellence", which is identified with eudaimonia, which is associated with happiness.

3. Based on the above ideas, and taking into account the building blocks of Mediation, can we conclude that the entelechy of resolving a dispute is its voluntary resolution (or attempted resolution) by the parties themselves, as the natural choice of resolution, which alone can lead to sustainable solutions?

IV. Mediation: an "open" system

1. What can it mean that a system is open? Does it mean that:

- It preserves opportunities, options, alternatives and the possibility of adaptation, balancing of interests and needs, and therefore it can evolve according to the circumstances?
- Is it therefore still in the process of being shaped and subject to the interaction of the parties themselves?
- Do the parties retain control and private autonomy?

Moreover, does the existence of options and the possibility of being shaped by the parties themselves a) not only have an independent value of its own, but also b) have the potential to create surplus value?

2. If so, Mediation is an open dispute resolution system and only an open system is potentially sustainable.

For example: I may want apples and end up getting apple pears or apple pie; I may end up exchanging my apple pie recipe for another fruit recipe or an apology; I may decide together with the other party to the dispute to make apple compote and share it as agreed; I may try other alternatives and I may end up looking at the issue from a different perspective again through Mediation.

This is because Mediation is based on the private autonomy and self-determination of the parties to a dispute, the search for alternatives and the formulation of solutions by the parties themselves, in a non-binding, legal way but out of specific laws and inflexible procedures, subject to the ultimate boundaries of morality and public order.

Thus, with Mediation, each party has something to gain (win-win).

V. Code of Civil Procedure (CCP) and arbitration: "closed" systems

1. What can it mean that a system is closed? Maybe that:

- It does not have opportunities, choices and the possibility of development?
- It concludes or reaches a predetermined state and fails to adapt to changing circumstances?
- It cannot be shaped and therefore is not subject to the interaction of the parties?
- The parties do not retain control and private autonomy?

2. If so, the CCP and arbitration are closed dispute resolution systems and a closed system is not sustainable.

For example: I ask for apples and an apple pie recipe. If I end up getting them, will I only get what I asked for and in the manner that I asked for it, or part of it. But even if I get the apples I asked for, I may not know exactly how to eat them. Similarly, if I get the apple pie recipe as I asked for, I may not be able to execute it as I thought I would. In any case, I have to settle for whatever they give me. After all, when and if I get what I asked for, I may not want it anymore or I may want other things.

3. This is because the adversarial system of the CCP, and in particular the system of argumentative dialectics³, is of defined content and outcome, of distinct rules of evidence and grounds for appeal. The same goes for arbitration, in both its domestic (Art. 867 et seq. CCP) and international commercial forms (Law 5016/2023), albeit with procedural flexibility. Indeed, in arbitration there are no provisions similar to Articles 116A & 214C of the CCP under which the court is required to encourage and urge the parties to resolve their dispute out of court through Mediation.

³ See "The argumentative dialectics of litigation of the CCP vs. the dialectic of Mediation", AandM 2022, annual publication, vol. 9, year 5, pp. 116. et seq.

In litigation under the CCP as well as in arbitration the litigants/parties seek the decision of a third party(-ies), that is binding and necessarily enforceable and get, when and if they get it, only what they asked for, rightly or wrongly and "as the law requires". The litigants/parties to an arbitration procedure thus exclude any other possible options and alternatives.

4. Thus, with the CCP litigation and with arbitration one party wins and one party loses (win-lose).

VI. CCP and, often, arbitration: solutions of last resort

Therefore, where Mediation is possible, litigation (in particular), but often also arbitration, should be solutions of last resort.

Because they lead to the cessation of:

- the voluntary relationship and communication between the parties,
- the same - "natural" choice and balance in the relationship between the parties,
- the possibilities of options and alternatives,
- evolution and therefore sustainability.

And because then the "new life" in the relationship of the parties ceases to be their "natural" choice and becomes "artificial", determined and imposed by the "algorithm" of the applicable rules of law, "as the law requires".

VI. Mediation: time and emotion / humour

Two additional ESG elements give Mediation its uniqueness in terms of sustainable dispute resolution: time and emotion / humour.

1. Time

To paraphrase Horace's (Roman poet, 65-8 BC) "Carpe diem" (seize the day) we can say "Carpe momentum" as speed is central to our times.

Only Mediation has the time immediacy that any dispute resolution requires.

In contrast, temporal ambiguity and uncertainty, evident in litigation and often in arbitration, is a loss of critical momentum.

2. Emotion and Humour

Which dispute is void of various emotions, of varying intensity depending on the case, but which often have a decisive influence on the positions of the parties? Is there a dispute without any emotion? Besides, humour, which may be derived from the Greek word "humor" (bodily fluid), is certainly connected with human health.

Considering that 65% - 93% of our communication is non-verbal and words are often inadequate, incomplete, misleading or unnecessary to convey the full picture, emotion and humour can make a difference.

Only Mediation allows for the manifestation and discharge of the emotions of the parties to the dispute and can include humour in its view of things. In contrast, the procedural rules of adversarial proceedings of the CCP and the procedural rules of arbitration fail to incorporate such critical parameters.

VIII. Key takeaways

To all, lawyers, litigants and judges alike:

- use a Mediation clause,
- make a sincere attempt at Mediation, including at the Mandatory Initial Mediation Session,
- use Articles 116A & 214C of the CCP, because for the purposes of ESG - sustainable dispute resolution: Give Mediation A Chance!

THINK
OUTSIDE
THE BOX

