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ADR MECHANISMS IN EUROPEAN UNION MARITIME LAW

YÜKSEK LİSANS TEZİ

ELİF EKİN ÇAYHAN

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ONAY SAYFASI

Ensitümüz AB Hukuku Anabilim Dalı Yüksek Lisans öğrencisi Elif Ekin ÇAYHAN'ın "ADR MECHANISMS IN EUROPEAN UNION MARITIME LAW" konulu tez çalışması 19 Şubat 2009 tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından oybirliği/ ~~oyçokluğu~~ ile başarılı bulunmuştur.

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Onay Tarihi

02/03/2009 tarih ve 2009/III sayılı Enstitü Yönetim Kurulu kararı ile onaylanmıştır.

Prof. Dr. Muzaffer DARTAN
Müdür

ÖZET

Dünyada son yıllarda Alternatif Uyuşmazlık Çözümüne başvuru artmıştır. Avrupa Birliğinin kendisine henüz yeni olan bu gelişmelere önem verdiği görülmektedir. Deniz ticaretine tekrar yönelmeler ile ekonomik ihtiyaçlar da göz önüne alındığında, bu çalışmanın tamamlanması gereklilik göstermiştir. Böylelikle Birlik içinde deniz ticaretine yönelik uyuşmazlıkların alternatif yöntemlerle çözümlenmesi daha mantıklı bir boyut kazanmıştır. Bu çalışmanın amacı yukarıda anılan gelişmelerin ortaya konulmasının yanı sıra konuya da ışık tutmaktır. Avrupa Birliği Deniz Ticareti Hukukunda Alternatif Yöntemler, Tahkimi ayrık tutarak, özellikle de Arabuluculuk vurgusu altında anlatılmıştır. Çalışma bu çerçevede, Birlik Deniz Ticaretine, dolayısıyla da Birlik Ekonomisine faydalı olmak üzere hazırlanıp, bitirilmiştir.

ABSTRACT

It has been experienced in the recent years that the use of Alternative Dispute Resolution increased rapidly world wide. European Union was sensitive to these innovations, as well. When the aim for sea trading and the economical needs considered all together with the former situation, it became necessary to complete this study. It is proved to be more logical resolving maritime disputes within Europe with ADR methods. The reasons for this subject matter to be chosen were the above mentioned condition and as well the desire to be able to enlighten the issue. The ADR Mechanisms in the European Union Maritime Law were told excluding Arbitration from the area, especially emphasizing on Mediation. Therefore, the study has been prepared and concluded in the manner that it would be useful for the Maritime and as a consequence for the Economy of the Union.

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ABBREVIATIONS

AAA : American Arbitration Association

ADR : Alternative Dispute Resolution

BIMCO : Baltic and International Maritime Conference

CIF : Cost, Insurance, Freight

CPR : International Institute for Conflict prevention & Resolution

EC : European Community

EJN : European Judicial Network

ECMT : European Conference of Ministers of Transport

EU : European Union

FIN-Net : Financial Dispute Resolution Network

FOB : Free on Board

GATT : General Agreement on Tariffs and Trade

ICC : International Chamber of Commerce

ICSID : International Centre for Settlement of Investment Disputes

IMO : International Maritime Organization

IOPCF : International Oil Pollution Compensation Fund

MEP : Member of European Parliament

MHPA : Milford Haven Port Authority

SOLVIT : Effective Problem Solving in Europe

UN : United Nations

UNCITRAL : United Nations Commission on International Trade Law

WIPO : World Intellectual Property Organization

WTO : World Trade Organization

INTRODUCTION

Maritime activities of the European Union are at most importance as the trade largely depends on the sea. The common policy adopted for an integrated maritime within the Union is the key element which sustains the given importance on the issue. Trade across Europe, generating a large scope for conflict areas, mostly regulated by or on the sea is a subject-matter which needs to be emphasized when considered the economical approach of the European Union. It is no news to a single market based economy that; disputes generate the crisis, yet the busyness of businesses generates the disputes. In this context, underlining the importance of maritime trading, adopting out-of-court settlement mechanisms becomes a requirement. Alternative dispute resolution (ADR) methods are considered to be amicable and voluntary procedures, conducted in a private nature aiming at resolving the disputes regardless of a binding decision but by mutual consent of the involving disputants.

The "Mediation Directive" adopted lately by the Union foresees the possibilities of dispute arising in cross-border transactions and directs the Member States to adopt necessary legislations in terms of civil and commercial ADR usage. This study approaches the subjects in a causal connection and considers that the socio-economical growth of the Union passes through easier access to justice. Without discarding the authority of the courts or the shadow of law-with a special emphasize on "Mediation"-alternative procedures are examined in the following parts as profitable mechanisms when used in cross-border maritime activities of the Community.

Two major developments recently taken place in the Union supports the idea of ADR usage in European Maritime Law. As mentioned above, the common policy lately introduced on "An Integrated Maritime within the European Union" with its recent plan on "Maritime Transport Policy for 2018" and the "Directive on Mediation in Civil and Commercial Cross-Border Disputes" have very much in common when considered the probable conflicts due growth in marine sector. This study combines especially these developments as well as other aspects in order to reach a diagnosis.

ADR, as not having a uniform shape within the Community, has different implementations in most of the Member States. The transposition period of the Directive in concern is until 21 May 2011, that the mediation practice within the Union will be subject to approximation in the following years. However, the future expectations do not include a regulated form of mediation or ADR, but a harmonized sum of national procedures. Therefore, it is suggested in this study that, ADR activity across the Union should be governed by a regulation after a certain period of time when the national laws step up to a mostly harmonized level. The cross-border nature of maritime sector is in urgent need of smooth operation which is by means of easy and quick but also concrete justice. This operation should not be interrupted by double standards, yet the channels of information should be kept open and avaliable for seekers of alternative settlements when conflicts are due. Therefore, an information network of ADR for cross-border commercial disputes is also proposed in this study, together with the former mentioned future regulation for out-of-court settlement procedures.

First of the four chapters begins with the explanations on alternative mechanisms, makes an analysis of the procedures when used in cross-border disputes, mentions the benefits and emphasizes on mediation in comparison with traditional methods. The second chapter is based on maritime conflicts and the ideas to dissolve them by means of ADR, supported by sample case law. In the third chapter, the maritime activities of the European Union are discussed by setting forth the contemporary transportation environment, stressing the future of the issue from the common maritime policy perspective and proposing a *maritime network* for the better governance of shipping disputes. Last chapter of the study examines the present context of ADR in the European Union with strong pronunciation on mediation directive in an expectation of the increase of ADR usage in maritime disputes, supporting the idea of a *regulated dispute resolution mechanism* for the Community.

The objective of this study is to underline all the issues related to the subject matter and identify the problems in order to offer solutions and support them, on grounds of law.

CHAPTER I: ALTERNATIVE DISPUTE RESOLUTION

ADR is used the term for "any type of procedure" that is an alternate to litigation.[1] This refers to generally a neutral third person/s who help/s the disputing parties to reach a solution without going to courts. It is a highly advantageous tool when considered in the international conflicts level's miscellaneous pitfalls such as the competence or even the enforceability matters. Furthermore, ADR is regarded as an economical, effective and efficient way recently.[2] When considered the commerce and industrialization level that the countries over the world had gained, a greater reliance on the courts grew. As a matter of fact, this caused the courts difficulty at handling the disputes in an adequate manner. So did the use of ADR in the courts and communities become rich.[3] There are still arguments about if the settlement agreements at the end of successful ADR sessions are binding or not.[4] This is a difficult question to answer. In the common understanding it is not binding but as the procedure is solely based on the consent of the parties, therefore it is always possible to make it binding.

According to these brief explanations ADR can be explained as a consensual method of settling disputes by the help of a neutral third party mostly independent of national legislations. The various types of alternative procedures which will be examined below are applicable not only in domestic disputes but also in cross-border matters. By virtue of the nature of alternative mechanisms, they can be considered as the future for international dispute areas. The changing approaches and the needs on conflict resolution draw the attentions on the voluntary processes in the world trade. With this perspective, the following parts will focus on different types of the subject matter and the predictable benefits due when they are used in the cross-border arena.

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[1] Christian,BÜHRING-UHLE, **Arbitration and Mediation in International Business**, The Hague, Kluwer Law International, 1996, p.261.
[2] William F**.** JAMES, "Alternative Dispute Resolution and Mediation Resolves Disputes More Efficiently and Effectively", [Electronic Version], *Missouri Lawyers Weekly,* 3/7/2006, (21 April 2007) p.s.36/125.
[3] Kimberlee K. KOVACH, **Mediation in a Nutshell**, Texas, Thomson-West, 2003, p.4,5.
[4] Gülgün ILDIR, **Alternatif Uyuşmazlık Çözümü**, Ankara, Seçkin Kitapevi, 2003, p.29.

1. TYPES OF ADR:

There are various types of methods which include a third party neutral's involvement for the resolution of a conflict. As the procedures vary, the schemes and outcomes differentiate but in general means ADR is considered of a non-mandatory nature. Therefore, distinction should be made in order to understand the focus of the study: Arbitration, considered as one of the ADR techniques in domestic means, is not included when international conflicts are involved.[5] Because International Commercial Arbitration is a whole different context more like a court hearing. In this respect, Arbitration will be discussed in the first place and the other alternative procedures will follow. A special emphasis will be made on Mediation-one of the ADR techniques-in the second, third and forth parts of this chapter as it is considered to be the prototype for Alternative Dispute Resolution.[6]

1.1. Arbitration:

It is the most common adjudicatory process among ADR which has been used extensively in solving commercial disputes, in the past and present.[7] It is a private adjudication as it is based and conducted in a private medium. However, this private nature includes a binding decision over the consent of the parties that they exclude the jurisdiction of public courts.[8] Arbitrations are generally hold by one arbitrator or a three panel. During the procedure presentations by parties are made and the award gained thereafter. This is more of a formal method compared to other techniques.[9] In international commercial arbitration, a complex structure is regarded due to the complexity of disputes brought before the panel/arbitrator. It is necessary to emphasize that Arbitration is alike court proceedings in much of its aspects.

[5] BÜHRING-UHLE, p.261.
[6] BÜHRING-UHLE, p.272.
[7] KOVACH, p.7.
[8] BÜHRING-UHLE, p.43.
[9] KOVACH, p.7.

Arbitration has categories depending on whether it is obligatory or voluntary, ad hoc or institutional and national or international as well as it depends on whether the parties to arbitration are private bodies or public bodies.[10] The scope of this study requires us to focus on international commercial arbitration which is defined in article 1/3 of the UNCITRAL Model Law on International Commercial Arbitration as follows:

"An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration is determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country."[11][12]

International commercial arbitral process which operates alongside the court system, but is ultimately dependent upon it for support, is considered to be outside the

[10] Süleyman DOST, **Yabancı Yatırım Uyuşmazlıkları ve ICSID Tahkimi,** Ankara, Asil Yayın Dağıtım Ltd. Şti, 2006, p.7.
[11] UNCITRAL Model Law on International Commercial Arbitration, United Nations Document A/40/17 Annex 1, 21 June 1985, p.7,8.
[12] The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road.

scope of ADR according to some scholars.[13] This is not totally untrue which will be understood when comparisons are made. Yet, it is appropriate to define arbitration as the adjudication of a dispute or a controversy on fact or law or on both, being conducted outside the ordinary civil courts, by one or more persons to whom the parties refer their issues for decision.[14]

There are two types of international commercial arbitration. The *ad hoc* arbitration is the type which is not bound by any institution, formed for only a specific dispute and conducted with rules adopted by the disputing parties. If the procedural rules are not determined by the parties- generally not- the existing procedures are used. *The United Nation's Commission on International Trade Law* has its rules[15], as was mentioned above, on "ad hoc commercial arbitration" which are generally the preferred procedures world-wide. An arbitration conducted according to these rules would not be controlled or monitored by any specific institution, in other words UNCITRAL guides the parties to a dispute if they choose to apply its rules.[16] The other type of arbitration refers to *institutional arbitration* which would not be formed on a specific dispute but conditional upon an organization or an institute, progressing with certain principles and rules and controlled by that institution or organization. The International Chamber of Commerce[17] is one of the most advanced institutions practicing arbitration worl-wide.[18]

1.2. Negotiation:

Negotiation is the basic step for every ADR scheme. What makes it one of these techniques is after negotiating on a certain dispute, parties may very well come to a consensus which ends the disputes before passing onto other means. It can briefly be called as the "communication directed at achieving a joint decision"[19] Steps in a

[13] Karl J. MACKIE, **A Hand Book of Dispute Resolution: ADR in Action,** New York, Routledge, 1991, p.62.
[14] MACKIE, p.55.
[15] UNCITRAL Model Law on International Commercial Arbitration.
[16] Feyiz ERDOĞAN, **Uluslararası Hukuk ve Tahkim,** Ankara, Seçkin, 2004, p.136-137.
[17] Hereafter called ICC.
[18] ERDOĞAN, p.147-149.
[19] BÜHRING-UHLE, p.222.

negotiation process can be counted as communicating and making the decision. Negotiation is approached hesitantly by authors whether it structures any form of theory or not.[20]

Negotiating can be defined as a back-forth communication designed to reach an agreement when parties have shared and opposed interests.[21] This method is based on the belief that before involving in any formal proceedings, parties to a dispute can communicate over the dispute in order to reach a solution. Contractual or commercial transactions lead lawyers to the negotiation table at most.[22]

1.3. Conciliation:

In a conciliation session, a private neutral party is involved who gives his opinion on the best solution. Conciliation is not generally a single stage. It is mostly governed by the rule in a mediation or arbitration agreement. The decision is not binding therefore when no solution is gained parties are free to seek court action.

Conciliation is a voluntary and a non-directive procedure. While involved in conciliation, parties may find themselves at various times in three types of meetings:

- Joint
- Separate
- Caucus (private)

"The choice of the appropriate type of meeting at the right time is as much art as science and it is possible only to sketch out some of the considerations a conciliator would have in mind."[23]

[20] BÜHRING-UHLE, p.223.
[21] MACKIE, p.74.
[22] MACKIE, p.75.
[23] MACKIE, p.106,107.

1.4. Fact Finding:

A fact finder is a neutral third party who does not give a binding decision but making the parties understand the outcomes or losses of the situation via examining the facts of the dispute. This person is generally a professional in the dispute area and the procedure is mostly conducted in the completion of the other ADR procedures such as mini-trials, mediation or arbitration[24] which means even if the dispute has not resolved due fact finding, the findings of the neutral party will constitute a big role in the following processes to a guided dispute.

The fact-finder prepares a report if the parties to the disputes have not shown a will to come to a consensus which helps the parties to estimate the risks in case of failure to agree.[25] If the fact finding procedure takes place in a late phase, then the disputants might not chose this method.

The procedure is solely constructed upon the wills of the parties in order to both underline the opposing ideas on facts and to reach a solution in terms of a non-binding perspective to end the dispute.[26] The fact finder- a neutral third party- does not make a commitment upon ultimate resolution of the dispute. This helps the parties to over come their opposing ideas without fearing a binding decision. Further more, the period that the process takes place is determined solely by the parties which is also an advantageous method underlining the power of party autonomy over the dispute.

The reason for disputants to choose this process is generally to learn the possibility of a probable case sued at public courts.[27] When the necessary information is gained, parties to the dispute may go for a settlement agreement. If the findings are not satisfactory, then the disputants are free to seek other alternative methods or directly go to courts. Fact finding is most profitable when the concerns are about a technical or

[24] ILDIR, p.78,79.
[25] ILDIR, p.79.
[26] ILDIR, p.82.
[27] ILDIR, p.81.

scientific dispute such as "patent, toxic tort and construction cases, or certain issues in anti-trust and securities disputes, or questions of foreign law."[28]

The procedure takes place in a medium where both parties are ready for finding the facts of the dispute. In this medium both sides have the right to reply but dependent on the fact finder. Witnesses are allowed to join the processes as well as the party attorneys.[29]

1.5. Neutral Case Evaluation:

In early neutral evaluation, a competent third neutral involves into the dispute at the beginning stage in order to identify the conflict and bring the parties into a new view point. The rendered decision is not binding.[30] The general purpose of this procedure is to provide an evaluation which may resolve the dispute in an easier way.[31]

The neutral third person evaluating the case tries to develop a new point of view for the parties by summarizing the dispute in terms of its past and present forms. With this new point of view, the disputants can intersect their interest by agreement and if not then the evaluation stays confidential. This also helps to shorten the court proceedings if the alternative method fails as the subjects of the dispute would have been narrowed and evaluated.[32]

This procedure also called "early neutral evaluation" is proper when a dispute is in its beginning stages. If the subject matter of the conflict is too complex or it relates to highly complicated past events, then this procedure would not be appropriate to resolve the dispute with.[33]

The parties of the dispute can choose one neutral third party as well as they can decide on a panel of evaluators. There is not a specific or obligatory method of

[28] BÜHRİNG-UHLE, p.312.
[29] ILDIR, p.80.
[30] ILDIR, p.83.
[31] KOVACH, p.11.
[32] ILDIR, p.84.
[33] ILDIR, p. 84.

evaluating a dispute. However some certain rules are annexed to this procedure. First of all, the parties shall deliver a statement of evaluation to the evaluator/s at least seven days prior to the meeting. The statement contains a list of facts and the necessary information for better evaluation of the case. Further more the statement shall include all possible documentation as well as necessary evidence. This helps the third neutral to gain information over the dispute. When the medium is complete and the parties are ready for the evaluation, short talks are made and evidences are submitted, then the evaluator prepares his/her report. The report shall be based on grounds aimed to resolve the dispute. However, the parties may not find it efficient. Yet, the evaluation helps them to understand the strong and weak points of the probable case. If they agree upon the evaluation, the dispute would be resolved in an easier, cheaper and confidential sense.[34]

1.6. Mini-Trial:

It is a confidential and non-mandatory procedure that aims at getting the parties together in order to find a resolution to the concerned dispute. It is conducted by a board of triars and best at commercial disputes.[35] The key element in such a procedure is preserving the business relationship[36] with the help of the counsellers in a fair but flexible medium.[37]

Mini-trial has the approach to take and consider the dispute as a "business problem". This approach segregating the matter in concern as a problem from the term "dispute" is mostly adopted by the business environments and it is in use when resolving commercial conflicts.[38]

The board of triars should consist of people who have very limited or no information on the dispute. They shall listen to the submitted information, as well as

[34] ILDIR, p.85.
[35] ILDIR, p.100.
[36] KOVACH, p.11.
[37] ILDIR, p.113.
[38] ILDIR, p.108.

they can examine the witnesses. If the board decides upon a solution, the parties of the dispute may make an agreement and the board may be given authority to decide on a binding basis. In the board of triars, a neutral third neutral may exist who may be elected to lead the hearings, or decide upon a binding agreement.[39] However this is not an indispensable element of mini-trials, yet it would be a more sophisticated structure if conducted without a third neutral advisor.[40]

When it is best to conduct mini-trials is a controversial subject. However, it can be said that it is most appropriate to involve into this procedure at the very beginning of a case sued in public courts whereas, the related documentation would have been examined and the parties would have known each other.[41]

This procedure looks more like litigation, yet it is based on a more flexible ground as the parties are free to choose their methods of trial. However, this chose should be between the limits of fairness.[42]

The mini-trial process ends in different variations. After the evidences has been submitted, the board gathers together in order to find a solution. If the parties ask for a binding decision, this means whether it is due the mini-trial agreement or upon a decision that the representatives have gained. If the parties ask for a recommendation, this can include a resolution as well. Finally, sometimes the procedure continues onto a mediation stage where the neutral third neutral can mediate the dispute in order to adjust the views and claims of the disputing representatives.[43]

It is necessary to state that mini-trial is not a real trial but it is a highly structured process of settlement of disputes. It narrows the differences between the perceptions of the parties[44] and is a flexible device which can be tailored to the precise needs of the disputants. There are no procedural laws governing this method, yet some characteristics can be counted as below:

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[39] ILDIR, p.108.
[40] BÜHRİNG-UHLE, p.305.
[41] ILDIR, p.111.
[42] ILDIR, p.112.
[43] ILDIR, p.113,114.
[44] BÜHRİNG-UHLE, p.304.

- The parties negotiate on the procedural rules to govern the process.
- The preparations are completed in a rather short time as the limit of discovery is rather short.
- The hearings are done within a shorter time like two days.
- There is no judge or jury, the presentations are made to the representatives and conducted by the neutral advisor.
- The issues are not delved into in order the process to be completed shortly.
- The representatives meet after the hearings in order to settle an agreement.
- If the settlement is not reached, the neutral advisor gives his/her advisory opinion on how the case would have been settled if gone to court.
- The procedure is confidential; the involvers give commitment that no information shall be disclosed.[45]

1.7. Med/Arb:

This is a type of mediation which is immediately followed by arbitration.[46] This procedure is useful when parties are in a need of a quick and guaranteed settlement.[47] The first role is of the mediator, who first tries to seek consensus among parties before getting into the deeper aspects of the dispute, which are to be handled by arbitrators.[48] In other words the neutral third person has the decision-making authority

[45] MACKIE, p.33,34.
[46] Rodney M ELDEN and Irene E. ZIEBARTH *Does Mediation Have a Place in International Maritime Disputes* http://www.maritimelawcenter.com/html/mediation/html , (12 March 2007) p.6.
[47] ILDIR, p.101.
[48] ELDEN-ZIEBARTH, p.1.

over the resolution of the dispute.[49] It is a common procedure as there is an approach considering the procedures of arbitration more reliable. However, mediation can very well achieve a settlement long before arbitration procedures begin.

This hybrid procedure is mostly designed for the possibility of failure of a mediation session that the dispute would not end up in litigation but stay inside the borders of ADR with an expectation of settlement. It is a procedure where good-will of the parties is important that for a quick settlement resulting in continuing the business relationship.[50]

Med/Arb method is mostly governed by an article of the contract between the disputing parties. However, it can be decided upon after the dispute has arisen. Once it is decided that the Med/Arb procedure will be conducted, a third neutral should be elected for to both mediate and arbitrate the case. This is sometimes too specific to find the right conductor, yet it is advantageous that even the conductor has the authority to end the dispute by means of a binding decision. A mediation taking place before arbitration helps the parties to behave more willingly before a binding decision is gained.[51] The control that parties feel over the final outcome of the dispute makes the process favorable among business environments.[52]

There are also disadvantages that the information gained on a mediation session might affect the conductor if the dispute has gone to arbitral levels. To avoid such confusion, it is best to agree upon the fact that the information attained in mediation could be used in arbitration.[53] The confidentiality principle of mediation, as well as inadmissibility as evidence criteria seems to be ignored but it should be kept in mind that unlike arbitration, mediation is a non-binding voluntary stage where parties are free to conduct their desired procedure.

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[49] Michael L. MOFFITT, **The Handbook of Dispute Resolution,** Harvard, Jossey-Bass, 2005, p.413.
[50] ILDIR, p.101.
[51] ILDIR, p.103.
[52] MOFFITT, p.409.
[53] ILDIR, p.102.

1.8. Mediation:

Mediation could be said to be a kind of an original appeasement overture, or conciliatory procedure which is primarily aimed for speedy resolution of disputes, or business conflicts, emanating from trade related issues. This process has been used ever since the people started living in communities, so it is probably as old as humanity. Intervention by other members of a community is a traditional dispute remover which can be found in the early societies of mankind.[54] Considering the present age, with all the complexity in business, this study makes a special emphasis on mediation in the following parts believing that such a big Community like the EU will benefit from it.

In the case of mediation, the procedure involves, inter alia, an appointment, upon request, of an impartial intermediary with mutual consent of parties, in order to facilitate the parties in arriving at a jointly agreeable solution to their contested issues.[55] Mediation is a flexible procedure which only aims at reaching a consensus eliminating points of agreement and disagreement.[56] However, it is strong and has the power to attain consensus among disputants.

Although there is not a uniform description for mediation, it can be defined as the non-binding intervention of a neutral third party who helps the disputants negotiate an agreement.[57] At the end of the procedure, if parties agree to a consent, then the settlement agreement is signed. If not, parties are free to seek other methods such as a court invention or arbitration.

The basic notion for understanding the mediation theory can well be defined when business disputes considered that in the saying "a man of a virtue can take care of his own business problems."[58]

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[54] BÜHRING-UHLE, p.274.
[55] Patricia, SIMMS, "Can't We All Just Get Along? Businesses Like Mediation as an Alternative to Costly Court Fights" [Electronic Version] *The Wisconsin State Journal,* 11/09/2006, p.s. 79/125 (11 April 2007).
[56] **Mediation Reader**, Text Book, Institüt für Anwaltsrecht an der hu Berlin / Tulane Law School. 8th Summer School on Dispute Resolution, 2006, p.2.
[57] BÜHRING-UHLE, p.273.
[58] BÜHRING-UHLE, p.262.

2. THE ADR PROCEDURE IN CROSS-BORDER DISPUTES:

International disputes are becoming more and more every year. This is the area where the biggest effort should be inserted into in order to keep the peace in the world. However, this effort by only courts or structures or reliance on legality will not be efficient to undertake the issue of international trade based conflicts. Besides going to litigation has pitfalls such as time and money loss.[59]

The link between economic efficiency, social well-fare and the management of legal justice is undeniable, yet but it is getting complicated recently with the move towards a more free trade.[60] Due to the globalization of the world economy and the increasing complexity of trade relations, the capacity of regulating complex transactions in world trade is insufficient.[61] Therefore, alternative methods give specific resolutions to specific matters in an easier, quicker, as a consequence more amicable way.

The European Union aiming at the approximation of nations has a great interest in securing the trade flow across its territories and it has to eliminate any non-legal barriers to justice which is trying to be achieved by regulating measures such as in enforcement of foreign awards among the EU. Yet, business needs effective, affordable and quick justice[62] and if this passes through alternative procedures, the necessary implementations should be done.

As this study is aimed at discovering ADR techniques in maritime and mostly transportation related disputes, it is necessary to emphasize that shipping business is a complex subject where a number of different legal sources involve. Arbitration is already being used on a broad sense. However, it is best to distinguish Arbitration from the ADR and to focus more on mediation and other alternative procedures to be relied upon for the resolution of disputes in cross-border environments.

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[59] SIMMS, par.1.
[60] Naomi GAL-OR, "Commercial Alternative Dispute Resolution in Cascadia" [Electronic Version] *Canadian Journal of Regional Science,* Vol.24, 2001, p.s.1/1, par.3-4 (30 January 2009).
[61] SIMMS, par.6.
[62] GAL-OR, par.10.

2.1. Analysis of the Procedure:

As emphasized earlier, arbitration is distinguished from the other procedures of alternative methods. Arbitration has much strengths for sure when international disputes considered which of those will be discussed later with also its weaknesses. The reason for seeking other ADR methods for business disputes is the "crisis in international arbitration characterized by an increasing proceduralization and the associated costs and delays, along with inherent limitations in its capacity to bring about consensual solutions."[63]

At the international level, ADR has become an increasingly favored method as its applicability being seen to resolve economic disputes.[64] When coping with conflict on a cross-border basis, a party should think in terms of creating a process for handling a flow of problem rather than to think about a solution which solves the dispute permanently. This needs a pro-active manner in order to formulate forward and progressive solutions, taking into consideration the opposing person's interests, motives and even psychological needs.[65]

The most favored way of dealing with cross-border conflicts is via mediation and conciliation in to-days approach in trade. It is not surprising that most of the private companies are seeking for economical ways of ending disputes. "The diagram below suggests a chain of possible solution deriving of such an ADR procedure:"[66]

1st step: identify the problem

2nd step: make general diagnosis

3rd step: describe approaches

4th step: initiate helpful decision making

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[63] BÜHRING-UHLE, p.216.
[64] GAL-OR, par.12.
[65] Roger FISHER, Elizabeth KOPELMAN, Andrea Kupfer SCHNEIDER, **Beyond Machiavelli: Tools for Coping with Conflict,** Cambridge, Harvard University Pres,1994, p.115.
[66] FISHER-KOPELMAN-SCHNEIDER p.151.

2.2. Benefits of the Procedure:

The movement towards alternative techniques in cross-border conflicts mainly aims at reducing the enormous transaction costs of litigation.[67] A second benefit is that the procedure is a more quick response to disputes when compared to arbitration or court proceeding. This is preferable for traders as time means money. Most importantly, involving in an ADR procedure, parties have the chance to survive their on-going relationship. This is because when going to court or arbitration, the solution is win-loose based which means at least one of the parties will not be satisfied and will not find it fair. However, in ADR procedures the picking point is the consensual medium itself which means there will be parties both happy on a win-win basis. Confidentiality is an other tool in such procedures as the parties gain control over managing the dispute on secrets of trade and other things that they might not want to reveal. If it were to count all these benefits in brief, they can be demonstrated as below:

- party autonomy
- flexibility
- more focus on interests
- relationship preserved
- confidentiality
- lower transaction costs.[68]

3. MEDIATION AS THE PREMIER FOR ADR TECHNIQUES:

In to-days global medium, conflicts should be the number one subject to be avoided. However, it is not possible to avoid them totally; what can be done is to settle them in the best possible way. Mediation itself is an enormously flexible procedure

[67] BÜHRING-UHLE, p.266.
[68] BÜHRING-UHLE, p.272.

which is "less formal than a court trial, more private, less costly and less bruising."[69] Due to the broad concept of the procedure, any unnamed type of mediation can be conducted with the consent of varying disputants.[70] As a consequence, over the last several years, mediation has been used effectively in nearly all types of cases and conflicts.[71] Furthermore, much of the research done in dispute resolution area indicates that mediation is the chosen process among participants.[72] This is because of the benefits it serves to its customers which will be later on listed. It is important to emphasize that mediation does not have any power to force parties to anything that means even the agreement is not enforceable due to parties' terms of interest. This informal procedure is solely private oriented which is why it is favorable when considered the private characteristic of cross-border commercial disputes.

3.1. Kinds of Mediation:

Due to the earlier mentions above, it is rather difficult to categorize the types of mediation hold for various conflicts. There are always attempts to grade them. Nominally they are as follows; scrivener, shuttle, muscle, therapeutic, trashing, bashing, hashing etc. mediation.[73] Among these names, a widely well-known typology can be made which is the evaluative, facilitative division. This approach is an argued one on subject. However it is useful to define mediation in a two-dimensional structure:

3.1.1. Evaluative:

Evaluative approach is not the designed method when considered the structure of mediation. "Neutral Case Evaluation" as explained in Part 1 is the procedure where evaluations are involved. The mediation process is deemed not to involve evaluation at

[69] SIMMS, par.4.
[70] BÜHRING-UHLE, p.282.
[71] KOVACH, p.34.
[72] KOVACH, p.33.
[73] KOVACH, p.63.

first sight. In other means, the mediator is not into the depths of the conflict.[74] He/she acts in an analytical way to quickly resolve the dispute. This is true by its nature. However, denying the fact that as consensual procedures is about party-autonomy, then there is never any limit to evaluate the case into the depths of it. This approach is called the "Evaluative Mediation Technique" introduced by "Riskin's Grid" which is a graphic shown below:[75]

Diagram 1:

Broad

Facilitative----------Evaluative

Narrow

3.1.2. Facilitative:

In facilitative mediation, the procedure is deemed to be a facility to over come the dispute. This is only done by adequate effort which generally does not mean assessing the history of the case, the roots of the disputes etc. In this type of mediation- which is the common type- a negotiation environment is created and the focus is solely on how to end the dispute. In this context evaluation is not intervened.

3.2. The Role and Responsibility of the Mediator:

The most important actor of a mediation procedure is no doubt that the mediator him/herself. Mediator is the person who gets the parties together into a consensus. He/she supervises the outcomes after doing the necessary structure. A

[74] ILDIR, p.67.
[75] KOVACH, p.63.

mediator would face some barriers in mediation such as lack of communication or parties' psychological biases.[76] However he/she is the person who has the ability to over come these barriers, who has trained in such way. Mediators are generally members of certain associations and they have a type of private registration process. This person is generally chosen according to the type of conflict as there are various mediators specialized in various areas.

3.2.1. Neutral Third Party:

When in a mediation, the party managing the conflict must be at same distance to both parties. Unlike in arbitration, parties can not take their own mediators and the neutral mediator together into the mediation table. Therefore, a win-win solution is reached. It is the mediator's duty to solve the dispute in real impartiality.[77] This is different than going to the court as all the courts should be neutral and try fair. This is about, never leaving a party aside when coming to a decision. That is what makes these dispute procedures alternative and makes it difficult to consider a mediation settlement binding in terms of public law.

3.2.2. Blameworthiness of Mediator:

Since the first obligation of a mediator is to create a neutral and amicable medium for the parties to mediate, he/she can never be blamed of failure to solution. This is again a consequence of gaining non-mandatory award. Where there are alternatives left to seek and no settlement has done, parties are free to going courts or conducting arbitration and not to blame the mediator. Therefore the mediation session should be conducted in voluntary environment that the parties shall understand and accept the blameworthiness of the mediator, as consequence of self-determination.[78]

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[76] KOVACH, p.75.
[77] **Mediation Reader,** p.30.
[78] **Mediation Reader,** p.30.

3.3. Beneficial Aspects Governing Cross-border Mediation:

There are benefits of mediation usage when confronted with disputes in general and also in large amounted ones referring to cross-border trade. It is getting more and more every day for the public courts to deal with numerous conflicts arise out of business relations. As the business is held by privates, why not the conflicts are? The answer to this question will be examined below by showing various benefits of the mediation procedure in cross-border disputes. The reason why *arbitration* also known as a private body is not considered in this study to be the future of such disputes will be discussed in the following parts.

3.3.1. Time and Money Saving:

It is never denied that litigation is an effective method to solve disputes. One other thing never denied as well is that it is time and money consuming.[79] High costs are shadowing the beauty of justice between traders and putting aside the probability of paying less money, between loosing and winning a case. Besides the lengthy procedures are not even comparable to ADR sessions which takes a few days or a few weeks depending on what type of procedure is conducted.

3.3.2. Confidentiality and Privacy:

It can be advantageous sometimes to have the outcomes of a case apart from the exemptions in public courts. However in most of the cases it is considered disadvantageous having the verdict publicized.[80] Traders have a great interest in keeping the award confidential when his/her relations and reputation concerned. Mediation ensures that the details and outcomes will not be shared with the public.[81]

[79] KOVACH, p.35.
[80] KOVACH, p.35.
[81] **Mediation Reader,** p.31.

3.3.3. Self Determination:

In a mediation agreement, parties are the self-determiners of the case which means they are the final decision makers.[82] The disputant will have the chance he/she lost before the dispute has arisen. This is a unique party-autonomy which should be getting the parties together via their consent. Knowing that the conclusion will award both parties' rights, the willingness to mediate would keep increasing in a medium of numerous positive awards. This is one of the reasons what makes the mediation a future alternative.

3.3.4. Preserving of Relationships:

It is no doubt that global economies are in need of long and sustainable trade relations which is difficult to carry as conflicts inevitably arise. In such a medium, wise professionals have begun to use mediation not to jeopardize his/her relationships in order to attain future prognosis. Mediators are specially trained professionals to avoid such cases and help the parties separate the problem from persons.[83] The reason why scholars call mediation settlement "amicable" is because of this win-win based awards and the preservation of relationships.

3.3.5. Flexibility:

Mediation is an informal process which is governed by only a few rules. Even the guidelines are not specific. This is due to its very nature as because mediation deals with human nature when in discussion. This may not give the best results when discussions are made in formal court atmosphere but in a mediation medium parties do not hesitate to talk freely[84] and govern the process with their most appropriate means.

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[82] KOVACH, p.36.
[83] MACKIE, p.89.
[84] KOVACH, p. 39.

3.4. When Mediation is Appropriate:

Looking at the structure it seems mediation would be fitting in all occasions. However there are some, in which mediating might not be appropriate. For instance when parties totally disagree with each other, excluding the possibility of an agreement, mediation will not be a good idea. Another possible scenario is when there are manipulating parties. Deceptive actions are contrary to mediation's nature as the will of mediation is getting to yes, together. The business interests of the parties may sometimes require a court award in terms of enforceability and binding force. In such cases it is not advised to seek resolution through mediation or other ADR methods. However, one can never know what the future brings.[85]

On the other hand, mediation is a suitable method when priorities of either or both of the parties are in terms of:

- Minimizing the costs involved in settling the dispute;
- Maintaining overall control over the dispute-settlement process;
- Seeking a just and equitable settlement;
- Maintaining privacy and confidentiality concerning the dispute;

Safeguarding an underlying business relationship between the parties to the dispute so as to ensure that business links are maintained after the mediation is settled. In the event of court or other mediums, the relationship among parties may be permanently vitiated.[86]

In a continuing or long standing relationship which is also based on future needed, it is seen that mediation serves a right purpose, unlike arbitration or court intervention where a decision may profit one party but cause indeterminate loss of goodwill, future business prospects or development of business activities.[87]

[85] JAMES, par.5.
[86] JAMES, par.5.
[87] JAMES, par.3.

3.4.1. Relative Merits of the Procedure:

The table[88] below shows the relative benefits of the Mediation procedure when compared to arbitration and court proceedings:

Table 1:

Serial #	Aspect	Mediation	Arbitration	Court proceedings
1.	Cost of process	Economical	Quite high	Very high
2.	Duration	Short 1-2 days or 60-90 Days	Fairly long 6 months- 2 years	Protracted and variable
3.	Type of award	Consensus among parties	Substantive Law and Procedure	Rigid Rules and Discretion
4.	Nature of process	By mutual agreement	Depends on views presented to arbitrators	Witnesses and facts presented to court
5.	Private/Public	Private	Private unless judicial review sought	Public
6.	How process begins	When talks fail	When mediation fails	When arbitration fails

[88] MACKIE, p.14.

7.	Binding upon parties	Not binding	Award is binding	Subject to appeal
8.	Choice of parties	Could back out anytime	Cannot back out pending arbitration award	Should accept courts' verdict subject to appeal
9	Parties to process	Mediator + parties	Arbitrator/s + parties	Court + concerned parties
10	Underlying factor	Mediator provided framework for parties to discuss and finalize the solution	Arbitration studies the case , discusses with parties and provides award after due deliberation	Court examines witnesses under oath and studies every aspect before providing verdict
11.	Acceptability	Need to be acceptable by all parties based on win-win solution	May be in favor of one party to disadvantage of another	Court's order may be in favor of right party and loss of other party.

3.4.2. Small Losses May Induce Future Profits:

When business relations and cross-border disputes considered, it is necessary to underline the facts beneath the cost-effective structure of mediation. In business it a wise approach to tolerate small losses in order to achieve larger profits and avoid future losses.

By involving all the disputing parties to the contract and seeking mutual compromises to protect their business interests through dialogue, it does not force awards or verdicts on parties but allows them to seek their own solutions through negotiations which, in the long run may be more profitable, especially on areas like cross-border or transport regimes. As seen mediation is generally a right tool to be chosen for dispute resolution, most of the disputant profiles would match in mediation easily in order to resolve their disputes.[89]

Parties who enter into mediation do not surrender their legal rights or remedies. If there is no settlement during the mediation, each side can continue to enforce their rights through appropriate court or tribunal proceedings. However, if a settlement has been reached through mediation, legal rights and obligations are affected in differing ways. In some situations, the parties may only wish to have a memorandum. In other cases, a more elaborate deed of agreement is drafted and this deed serves to bring a legally binding covenant.[90]

4. THE REASONS FOR MEDIATION AS A WEAPON OF CHOICE:

There are several reasons why mediation should be favored among other ADR methods. First of all it has a unique structure that is getting together all the affiliate aspects of different procedures and constitutes a hybrid but well sufficient body. It is playing an increasing role in resolution of cross-border disputes. The main reason which makes the procedure increasingly popular is the statistics in resolution which refers to a

[89] BÜHRING-UHLE, p.257.
[90] BÜHRING-UHLE, p.245.

high percentage. Most of the cases handled by mediators reach to an agreement. Of course some aspects of the procedure have role in this success. In U.S. and in the U.K. movement towards mediation covered a long route since the 1970's.[91] In the following years ADR and mediation served the business disputants an ease-of-use alongside the delays and costs of the legal system[92] as well as the effectiveness of those alternative procedures became apparent due to the success rates of such sessions.

4.1. Backlogs and Onerous Work Pending in Courts:

The need for alternatives in the public litigation system prevails because of its overload. The complexity and high capacity of the disputes that courts have to face is not only burden to themselves but also burden for the disputants. Release of these burdens is seen in the context of ADR referencing. Courts recently have an incentive to advise disputant parties to first seek other forms of removers before the public hearings. This is not effective in every case but it is becoming more common every day. Loading out the overload on the court system means a quicker access to justice dependent on the wills and interests of the parties to a dispute.[93] Effective and speedy justice should be attained in order to serve people a better life.

Backlogs and numerous cases will not lead the public to a well-fare level. There are alternatives to everything, why not to different dispute resolutions? Once a nation is believed that his right will be served equally, he will not dispute with others. In other words, public courts of a state are the powerful and equitable domains of a state which would never be disrespected or underestimated. It is only the release of a burden on busy court systems. ADR methods are alternatives for their seekers of as because a court will only advise the procedure, will not force to it. Yet, in some procedures the parties are ordered by a court but it is still their will to make an agreement or not.

[91] SIMMS, par.15.
[92] MACKIE, p.2.
[93] JAMES, par.7.

4.2. Effectiveness of Mediation vs. Conventional Techniques:

Traditional methods for conflict solving are more in concern of deciding the case and not that a concern of settling the case. This is an advantage for mediation and other alternative techniques that most of the interested parties are in concern with settling the case. This approach bonds the mediator and the parties together in an amicable way through the settlement. Mediation mediums are non-bureaucratic and flexible, therefore the tension is reduced. Furthermore, the non-coercive and voluntrastic approach of the procedure creates more effective results when compared to adjudicatory processes.[94]

Mediation is often criticized for being unable to providing binding decisions. This is criticism is yet insufficient to explain the case. Alternative techniques should be looked at from a conjectural and futuristic point of view. The binding decision not always has to be taken by a final decision-maker but it should also be taken by the parties themselves to a dispute. In other words it is their will and their concern to make the settlement agreement binding or not.[95]

4.3. Differences between Arbitration and Mediation:

It is needless to state that although both are considered in the ADR context, Arbitration is a total different body than mediation is. Arbitration is a tool that fulfills largely the same function that litigation performs in the domestic field which is also burdened by terms of high transaction costs comparable to litigation.[96] Arbitration is conducted under the prevailing laws and is subject to a binding decision at the end of the procedure. Its nature is very different from mediation as the final out come of arbitration is generally an award much in favor of only one party. Its stages of performance are also different than each other.[97]

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[94] MACKIE, p.91.
[95] ILDIR, p.25.
[96] BÜHRING-UHLE, p.334.
[97] BÜHRING-UHLE, p.357-363.

Sometimes they are combined together which is called Med/Arb and will be discussed later. However, they still have controversy in most of the features. As this study has affirmative opinions on mediation usage when in comparison with arbitration, the below mentioned Med/Arb procedure should only be considered when the case really includes the possibility of not reaching a settlement agreement by means of mediation, but including the possibility that arbitration might resolve the dispute on the next stage.

4.3.1. Med/Arb Procedure:

Mediation, instantly followed by arbitration is called Med/Arb. In such a process the mediator takes care of consensus among parties in order to carry a fruitful mediation session. The mediator, knowing the fact that if talks fail, arbitration will take part, does not get into the deeper aspects of the conflict such as indemnity or loss and damage liabilities. This is generally how the mediation is handled as deeper aspects or the right-wrong determination is not involved in the process. However, in a Med/Arb procedure, the mediator has even smaller duty. In cross-border disputes, the mediation is generally a clause which needs to be attempted first and if no consensus is achieved, the arbitration follows immediately.[98] It is sometimes a necessary procedure yet it gives the parties a feeling as the arbitration tool standing there that they will at least refer to it for solving the dispute. This may cause parties to pay inadequate attention to arbitration which may result the dispute to be resolved in arbitration, eliminating the possibility of mediating to agree.[99]

It is often worthwhile to for mediators to act as sole arbitrators where the parties can agree if the matter does not resolve during mediation; but it is, in certain cases required to have separate mediator and arbitrator or single mediator and

[98] BÜHRING-UHLE, p.283-284.
[99] BÜHRING-UHLE, p.369.

arbitration panel with three different professionals offering expert services for cause of dispute adjudication and eventual settlement.[100]

The easiest way to install mediation is to concur to it. Since it is at its center, joint decision, if the parties agree to it, it can occur even without contract provisions mandating it. They can agree to mediation techniques even before the formal arbitration is enforceable. In the event mediation could solve the problem sufficiently, it would be beneficial and sufficient.[101] Once again, mediation could also be chosen as the viable means for future disputes. Mediation can also be added to contracts. A large number of mediation cases are resolved at this stage itself, obviating the need for arbitration, or court intervention.

4.3.2. Mediation vs. Arbitration:

As mentioned earlier that there are fundamental differences between arbitration and mediation techniques, the essentials of which could be seen as follows:

- Arbitration is an objectively designed procedure, according to the signed covenant between the parties seeking remedial of disputes. It may be court designated arbitration and binding upon the parties. On the other hand, mediation is the use of a third party mediator who assists in bringing disputing parties on the dialogue table. While under arbitration, the parties refer the dispute to an authority whose award is binding. In the case of mediation there is no question of any award- the mediator does not have a role, or factual powers to enforce decisions upon the parties.[102]

- In the case of arbitration the parties are aware of their rights and responsibility under prevailing laws, the arbitrator is designated to study the issues surrounding the matter, seek referrals among the parties and offer solutions. In the case of mediation, the mediator is not bound by the laws as the main aim of the procedure is

[100] ILDIR, p.104.
[101] MACKIE, p.89.
[102] **Mediation Reader,** p.26.

not to decide who is right and who is wrong that it is to gain meaningful solutions for each of the parties.[103]

- An arbitration award may bind the parties, but a mediation decision may not do so. This means where there is possibility to seek other options, parties who attended to a mediation session will have the chance to seek further judicial remedies.[104]

- Arbitration functions within the legal framework, or the conduct of the parties under contractual agreement, but mediation is an informal and out- of-court procedure that is reached by the parties themselves. This leads the parties to a very independent nature of a conflict resolution where private interests of the parties will be better served in accordance with each other. The scheduling of mediation is simple and speedy, as it may sometimes take four to six hours from beginning to end.[105]

- In arbitration, a party's task is to persuade the arbitral tribunal of its case. It addresses its arguments to the tribunal and not to the other side. In mediation, since the outcome must be established by both parties and is not decided by the mediator, a party's task is to convince, or to negotiate with, the other side. It addresses the other side and not the mediator, even though the mediator may be the medium for communications from one side to the other. In other words, the objective of arbitration is an award, which may be one-sided and favoring one party to the detriment of another, but in case of mediation it is a mutually agreeable and acceptable solution decided by all the parties through dialogue with one another. Last but not least it can be summed as; "an arbitrator is the decider of an award while a mediator is the facilitator of a solution."[106]

5. THE LEGAL FRAMEWORK FOR CROSS-BORDER ADR:

Despite the fact that mediation and other ADR techniques gaining a high evolution and development, legal arrangements for cross-border alternatives do not exist

[103] MACKIE, p.24-26.
[104] KOVACH, p.2-3.
[105] SIMMS, par.10.
[106] SIMMS, par.6,7.

in the most practical way. International litigation and international arbitration are segregated from the first issue as they have specific governing laws.[107] A few model rules exist which will be counted below. However, it is still problematic in recognition and enforcement of the procedures. Considering the multiplicity of different legal systems, a framework suggestible for cross-border international ADR should ensure that:

- the procedure is conducted and the competing procedures are excluded
- the result ensuring neutrality and confidentiality with minimum

procedural standards and within a reasonable time

- the result is legitimate
- the result is final and enforceable[108]

5.1. Model ADR Procedures:

In the last years, as mediation and other alternatives gained commonness, the evolution of ADR accelerated consequently and some model developed. However, there are still no international treaties dealing with the recognition of foreign ADR awards.[109] This is inevitably affecting international trade and relations, therefore necessary conventions should be concluded for a codetermination.

Institutions have built up model procedures especially governing conciliation, mediation and mini-trials. The procedures are generally inserted into commercial agreements separately or attached to an arbitration clause as a back-up facility in case the negotiations or ADR fail.[110] Namely these model procedures are:

[107] BÜHRING-UHLE, p.343.
[108] BÜHRING-UHLE, p.351.
[109] BÜHRING-UHLE, p.357.
[110] BÜHRING-UHLE, p.344.

- ICC Conciliation
- UNCITRAL Conciliation
- World Bank / ICSID[111] Conciliation
- AAA[112] Mediation
- The CPR[113] Model Procedures for International Mini-trial

5.2. Future of ADR Procedures:

As mentioned above, model ADR rules exist in both national and international levels. There is a paradigm on if the rules are contrary to ADR's contractual nature. However, there should be procedures to ensure the processing of ADR in order to guarantee the finality and enforceability of the results.[114] The attempt towards structering these voluntary mechanisms is a requirement in the international arena as the procedures in each of them are various.[115]

The legal problems arising out of the use of alternative mechanisms in cross-border disputes are also in concern with the EU Member States as in most of the countries there are existing mechanisms at their domestic level. The new Directive[116], which will be examined in Chapter IV, is a step towards the harmonization of present ADR procedures, requiring the Member States to adopt necessary legislations.

[111] International Centre for Settlement of Investment Disputes.
[112] American Bar Association.
[113] Civil Procedure Rules.
[114] BÜHRING-UHLE, p.363.
[115] BÜHRING-UHLE, p.343-344.
[116] 2008/52/EC.

CHAPTER II: MARITIME CONFLICTS

When considered the volume of the world's seas and oceans and the numerous dissimilar voyages and cargoes carried, the maritime industry generates vast number of financial transactions each year, as well as it generates various disputes.[117] Carriage of goods by water is an open market to every sort of industry which handles more than road carriage could afford. The complexity of this sector inevitably leads to conflicts.[118] Transportation related disputes can be counted as follows; "the investigation of transported goods and ensuing liability attached to the maritime carrier, damages to the ship caused by the nature of the carried goods, issues of lay days and demurrage including damages resulting from late entry to port or late access to the operative quay, damages suffered by the carrier as a result of force majeure, issues relating to non-execution of charter parties (for example, non-payment of the charter fee, late return of the vessel or early collection of the ship), sale, construction and ship repairs, matters relating to salvage at sea, and maritime insurance."[119]

Transportation by means of the world's seas and oceans is the oldest and most common way of trading. It is undeniable that when the "era of shipping" arrived, it brought changes alongside in social, economical and political lives of mankind and over the thousand years it gained more strength in affecting world trade by all means.[120] As a consequence, the anticipated unconformity will not be related to one single country but to any two or more countries of the world. However, within the private characteristic of commercial disputes, it has always been prudent for the parties to add arbitration clauses into their contracts upon signing in order to avoid the likelihood of dealing with international dissonance and complexity because anything that happens in the sea or related to the sea is a deep-drawing subject that permeates the layers of international law.

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[117] ELDEN-ZIEBARTH, p.1.
[118] Martin, STOPFORD, **Maritime Economics,** London, Routledge, 1997, p.3.
[119] Fabrizio, MARELLA, "Emerging Dilemmas in International Economic Arbitration: Unity and Diversity in International Arbitration: The Case of Maritime Arbitration" [Electronic Version] *American University International Law Review* 20 Am. U. Int'l L. Rev. 1055, 2005, (17 April 2007) p.3.
[120] Carl E., McDOWELL. And Helen M., GIBBS, **Ocean Transportation,** New York, Mc-Graw Hill, 1954, p.7.

The conflicts mentioned in the first paragraph refer to private relations between the trade parties. However, the private disputants of the environment may involve different nations via the international characteristics of marine trade. Arbitration is a favored method as it is considered to be effective when dealing with multinational issues but still there are more benefits to relate on ADR techniques, especially mediation, in this study. Before doing it, it is necessary to discuss those disputes.

1. TYPES OF PRIVATE CONFLICTS:

It is necessary to indicate some of the possible parties to a maritime conflict before exploring the types of conflicts. First of all, the ship owner or the ship manager in some cases is a natural party to these kinds of conflicts. The maritime carrier and charterer are two other chief positions in such issues. Of course the insurer has a special role in marine disputes as it is nearly impossible to find uninsured sea transportation in the world.

The disputes concerning maritime affairs may be due timing, damage or the state limitations and practical difficulties in ports management. These conflicts are disadvantageous of the disputing parties as they cause time loss. When the goods do not reach at their destinations, trading and producing of them would be reduced which would also result a loss of economy. Furthermore, it affects the good-will between the traders as well as it increases the prices of insurance and freight. It is also needless to state that the aim of a shipper is always to obtain better and cheaper transport over the whole distance from origin to destination.[121]

1.1. Damage of Goods:

In case of damage of goods, the liability belongs to the maritime charterer generally. This is a typical dispute which may arise out of failure in duty of care and the

[121] STOPFORD, p.7.

nature of negligence holds the charterer liable due contractual obligations. The biggest obstacle in resolving the disputes due damage of goods is the practical difficulty in determining the law applicable to the dispute. The characteristics of the dispute changes whether a CIF of FOB clause is included.

Damage of goods contains issues related to general-average loss and the interested parties would be the vessel owner, the charterer and also the ship owner in some cases.[122] General-average clauses are mostly placed in charter-party contracts or to bills-of-lading.[123] Another disputing party that would involve can be the insurer if the dispatch report is not prepared.[124] Especially when the dispatch is being prepared, there is stage for ADR methods to involve. Beyond its technical requirements, the right to object to the report would be eliminated and the process would gain speed as well as the party wills would lead the outcome.

The damages that occur within the national or international waters are due different regimes which have concerning consequences. In the domestic context the dispute is resolved due private laws. However, in international disputes, even the conflict nature is private originated, there would still first be reference to the international and public laws. In this context, the damage of goods when they are due between two traders from different nationalities would be better governed via the alternate tools.

1.2. Damage of Ship:

The nature of the carried goods may sometimes cause damage to the ship. This type of conflict may also have more than one liable party. In such cases the ship owner, charterer or the holder of bill of lading can be held responsible. If the carrier due negligence did harmful actions to the ship or inappropriate goods were loaded to the

[122] Carl E. McDOWELL and Helen M. GIBBS, **Ocean Transportation,** New York, Mc-Graw Hill, 1954, p.332.
[123] Cemaleddin, YAVAŞCA, **Deniz Ticareti Hukuku: Deniz Kazaları ve Deniz Sigortaları,** İstanbul, Beta, 1993, p.114.
[124] YAVAŞCA, p.115.

ship, both situations lead to damages lead on a multi-partial context. Again, the domestic laws primarily being applied into the subject matter constitutes an obstacle.

The ship can be damaged partially or entirely. If it is possible to repair the damaged parts of the ship, disputes would arise due negligence and also in terms of general-average as of whom the expenses and in what portion will be paid.[125] If it is not possible to repair the ship, a total loss indemnification will be in concern which might require the ship to be subject to auction.[126] Both situations would require expertise and the involvement of other expenses between the liable parties.

1.3. Insurance Claims:

The transported goods as well as the ship are subject to insurance. This practical necessity gives rise to many conflicts between the various parties in a maritime affair. This is because insurer companies sometimes do pay a lot of costs. Due the opening of international trade routes, the freight and the ship are insured as a necessity. This necessity finds its application by protection of freight and ship in all means. A good cargo bill that covers all the damages can never be afforded. Due this, insurance companies set techniques in order to create affordable policies. Therefore, risk management and predictable risks were conducted under the same standard bill. The reason why it should be used in maritime is because unpredictable risks decrease the trading. Managing these risks were beneficiary for both the insurer and the insured party. The new methods of conflict resolution lead standard bills to be developed and they eliminate the risks as well as the disputes. Maritime law in this context, independent from the domestic procedures, will come over its own problems on grounds of a multi and global rules of procedure. The volume of the disputes forced the insurance companies to be together in order to cover the claims by means of reassurance that they spread the risks all over the world so that the insurance companies survived. In such an understanding the internationally characterized rules governing maritime disputes seem necessary. Spreading the risks, in other words referring to a non-national

[125] McDOWELL-GIBBS, p.369.
[126] YAVAŞCA, p.215.

system of rules, when considered the large amount of money on the spot, the maritime affairs not only helps itself but also generates dynamics on other aspects in the world.

1.4. Breach of Contract:

When a breach of contract is due, it may refer to many disputes such as the non-payment of the charter fee, late return of the vessel or early collection of the ship.[127] In case of infringement, the parties to a conflict may vary. In practical carrier generally causes the infringement of the contract. There are various types of breach of contract, such as the carrier's breaking the time charter. Other type refers to breach of rules set for the navigation of goods. One other breach is due to pricing such as extra charges on bills of lading or the agreed charge not being paid. Lastly, the quantity of the goods carried may cause breach during or after the loading.

1.5. Operational Events:

Damages that lead to a conflict may sometimes arise out of late entry to port which is generally due to issues of lay days and demurrage. Or late access to the operative quay is a possible damage reason causing liability to the parties.

1.6. Collision:

Collision at sea is one of the major events that constitutes dispute between the parties. It can be faulty or without fault. This division results in different stages of liability, yet they both cause damage and dispute.

It can be said that the most important and bitterly contested cases in admiralty law arises out of collusions. Collusion liabilities vary; such as the violation of

[127] MARELLA, p.1.

navigational rules or lack of care. The important point of collusion is that the causal connection should be proved in order to call it a collision.[128]

The other terms for collision are that one of the colliding parts should be a sea-going ship and they should be separate from each other. The act of collision is also important that they should collide each other effectively.[129]

Collision damages are subject to adjustment. However, this might not be done properly between the parties, then the dispute arises. The expenses of such a case would include detention, loss of profits, physical damages and the damages that are not insured against, under hull policies.[130]

1.7. Salvage:

Salvage is a special admiralty issue which does not exist in other branches of law.[131] Salvage services can be voluntary or contractual.[132] If a sea-going ship is in danger and in need of help, the salvation of the ship and the freight should be accomplished by another on-going ship at sea. This duty of assistance is subject to payment as it is stated in Brussels Convention article 3.

Salvation includes danger which should not be considered solely sea based, yet the seamen could be fallen ill that a disability for service might appear, or the fuel is empty, or the ship chandler is finished, or a fire has started. Under these circumstances, the salvation is required even if the dangerous situation has not beared its consequences yet. This is because it would be too late to assist the ship if the danger actually starts.[133]

When the duty of salvage is fulfilled, awards are due only if it is not a salvage vessel. The amount of the award can be determined by the court proceedings. To avoid

[128] McDOWELL-GIBBS, p.338.
[129] YAVAŞCA, p.9.
[130] McDOWELL-GIBBS, p.373-374.
[131] YAVAŞCA, p.35.
[132] McDOWELL-GIBBS, p.341.
[133] YAVAŞCA, p.39.

this kind of dispute, parties may seek negotiation and other means of alternative resolutions in order to settle an agreeable amount.[134]

1.8. Force Majeure Events:

Unexpected occurrences may happen due to unpredictable circumstances which is generally a burden for the carrier party to bear. However, these types of inconveniences may constitute disputes.

1.9. Other Types of Liability Occurrences:

These disputes may result via sale of the ship, construction or repairs of the ship, or matters relating to salvage at sea.[135] They can be considered as disputes related to transportation in a way. However this study will not examine these types of liabilities due to its scope.

2. GOVERNING ASPECTS OF MARITIME AFFAIRS:

The fact that most of the maritime issues have an international character, various procedures have been adopted in order to spare the Maritime Law from the shadow of national rules and to give it its liberty of a harmonized concept.[136] As the general maritime law is composed of the maritime customs, codes, conventions and practices[137], it should not have national boundaries that would jeopardize its fluency and fruitfulness in world trade which is the most common means of it. Those rules which

[134] McDOWELL-GIBBS, p.372.
[135] MARELLA, p.1.
[136] YAVAŞCA, p.3.
[137] William, TETLEY "The Lex Maritima" **Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant,** Thomas E. Carbonneau, Juris Publishing- Kluwer 1997, p.43.

will be mentioned below have their existence in the wills of marine traders which refers to a very private and contractual stage.[138]

Rules governing Maritime generally refers the disputes to Arbitration procedure which is commonly adopted by maritime environment. The arbitration procedure itself has regulating rules, as well. However, the alternative of ad hoc arbitration exists all the time in harmony with its very nature and also it is harmonic to maritime affairs' private nature. Still, it is not the only and compulsory method to handle maritime disputes that also mediation like procedures are evolving in the concerned field.

2.1. International Conventions:

Maritime conflicts are as mentioned earlier governed via tools of private law which are independent of national legislations. When countries are parties to the same international convention, then the individuals to the dispute have a common platform where they can seek their solution. As the ships trade internationally, there is a strong incentive to standardize the features of domestic rules which relate to the international operation of transportation.[139] Especially in some of the areas such as ship design, collision avoidance, load lines, pollution, tonnage measurement and certificates of competency, issues should be governed by uniform rules otherwise the maritime trade would face practical obstacles.[140] Some these conventions can be counted as follows:

- International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (1924 Brussels Convention, later modified by the Protocols of 1968 and of 1979, the so-called Hague-Visby Rules)

[138] TETLEY, p.45.
[139] STOPFORD, p.440.
[140] STOPFORD. p.454.

- The United Nations Convention on Carriage of Goods by Sea (The Hamburg Rules 1978)

- Brussels Convention 1924 for the unification of certain rules of law relating to bills of lading

- International Convention on Salvage (London Convention) April 28, 1989)

- Convention on Limitation of Liability for Maritime Claims (LLMC, 1976)

- Convention on the International Regulations for Preventing Collisions at Sea (COLREGS, 1972)

- York-Antwerp Rules of General Average 1974 (amended in 2004)

- The 1910 Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea

- The 1910 Brussels Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels

2.2. International Organizations:

International organizations also constitute a platform where maritime disputes are discussed. WTO and GATT are examples of such organizations who deal with such cross-border disputes. In addition; ICSID, ICC and WIPO are also examples of panels where different nationals resolve their navigational disputes. As an example, UNICITRAL aims at harmonizing and unification of the laws of different national systems which has its procedural rules on international transportation.[141]

[141] Hakan, KARAN, **Law on International Carriage of Goods,** Ankara, Turhan Kitapevi, 2006, p.10.

"International Maritime Organization[142] which came into operation 1958 as the Inter-govermental Maritime Consultative Organization and changed its name into IMO in 1982. The organization consists of 155 member states and is responsible for developing a comprehensive body of conventions, codes and recommendations which could be implemented by those member states.[143] The major conventions of IMO are as follows: SOLAS: International Convention for the Safety of Life at Sea, 1974 as amended, and its Protocols (1978, 1988), SAR: International Convention on Maritime Search and Rescue (1979), INTERVENTION: International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, and its Protocol (1973), MARPOL: International Convention for the Prevention of Pollution from Ships, 1973, and its Protocol (1978) Annex I (2 Oct. 1983); Annex II (6 April 1987) Annex III (1 July 1992); IV; Annex V (31 Dec. 1988), OPRC: International Convention on Oil Pollution Preparedness, Response and Co-operation, (1990), LC: Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 as amended, and its Protocol (1996), COLREG: Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended 15 July 1977, FAL: Convention on Facilitation of International Maritime Traffic, 1965, as amended 5 March 1967, STCW: International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended 28 April 1984, SUA: Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and its Protocol (1988), LL: International Convention on Load Lines, 1966, as amended and its Protocol (1988), TONNAGE: International Convention on Tonnage Measurement of Ships, (1969), CSC: International Convention for Safe Containers, 1972 as amended 6 September 1977, SALVAGE: International Convention on Salvage, (1989)."[144]

[142] Hereafter called IMO.
[143] For the deatails of the Conventions see STOPFORD, p.443.
[144] McDOWELL, p.444.

2.3. Other Organizations:

There are other organizations such as BIMCO who produce or accept the model rules for conflict management. As the character of maritime affairs, those model contracts served by organizations are easy procedural tools to cope with their conflict. When considered the risk of involving into international politics when a matter is not solved, it is rather favored by the merchants to follow these model procedures.

3. ADR IN MARITIME CONFLICTS:

The development of international treaties and conventions, we face two major problems. First of all is the difficulty in dealing with different legal systems of the various countries. Secondly individual nations and their shipowners fear that if they agree to adhere to some international common denominator, competitive advantages would be sacrificed.[145] Furthermore, the procedural steps of bringing an international convention into force slow down the work as because they must first be ratified by a minimum number of participant states.[146] In this context, alternative mechanisms should be used where it is possible to resolve a dispute in quick and consensual way.

As the use of ADR gains power on several areas, it is undeniable that it has an influence over the marine traders and associations. Many disputant parties are encouraged to seek ADR before involving into long court procedures and arbitration by professionals.

Maritime disputes being resolved by means of Arbitration is not new to the world of sea. Yet, other alternative methods are being favored recently. Before examining the usage of ADR in transportation related disputes, it is necessary to indicate the instruments of maritime ADR law:

[145] McDOWELL, p.431.
[146] McDOWELL, p.432.

- Geneva Convention 1961 on international commercial arbitration
- United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958) New York Convention
- LMAA Mediation Rules (London Maritime Arbitrators Association)
- SMA Mediation Rules (Society of Maritime Arbitrators)
- BIMCO Mediation Clause (Baltic and International Maritime Council)

3.1. Mediation in Maritime Conflicts:

"All the possible parties to a transportation related dispute should concentrate on trading rather than quarrelling"[147] can be the momentum of future conflict conceptualism. Because even the amount of money spent on conflict resolution via courts or arbitrations constitutes a great obstacle for future trading. Speediness is another advantage when a whole world benefits from maritime transport. The advantage here is the peaceful settlement.[148]

"Arbitration has long been favored as a fast, efficient and economical way to resolve maritime disputes."[149] However, there is not any disadvantage indicates that a mediation is useless at sea.[150] Moreover, it has favorable factors that made the whole world start paying more attention to it.

It was stated in a report that United Kingdom had over 50 organizations providing ADR for the international and financial market of the territory. The report not only relates to the growth in ADR Laws sector but also indicates the need for maritime debates to be resolved in order to continue safe and secure maritime trading across UK.

[147] LLOYD'S LIST INTERNATIONAL, "Legal Costs Push Dispute Resolution in a New Direction" [Electronic Version] 30/11/2006, p.s. 1/125 (16 April 2007).
[148] LLOYD'S LIST INTERNATIONAL, "Panel Plans Peaceful Path to Sea Justice" [Electronic Version] 18/10/2006, p.s. 13/125, (16 Apr. 2007).
[149] ELDEN-ZIEBARTH, p.3.
[150] ELDEN-ZIEBARTH, p.7.

The following case law also takes place in the territories of Great Britain where both maritime and mediation businesses are populated.[151]

In practice, due the private characteristic of commercial disputes, it has always been prudent for the parties to add arbitration clauses into their contracts upon signing in order to avoid the likelihood of dealing with international dissonance and complexity because anything that happens in the sea or related to the sea is a deep-drawing subject that permeates the layers of international law was the reason why the arbitration process was favored among merchants and marine lawyers because the arbitration clauses in shipping contracts helped parties overcome the matters related to jurisdiction and jurisprudence while also releasing the burden of litigation.

. However, in some cases arbitration itself became a burden because generally the process is being conducted by three arbitrators whose joint decision is binding. The process might seem easier than going to court but considering the fact that the decision would be binding, it is harder for the panel of arbitrators to reach a consensus within a very short time. It is also obvious that it will be more expensive. In addition, two of the arbitrators are to be chosen by opponents which mean there is only one neutral arbitrator among three. These burdens can be minimized due use of mediation and other alternative means for conflict which will be proved via the case study below which resolved the maritime related dispute with mediation.

3.2. Case Study:

This part of the study will show an example of how mediation resolved the dispute relating to cross-border transportation. An analysis of the outcome will be made thereinafter.

[151] The LAW SOCIETY, "Lawyers Drop Anchor in London as Mediation Grows", *Law Society Gazete,* [Electronic Version] 05/06/2003, p.s.9/20, (16 April 2007).

3.2.1. Sea Empress:

This is an examples case which shows how a maritime dispute is resolved by means of mediation. The dispute contains Milford Haven Port Authority[152] spilling accidental oil into the sea which caused the International Oil Compensation Fund 1972[153] and the insurer Assuranceforeningen Skuld[154] pay in cooperate a total amount of 36.8 million Pounds due to the damage has been given to marine and environment.[155]

"The Sea-Empress grounded off in MHPA in February 1996 spilling 72000 tones of crude oil and causing widespread pollution at the sea and along the adjacent shoreline."[156] In Sea-Empress disaster, the critical aspect that could not be immediately tacked in the Sea Empress disaster was the offloading of leaking oil from the damaged hull until it had lost almost 50% of its cargo.

The damages were huge spreading over various areas which resulted in a high compensation paid to such as for the cleaning up operations and fishing industry due to the loss of earnings as well as other sectors which affected from the oil pollution at sea. The amounts of the compensation paid was, 29.9 million Pounds by the Fund and 6.9 million Pounds by Skuld which of course lead the two into taking court action as they decided the negligence belonged to the MHPA.[157]

The litigation was held in the Court of Admiralty in London. "MHPA strongly rebutted the allegations and denied any liability for the incident."[158] The court advised the litigating parties to seek for mediation as a way through the dispute. The parties agreed to take the advice in consideration and involved into mediation sessions which was only held within 2 days.

At the end of the procedure, the dispute has been settled and contrary to its approach at the court hearings, MHPA agreed to pay compensation which was at the

[152] Hereafter called MHPA.
[153] Hereafter called the Fund.
[154] Hereafter called Skuld.
[155] *Sea Empress,* 2003, International Oil Pollution Compensation Fund, press statement. http://fr.iopcfund.org/pr-pdf/sea_empress.pdf , (1 September 2008).
[156] *Sea Empress,* par.1.
[157] *Sea Empress*, par.1.
[158] *Sea Empress*, par.2.

amount of 20 million Pounds to the Fund and Skuld due to the payments they had done to the claimants. This was an amicable way of ending the dispute as the both parties did not suffer from unfairness or superfluous burden. Mediation led them to a real quick, just and equitable resolution.

3.2.2. Analysis of the Case:

The mentioned case is regardless showing the beneficiary outcome of a procedure completed in terms of mediation involvement. The Fund is an organization which works under the 1992 Civil Liability Convention due to the compensation of oil damages occurred in the sea. The liability of the Fund is to both public and private bodies in order to cover losses due oil pollution. In such context, it is sometimes impossible to held responsible only the Fund in order to give all its funds for such disasters. The Sea-Empress is considered to be one of the worst polluting incidents that occurred in the European waters.

The total claims arising out of this incident by far surpassed big amounts which the Fund was sure available of compensating. However, the claims pursued was not only a concern of the Fund. In other words, if the case was settled under the prevailing laws and the court system, MHPA would be paying compensation back to the Fund and Skuld, a lot more than in the mediation agreement. The negligence issues involved in the case would therefore result in a loss of good-will and future relationships whereas the Fund is very much in relation with all the ongoing ships, charteres and other authorities in the European waters.

The aspect of mediation usage in Sea-Empress case leads us to see the dispute in the light of amicable solutions where large amounts of funds are concerned. The flow of the international trade is very much in accordance with economical abilities. These abilities once been failed, the system suffers the consequences. In such an environment, where maritime issues and the transportation of goods should not be jeopardized, parties to a dispute may be willing to first discuss the issue between themselves as seen in the Sea-Empress case. Although it was a court advice to settle the case under mediation

terms, parties are always free to first seek mediation before carrying their disputes to courts. If necessary arrangements on the procedural rules of ADR fully completed once, the limitation problems will be overcome as the general approach is the suspension of the timing when ADR procedures start. This is due to a rights preserved basis as the parties keep their option to seek court intervention.

CHAPTER III: MARINE TRANSPORTATION WITHIN THE EUROPEAN UNION

A nation's interest is very much in accordance with its sea power.[159] As a consequence the European Union consisting of 27 nations can find its power in its sea power, as well as in its sea trade. The military authority, in other words navial powers are out of the scope of this study. However it is necessary to emphasize the link between them as because a community's strength is also dependent on its ability to absorb imports and to produce for export.[160] This activity is mostly performed by ships, so it is important to underline that shipping is essential to trade and trade is essential to shipping.[161]

European Union's maritime zones can be listed as; the Mediterranean, the Baltic, the Atlantic Arc, the North Sea and the Black Sea.[162] When considered how many nations are in trade with other nations, the volume of the subject could be seen better. In such a context it is natural that the Union has a common policy on sea not only including trade aspects but also other matters related to sea. It can be stated that the recent policies of the Union towards sea trade have had a significant impact on the size and direction of trade[163] that it continues to make more adoptions on the subject matter in order to sustain the development.

It should be stated that the Union's matters relating to sea are in a two-dimensional level, as it consists of inland waterways and of international waterways. As a consequence, shipping is crucial for the Community in terms of employment, security of supply and economic independence because sea and transportation have their own

[159] McDOWELL-GIBBS, p.30.
[160] McDOWELL-GIBBS. p. 30.
[161] McDOWELL-GIBBS p.34.
[162] IMP, An Integrated Maritime Policy for the European Union, 10/10/2007, http://eur-lex.europa.eu/LexUriServ.do?ur=COM:2007:0575:FIN:EN:PDF , (02 September 2008), p.3.
[163] STOPFORD, p.226.

industry such as ship-building, ports, charterers, shipbrokers, marine finance and insurance, as well as training and research sectors.[164]

1. CONTEMPORARY MARITIME TRADING:

One of the crucial aspects of maritime trade is the contribution of ports which handle 90% of the EU's trade with 3rd Countries and nearly 40% of trade among the member states.[165] When only looking from an integral prospective, it still too much business relationship across the union which gives inevitably rise to the increase of spot conflicts.

The union is based on a single market economy which means the members of the market will be treated equally and better when 3rd countries concerned. In such a market economy, there are benefits as well as challenges. This means that "trade within the EU could be characteristically different from that outside the EU in terms of covenant determination and consummation, tenancy, currency of contract, trade obligations and issues relating to payments, etc. The major challenge would be in terms of stiffer uniform trade terms and blanket policies while the benefits could be larger scope for business and profitability."[166]

The financing of ports and maritime infrastructure and policies on charging their users vary from one country to another, reflecting the considerable differences in the approach taken towards their ownership and organization. Ports may be owned by the State, regional or local governments or by private enterprises. For instance, in Southern Europe public ownership and public management exists, as in Northern Europe these issues are private characterized. Also a mix of private and public management prevails in some cases.[167] "In the past, ports tended to be seen mainly as

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[164] Uwe K. JENISH, "Eu Maritime Transport: Maritime Policy, Legislation and Administration" [Electronic Version] *WMU Journal of Maritime Affairs,* 2004, Vol.3, No.1, 67-83, (29 January 2009) p.67.
[165] EUROPA, Port Infrastructure: Green Paper, 24/01/2008, http://europa.eu/scadplus/leg/en/lvb/|24163.htm, (05 September 2008).
[166] EUROPA.
[167] JENISH, p.68.

suppliers of services of general economic interest provided by the public sector and financed by the taxpayer, whereas now the trend has moved towards considering ports as commercial entities which ought to recover their costs from port users who benefit from them directly."[168] The port industry can therefore be seen as an industry in transition.

1.1. Transportation within the Member States:

As mentioned earlier, a big traffic jam is present at seas of the union. This is not only because it is surrounded by 5 seas and 27 countries, but also economy is carried by means of water in the context of "single market". It is a fact that the shipping sector will always remain one important sector among others. However, in the years to come, challenges await for the Union as the negative effects of the global crisis gets deeper. Relying upon maritime trade especially in the internal level on short-sea shipping will support growth both for EU intra-trade and its neighbor countries.[169]

In this context, the inland transportation system requires a harmonization of nations both in administrative and legal terms.[170] The Commission also states that a European network for promoting inland transportation is required and it will be launched in the future.[171] The issue is mostly focused on logistics and co-operation[172] between the Member States in order to sustain the economic development and secure operation of the internal market. There are laws governing the subject matter which will be related in the following parts and there are preparations for new legislation concerning the peaceful flow of sea transportation among the Union. Yet the need for

[168] EUROPA.
[169] IHS, *EU's Maritime Transport Policy,* http://engineers.ihs.com/news/2009/eu-en-maritime-transport-policy-details-1-09.htm, (02 February 2009).
[170] ECMT, **European Conference of Ministers of Transport**, "Strengthening Inland Waterway Transport: Pan-European Co-operation for Progress" 2006, p.16.
[171] EMCT, p.16.
[172] EMCT, p.18.

alternative procedures stays when considered the emerging regional legal regime for the Maritime industry of 27 States.[173]

There is no denial that marine transportation generates high risks and conflicts when such a union considered based on the harmonization of nations. However it is inevitable to avoid all the disputes. What needs to be done is the peaceful flow achieved among the traders of different nations which would be by means of avoiding conflict as much as possible. Therefore, a network not only for administrative purposes but for also legal certainty is needed in order to help Member States benefit from easier access to justice by means of alternative procedures offered by the Community, itself.

1.2. Transportation with 3rd Countries:

European Union's economy is mostly based on its trade and the %90 of this trade is carried out by sea with non-EU countries. It can be said that transport is a strategically important issue for the Union in its external trade as well as in its external relations. It is world's biggest trading partner[174] and is ready to compete in the international arena by up-coming policies on maritime.

Maritime Transport Policy for 2018 has been announced lately[175] by press release focusing on the importance of the globalization process due to the world trade and commercial interconnections in the world market.[176] Europe's largest industry of export is by its shipping industry which provides services not only across Europe but also around the world. The generation in world trade effected the EU in the recent years in terms of expanded shipping between member states and third countries.[177] However, the lately break out of the global economical crisis, certain risks prevailed.

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[173] JENISH, p.79.
[174] JENISH, p.67.
[175] RAPID, **Europa Press Releases,** "The European Union's Maritime Transport Policy for 2018" 21/01/2009, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/16&format=HTML, (02 February 2009).
[176] RAPID.
[177] JENISH, p.67.

In the press release, it was underlined that "the European operators are undermined by unfair competition, which results from lax enforcement of safety, security, environmental and social standards in certain parts of the world. Achieving effective governance of maritime affairs and an international fair level playing field for maritime transport remains a crucial challenge to the global community."[178]

1.3. Maritime Disputes:

There are various types of Maritime conflicts that can arise between the parties. The member states of the union have an internal trading between themselves due to the single market environment. In this context, parties sometimes have difficulties in scheduling the charges of their transport. The ship owner or the company is responsible for publishing the transport charges. However, sometimes infringements are made. Another possible area of conflict arise is due unfair pricings.[179] This is not possible in a single market but when trading with the third countries, it happens. The external trade sometimes generates conflicts in the internal base. Labor dispute is one other dispute type that the shipping industry faces. In a union aiming at high levels of economy as well as high levels of well-fare, labor disputes should immediately be eliminated. Disputes concerning charter party liabilities are between the owner of a vessel and the charterer on the subjects of voyage, time, demise or bareboat.[180] This is a very common type of conflict arises between different private bodies of the different member states. Pollution liability is an important matter as the seas of the union should be protected as well as the environment around it consisting of natural sources and the human factor. The shipping industry requires to maintain insurance due polluting.[181] Carriage of goods is the core of the transportation issues which includes various liabilities. The contracts, bill of lading etc. are all counted as in this context. The

[178] RAPID.
[179] KARAN, p.23.
[180] LLOYD'S LIST INTERNATIONAL, "Maritime Clusters Should Drive EU Policy", [Electronic Version], 25/10/2006, p.s. 37/125, (16 April 2007), par.1.
[181] LLOYD'S LIST INTERNATIONAL, par.2.

carrier's responsibilities such as proper loading, keep, care etc. constitutes negligence if done not so properly.[182]

Disputes are various as seen above. In brief they can be counted as follows:

- Transport charges
- Unfair pricing
- Labor disputes
- Charter party liabilities
- Pollution liabilities
- Carrier Negligence

2. GOVERNING ASPECTS OF MARITIME:

It is very important for the union carrying on the good relationships between merchants. As it is based on peace and prosperity across itself, the economical, political and social dynamics are due importance. The Treaties of the Union as providers of the single economy and market, promotes the necessary actions. However, there are other tools to cope with a high range of economy in such a Union. Shipping is a key element in the economical development basis. The authorities of the union pay more attention to sea related transportation every day. The integrated maritime policy is one of the key procedures which is believed to lead the union through a safer stage on the merits of trade and other areas in concern. Furthermore, the Union is party to international conventions on the subject matter, as well as it has its own legislations. Before focusing on the integrated maritime policy of the European Union, it is best to examine the existing conventions and legislations in force.

[182] LLOYD'S LIST INTERNATIONAL, par.6.

2.1. Legislations in Force:

It is necessary first to indicate what the community legislations are consisting of. The primary legislations refers to the founding Treaties and the secondary legislations consist of the law-making of the Community Institutions which are namely; regulations, directives, recommendations and opinions. The European Court of Justice[183] also has the power to regulate law by means of its decisions and by laying down general principles of law. Doctrines are also considered one of the sources of law. Finally, the International Conventions made with third countries[184] and international organizations are sources of the European Union law.

It is needless to say that all EU legislations are applicable to Maritime affairs. However, when considering the specific rules designed for the Union's shipping was not existent not until 1979 when "the Common Maritime Transport Policy" was shaped and the Commission made a proposal for the ratification of the UN Liner Code to be compatible with EC law and with the commercial principles present for OECD states.[185] Here are the related legislations entered into force ever since the common maritime policy was adopted:

2.1.1. International Conventions:

- The HNS Convention, 1996 (International Convention on Liability and Compensation for Damage in Connection with Carriage of Hazardous and Noxious Substances by Sea)[186]

  2002/971/EC: Council Decision of 18 November 2002 authorizes Member States, in the interest of the Community, to ratify or accede to the above mentioned convention.

- United Nations Convention on the Law of the Sea (UNCLOS)

[183] Hereafter called the ECJ.
[184] Gülören TEKİNALP and Ünal TEKİNALP, **Avrupa Birliği Hukuku,** İstanbul, Beta, 2000, p.67.
[185] JENISH, p.71.
[186] HNS Convention, OJ L 337, 13.12.2002, p. 57–81.

- Maritime Labor Convention, 2006 (International Labor Organization)

2007/431/EC: Council Decision of 7 June 2007 authorizes Member States to ratify, in the interests of the European Community, the above mentioned convention

- International Convention for the Prevention of Pollution from Ships, 1973 (IMO Convention as modified by the protocol 1978 relating thereto MARPOL)

- International Convention for the Safe Containers, 1972 (CSC) as amended in 1993

- International Convention for the Safety of Life at Sea, 1974 (SOLAS) as amended in 2007

2.1.2. Secondary Legislations:

- Council Regulation of 15 May 1979 concerning the ratification by Member States of the UN Convention on a Code of Conduct for Liner Conferences[187] – Repealed by the Regulation (EC) 1490/2007 of the European Parliament and of the Council 11 December 2007[188]

- Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between the Member States and between Member States and third countries[189] by Regulation 3572/90 of 4 December 1990[190]

- Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of articles 85 and 86

[187] O.J. L 121 17/05/1979 P. 0001 – 0004.
[188] OJ L 332, 18.12.2007, p. 1–2.
[189] OJ L 378, 31.12.1986, p. 1–3.
[190] OJ L 353, 17.12.1990, p. 16–16.

(competition rules) of the EU Treaty to maritime transport[191] repealed by the Council Regulation (EC) No 1419/2006 of 25 September 2006[192]

- Council Regulation (EEC) No 4057/86 of 22 December 1986 enabling the Community to respond to the unfair pricing practices pursued by certain shipping lines outside the Community[193]

- Council Regulation (EEC) No 4058/86 of 22 December 1986 concerning coordinated action to safeguard free access to cargoes in ocean trade[194]

- Council Resolution of 24 March 1997 on a New Strategy to Increase the Competitiveness of the Community Shipping[195]

- Council Regulation (EEC) No 479/92 of 25 February 1992 on the Application of Article 85 (3) of the Treaty to Certain Categories of Agreements, Decisions and Concerted Practices between Liner Shipping Companies[196]

- Regulation (EC) No 789/2004 of the European Parliament and of the Council of 21 April 2004 on the transfer of cargo and passenger ships between registers within the Community[197]

- Directive 2002/6/EC of the European Parliament and of the Council of 18 February 2002 on reporting formalities for ships arriving in and/or departing from the ports of the Member States of the Community[198]

- Council Directive 96/26/EC of 29 April 1996 on admission to the occupation of road haulage operator and road passenger transport

[191] OJ L 378, 31.12.1986, p. 4–13.
[192] OJ L 269, 28.9.2006, p. 1–3.
[193] OJ L 378, 31.12.1986, p. 14–20.
[194] OJ L 378, 31.12.1986, p. 21–23.
[195] OJ C 109 , 08/04/1997 P. 0001 – 0002.
[196] OJ L 55, 29.2.1992, p. 3–5.
[197] OJ L 138, 30.4.2004, p. 19–23, repealed the Council Regulation (EC) No 613/91.
[198] OJ L 67, 9.3.2002, p. 31–45.

operator and mutual recognition of diplomas, certificates and other evidence of formal qualifications intended to facilitate for these operators the right to freedom of establishment in national and international transport operations[199]

- Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)[200]

- Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements[201]

- Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security[202]

- Regulation (EC) No 2099/2002 of the European Parliament and of the Council of 5 November 2002 establishing a Committee on Safe Seas and the Prevention of Pollution from ships (COSS)[203]

- Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency[204]

- Directive 2001/96/EC of the European Parliament and of the Council of 4 December 2001 establishing harmonized requirements and procedures for the safe loading and unloading of bulk carriers[205]

[199] OJ L 124, 23.5.1996, p. 1–10.
[200] OJ L 364, 12.12.1992, p. 7–10.
[201] OJ L 33, 4.2.2006, p. 87–87.
[202] OJ L 129, 29.4.2004, p. 6–91.
[203] OJ L 324, 29.11.2002, p. 1–5.
[204] OJ L 208, 5.8.2002, p. 1–9.
[205] OJ L 13, 16.1.2002, p. 9–20.

- Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of the shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (Port State Control)[206]

- Council Resolution of 8 June 1993 on a common policy on safe seas[207]

- Decision No 167/2006/EC of the European Parliament and of the Council of 18 January 2006 concerning the activities of certain third countries in the field of cargo shipping[208]

2.2. An Integrated Maritime Policy:

One of the "soft law" measures of the European Union is developing Community policies which those policies are not of a binding nature but sets the present context of an issue regarding the union and foreseeing solutions via them.[209] The Commission with the help of the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions together agreed on such a soft law product and set the integrated marine policy of the Union finally on 10th September, 2007.[210]

The policy emphasizes the importance of the seas of the union and its actual areas such as the trade routes, climates, food sources, energy sources, residential occupancy which in other words structures its well-being and prosperity.[211] In the executive summary of the policy, it is stated that the use of seas inevitably leads to conflicts which is very much concerned in this study.

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[206] OJ L 157, 7.7.1995, p. 1–19.
[207] OJ C 271 , 07/10/1993 P. 0001 – 0003.
[208] OJ L 33, 4.2.2006, p. 18–21.
[209] Paul, CRAIG and Grainne, DE BURCA, **EU Law: Text, Cases and Materials,**, Oxford, Oxford University Press 2003, p.117.
[210] IMP, p.2.
[211] IMP p.2.

It can not be denied that there is an inter-link between the seas but not between the nations of their neighbors. The common policy aims at joining the links together among member states. It is also stated that the connection approaches are as well encouraged by the stakeholders. As a consequence, it is believed that "an integrated maritime policy" will increase the union's capacity to deal with the challenges of global and competitive trade environment of the world.[212] The tools for an integrated maritime policy are considered to be as follows:

- A European network for maritime surveillance
- Maritime spatial planning and integrated coastal zone management
- Data and information[213]

The surveillance refers to the control of safe usage of the seas which is considered to secure the borders of the union. Not only in terms of navigation and pollution safety, but also the ensuring of law enforcement is foreseen.[214] The term "spatial planning and integrated coastal zone management" refers to addressing the challenges due the growth in competitive usage of seas arising out of transport, fishing and other related activities. Therefore, the planning is fundamental in the area wherever development is targeted.[215] The data collection is fruitful for the purposes of development if it is collected in accordance with the policy in terms of a comprehensive system.[216] Summarizing these above mentioned aspects, the integrated policy of maritime governing all issues relevant to sea is in need for development and achievement due the solid goals of the union. It is acknowledged that an integrated and common maritime approach is necessary as it will be better seen when below the action areas of the policy are discussed.

[212] IMP, p.2.
[213] IMP, p.5,6.
[214] IMP, p.5.
[215] IMP, p.6.
[216] IMP, p.6.

2.2.1. Action Areas of the Policy:

The Commission of the European Union have determined its focus areas due structuring the maritime policy. These areas are as follows:

- Maximization of sustaining use of the European Seas and Oceans.
- Construction of database for innovations in maritime.
- Attainment of the highest quality in marine life.
- Promotion for the Europe leadership in international maritime.
- Enlargement of maritime visibility across Europe.

"Shipping is vital for Europe's international and domestic trade."[217] This is stated in the concerned policy. According to the statistics, "in many member states, the recent growth of the maritime economy has been higher than that of the overall economy."[218] It is expected that the container movements will be in duplicate by the year 2020 which has already shown an increase signal since 2000. Maximizing this use of European seas needs to be done immediately as it is not yet believed that a real internal market does not exist for the Europe's maritime transportation. As the Commission is very well aware of the dependence on trade, which is especially carried via seas is a vital arena where action should be taken if the Community aims at a leadership at the sea, as a focus area.[219] The coastal regions have no doubt that a strategic importance due their ports and marine industries. As a consequence, the integrated maritime policy aims at preventing disasters, securing the tourism as well as the social life in the coastal zones. Promoting the leadership of the EU in the international arena is considered to be a movement which should first establish the coordination between the member states. There are some urgent ratifications have to be

[217] IMP, p.7.
[218] IMP, p.7.
[219] IMP, p.8.

done due harmonizing the internal market as because the leader of an international maritime board should be uniform inside.[220]

2.2.2. Framework for Policy Making:

The integrated maritime policy of the European Union stands on three pillars which as stated before are surveillance, management and data collection. It is stated that the surveillance activities are at Member States' hands generally operated by different agencies and independently.[221] This inevitably gives rise to practical difficulties when considered the transnational nature of the subject matter. Therefore, the Commission indicates the need for improved co-operation between the Member States's concerned agencies and rebuild the present monitoring and tracking system in a more interoperable way.[222] Virtually the same reasons stand for the spatial planning of maritime and the management of coastal zones, to the effect that a commitment to facilitate common principles at the Community level should be made for the sustainable development of marine areas. The Commission finally foresees the requirement of a collective data and information system which should be collected in a comprehensive and collective way as improved access to high quality data[223] is vital for the interests of the Community.

It is stated that an Integrated Maritime Policy will "change the way we make policy and take decisions"[224] and the existing procedures are found inadequate, therefore the need for conflicts to be avoided or resolved is stressed. The Commission does not mention a network for ADR services for maritime affairs yet the necessity for sound systems at every level is voiced. It is also stressed in its surveillance plan for the networking of maritime affairs that there are dimensions not spelled but will needed to be developed over a period of years.[225] There are a number of ADR networks existent in the Community on areas of consumer and business disputes which will be shown in

[220] IMP, p.13.
[221] IMP, p.5.
[222] IMP, p.5-6.
[223] IMP, p.6-7.
[224] IMP, p.3.
[225] IMP, p.7.

Chapter IV of this study and at the end of this chapter a connection will be made through these present bodies and a future body of maritime ADR as a suggestion in the light of both the EU's integrated Maritime Policy and the new directive on mediation in civil and commercial matters.

2.2.3. EU's Transport Policy for 2018:

European Union very recently adopted the transport strategy contributed to the maritime performances of the European sector and to the sustainable development of the market economy.[226] This strategic plan foresees a period of 10 years. Briefly the plan focuses on; competitive European shipping, human factor, greener maritime transport, safe and secure system, international scene, short-sea shipping and ports and innovation and technological development.[227]

3. THE MARCO POLO PROGRAM:

The EC has been endeavoring ceaselessly to promote the economic cause of its member States and introduce innovative ideas and practices that could facilitate smooth and environmentally friendly trade between EU countries. As a sequel to this ideal, it has introduced Marco Polo program to better facilitate inter-modal transportation among member States with relation to surface transport movements.[228]

The program aims at making the flow of trade more based on the sea as road transportation is considered to be not environment friendly and dangerous. This will inevitably promote the use of seas between member states which is good. However, the disputes may arise due the increases in sea transportation.

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[226] RAPID.
[227] RAPID.
[228] Cem, SAATÇİOĞLU, **Ulaştırma Sistemleri ve Politikaları: Türkiye – Avrupa Birliği Uygulamaları,** 1st Eddition, Ankara, Gazi Kitapevi, 2006, p.97.

3.1. The Features of the Program:

In recent years it has been admitted that road transportation is not the healthiest way. The feature of the program is to reduce this road traffic and rely more on the seas. Transportation by means of seas is the oldest way of trading. After the motor vehicles and aero planes started to be used in carriage of goods, the way of sea trading existed but less busy. Nowadays, our planet is under some serious risks as precautions should be taken. Environmental friendly approaches always eliminate those risks. The Marco Polo program drafted by the union is such a movement which not only increases the sea trading, but also saves the world.

Environment friendliness is not the only aim of the union, it at the same time aims at efficiency in the trade. Furthermore, internal and external trade is expected to increase as a consequence which the union aims at. "The White Paper on transport observed that the rate of road freight transportations in the EU would rise by 10% by 2010 and cross border traffic is expected to double by 2020. This is a matter of concern not only for environmentalists but also economic planners and relevant governmental agencies in the EC. There is also a crying need for diverting short route traffic from road to more effective waterways or alternative service not only from the environmental protection point of view but also in terms of attaining better logistic management efficiencies in inter-modal transportation."[229]

Marco Polo program as explained above is not only an environmental movement but also a movement towards a better economy by means of better and effective trade. This is no doubt that an increase in the sea shall arise both for transportation in terms of everything and the trading activities. It is seen from this perspective that the disputes will continue rising which should be resolved effectively for the trade to continue in a circle.

The implications of Marco Polo program does not include terms of mediation but from a practical point of view, it clearly states that an increase in sea trading will lead to an increase in the maritime conflicts. As I tried to mention earlier in some parts

[229] EUROPA, p.6.

of this study that marine conflicts would best be resolved by means of mediation as a quick, alternate tool. There is no doubt that business risks are increasing every day, the world is circling around itself as the borders are not literally borders any more.

Therefore with the induction of Marco Polo, the incidence of maritime issues as well as the flow among the member states, puts the program into an important reason when future mediation is considered.

In the years to come, road transport needs to be substituted, as far as is possible with alternative modes of transportation which the program foresees and adopts necessary approaches.[230] In a short while it may be expected many sea traders begin to use mediation as the sole decision-making procedure for their disputes.

4. A FUTURE MARITIME NETWORK FOR THE EUROPEAN UNION:

Initiatives are launched all over the world, especially in United Kingdom and United States of America to promote the use of alternative procedures to shipping disputes.[231] Arbitration as the common way of resolving maritime conflicts are being criticized due to its costly and long panel proceedings. The advantage that mediation and other ADR methods such as conciliation bring is that they apparently remove the disputes in an amicable way in the international arena when considered the cross-border nature of conflicts that arise out of shipping affairs.

As it is discussed in the previous parts of this study, European Union depends mostly on sea trade both across the Community and around the world. It is inevitable that conflicts do arise out of these shipping and trading affairs. The aim towards a secure and safe maritime operation is clarified in the statements of the Commission as mentioned earlier. The remedies that are suggested by the Community does not include a network to resolve shipping disputes. However a safe and secure operation would also

[230] SAATÇİOĞLU, p.97.
[231] LLOYD'S LIST INTERNATIONAL.

be ensured by means of a fair and quick system of justice accessible to all Member States based on sound legal grounds.

The new mediation Directive on civil and commercial matters, which will be examined through in Chapter IV, is framing the mediation usage and leaving the necessary legislations to be made by the Member States. Therefore, Member States can take action in the areas of maritime ADR as shipping disputes are considered *"cross-border"* and can be of *"commercial"* or *"civil"* nature. Yet, the different national bodies and legislations should be in co-operation with each other in the internal market in order to provide and sustain the exchange of information in a safe and secure environment. European Union has ADR networks in areas other than maritime which are related in Chapter IV.[232] It also has networks for shipping industry such as "Network for Maritime Clusters" yet but a "*Maritime ADR Network"* does not exist and is required for to help the industry in terms of conflict resolution assistance providing information about authorized out-of-court bodies and the applicable legislations.

The inter-link between the Member States is undeniable as it is stated in the Communication from Commission on *"An Integrated Maritime Policy for the European Union"* that "sea-related policies must develop in a joined-up way as because all the matters relating to Europe's oceans and seas are interlinked."[233] Therefore the Member States shall develop national integrated maritime policies and the Community shall assisst them with necessary strategies. However, *"the Action Plan"* does not contain a concrete strategy on how the shipping industry could benefit from ADR procedures when considered the already existing usage of Arbitration and the growing demand for especially Mediation and other methods on the international platform of transportation related disputes. As can be seen, shippers, traders, transporters and all the related parties in maritime affairs are able to resolve their disputes by means of Arbitration and ADR, yet the Directive 2008/52/EC as promoting the use of mediation in commercial cross-border conflicts and enforcing the Member States to harmonize their laws will, result an increase in the field of ADR when maritime affairs are in concern. Consequently, the Member States willing to discuss their problems should be supplied by the Community.

[232] SOLVIT, FIN-NET, ECC-NET.
[233] IMP, p.2.

In the light of the above explanations, a future ADR Network for Maritime could be considered where shippers, brokers, insurers and other concerned parties can seek for easy and quick remedies to their disputes. An online system of information could be gathered so that the firms and individuals would gain knowledge about where to address their applications, as well as they would have access to information on procedural rules and other related legislations. Like the other existing ADR networks, for consumers in example, the “Maritime ADR Network” would not give legal advice but it would help the shipping industry to access to appropirate ADR schemes in every Member State.

CHAPTER IV: ADR IN THE EUROPEAN UNION

The union which is often called the "common market" has a supranational legal body of which the 27 member states have transferred their sovereign rights into. As a consequence the national laws of these members were replaced in many areas with those of community orders.[234] Development of this common market has not been easy due to the different laws and politics of such states.[235] Common policies have adopted, as much as harmonization of laws made but conflicts kept arising between the neighbors.

In the unique shape of community legal order, Alternative Dispute Resolution methods start to gain power in the recent years as the nationals and governments see the advantage on it. Due to this need, a few legislations are made within the already existing framework of ADR which could be voiced in article 65 of the EC Treaty. The article refers to "the service of extra-judicial documents and the recognition and enforcement of decisions in extra-judicial cases."[236] However, the best rules governing ADR does not exist within the Europe, but some innovations has been made. These legislations will be counted later in this study.

It is necessary to underline that there are governing rules for ADR in most of the Member States and not surprisingly these laws are different from each other such as; "Finland makes conciliation a pre-requisite to court action. In Germany, judges are asked to support an amicable resolution through court proceedings. In France, Article 21 of the Civil Code states that it is the duty of judges to reconcile the parties. In England the Civil Procedure Rules expressly encourage the use of ADR."[237] In this context, the need for harmonization of laws of the Member States is a requirement when

[234] Ralph H, FOLSOM and Michael Wallance GORDON and John A. SPANOGLE, **International Trade and Economic Relations**, U.S.A, Thomson West, 2004, p.195.
[235] FOLSOM-GORDON-SPANOGLE, p.199.
[236] Julia, HÖRLE, "Alternative Dispute Resolution in the European Union" *ADR Online Monthly*, 2003, http://www.ombuds.org/center/adr2003-7-hornle.html, (12 March 2007) p.1.
[237] Philip, NEWMAN, "Legal Problems and Opportunities for ADR in the European Union" **EuroExpert Symposium,** Portugal, 2003, http://www.euroexpert.de/sixcms/media.php/61/legal_problems.pdf , (26 January 2009), p.2.

considered that one of the objectives of the Commission as seen in its works is to encourage ADR, practically in cross-border matters.[238]

1. PRESENT CONTEXT OF ADR:

The use of ADR is new to the union which can be considered at a development and experimentation stage. Thus, the expenses and delays in courts as well as the enforceability matters are urging Member States to the usage of ADR.[239] These matters do exist for alternative procedures, too. However a uniformity effort would be effective in the concerned area equivalent to its very nature.

1.1. Application of EC Law in ADR Procedures:

As non-mandatory nature of the alternative procedures, application of EC law may not be necessary in every dispute. Yet, when possible, there remains nothing contrary to the use of EC law in such procedures. However "the specifity of EC law was conceived as an instrument of an ambitious economic enterprise- the ceration of an economic Community based on integrated markets of Member States."[240] Therefore it is difficult to say that this Community covers all the different types of private and commercial relations that those of concerned parties inevitably seek for ADR or arbitration to resolve their cross-border issues. The Community may adopt certain procedural rules for to govern those mechanisms as those mechanisms are generally based on directories.

The private-procedural character of ADR mechanisms when compared to the public-substantive nature of the existing Community law[241], there appears practical

[238] HÖRLE, p.2.
[239] HÖRLE, p.2.
[240] Natalya, SHELKOPLYAS, **The Application of EC Law in Arbitration Proceedings,** Amsterdam, Europa Law Publishing, 2003, p.10.
[241] SHELKOPLYAS, p.15.

difficulties of application. The Directive[242] only framing the matters of mediation in civil and commercial disputes leaves the action to the Member States to take in necessary areas which means there are no regulatory rules at the Community level.

It is also necessary here to indicate the role of the ECJ and Article 234 of the Treaty, namely the preliminary-ruling procedure. The main objective of this provision is "*to ensure uniform interpretation and application of Community law by giving jurisdiction to the ECJ in matters of interpretation of the Treaty, the validity and interpretation of acts of Community institutions, and interpretations of the statutes of bodies established by an act of the Council*." [243] The question here is; whether out-of-court bodies and tribunals can be considered within the scope of art.234 or not? In *Nordsee Case*[244] "a dispute arose out of an agreement among a number of German shipping groups under which the latter agreed to pool and redistribute, according to certain apportion criteria, the financial aid received by each of them individually from the Community funds for the construction of factory ships for fishing."[245] The pooling agreement contained an arbitration clause and the arbitrator who was appointed by the Bremen Chamber of Commerce and Industry had to deal with the question whether the legality of the pooling agreement would be examined in the light of the Community law.

The arbitrator then decided to refer to the ECJ for its preliminary-ruling whether the arbitral tribunal was falling within the scope of art.234 of the Treaty in order to make a preliminary reference and whether the arbitration procedure and the final award would be on grounds of Community law or on grounds of equity. At the end of the procedures, the Advocate General of the case came to the conclusion that arbitral tribunals should be included in the scope of art.234 to ensure the uniform and correct application of Community law in the sphere of arbitration proceedings, too. From this point of view, it can be said that out-of-court settlement mechanisms can therefore seek for ECJ referrals, as well as EC law can be applied in ADR proceedings where necessary.

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[242] 2008/52/EC.
[243] Article 234 (EC).
[244] Case 102/81 Nordsee v. Reederei Mond [1982] ECR 1095.
[245] SHELKOPLYAS, p.412.

The use of ADR would not jeopardize the doctrines of "direct effect" or "supremacy" as it does not aim to create a new legal system different than of that governing the union. Moreover, it helps the community to gain development in economical zone which is counted one of the main achievements. Thus, procedural obstacles should be put aside in order to reach a practical level where conflicts are solved via alternate tools more easily and effectively.

1.2. Enforceability and Recognition:

When compared to the United States of America, ADR in Europe is a rather unknown territory where validity and enforceability matters still exist[246] with the exception of United Kingdom, for sure. Although the procedure has a contractual nature that settlement agreement is left to party autonomy, it is still needed to have rules governing the procedures via a uniform application among the member states.

The Brussels Convention on Recognition and Enforcement of Judgements in Civil and Commercial Matters does not apply to arbitration awards as it is stated in art.3 (4) The objective of the mentioned Convention is provide the free movement of decisions, in other words a judgment will be enforced and recognized in a Member State other than of where the court is located. It is necessary to indicate the interaction between Brussels Convention and Lugano Convention that a court decision of a non-Member State if concerning enforcement and recognition in a Member State, will be subject to the latter Convention provisions.[247]

Those Conventions are not applicable to out-of-court settlement awards as mentioned in the first paragraph. Until the Directive 2008/52/EC was adopted, there were no Community measures on the subject matter. Article 5 of the concerned Directive orders the Member States to ensure the enforcement of settlement agreements

[246] HÖRLE, p.3.
[247] Ceyda, SÜRAL, **Avrupa Birliği'nde Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi,** İzmir, Güncel Yayınevi, 2007, p.49.

upon the request of the parties unless the agreement is contrary to Community law or national laws.

2. GOVERNING COMPONENTS OF ADR:

The legal aspects that govern cross-border ADR within the union are generally constructed via directives and recommendations. These legislations are based on certain areas of conflict such as consumer, or insurance etc. A brief survey on them will be made below.

2.1. Legislations on ADR:

It was stated before that ADR is new to the Union. The below mentioned instruments of law are the initial legislations in the concerned field. They are mostly in relation with consumer disputes across the Europe as because the Community is aimed at achieving a better judicial efficiency among its citizens and creating a trade market with the minimum complaints. It is believed that the flow of the market economy is through easier access to justice.

2.1.1. Recommendation 98/257/EC:

The Commission issued a recommendation in 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.[248] The Commission in its recommendation underlines the probable difficulties of court proceedings may discourage the customers from exercising their rights, especially in matters of cross-border conflicts.[249] It also emphasizes the urgent need for a Community action to be taken in the field of alternative dispute resolution, having regard to the advantages of those alternative procedures such as less time and less money consuming

[248] 98/257/EC, O.J L 115 , 17/04/1998 P. 0031 – 0034.
[249] 98/257/EC, par.3.

criteria.[250] As there are existing bodies of out-of-court settlement in Member States, the Commission believes that a mutual confidence between them would occur.

The Commission makes its recommendations on the principles that needs to be respected by the existing and future bodies and procedures of alternative conflict resolvement. These principles namely are; principle of independence, principle of transparency, adversarial principle, principle of legality, principle of liberty and principle of representation. Yet, as the recommendations are not binding for Member States, more legislations are adopted and should continue to be adopted for the respect of common principles in a harmonized nature of conflict resolution across the Europe.

2.1.2. Council Resolution of 25 May 2000:

The Resolution on a Communitywide network of national bodies for extra-judicial settlement of consumer disputes foresees the increase in cross-border consumer transactions with the introduction of the new money currency as well as the development of new forms of marketing such as e-commerce.[251] The Council reaffirms the Commission's belief in strengthening consumer's confidence in the effective functioning of the common market and taking the advantages of market offers.[252]

It is importantly underlined in the resolution that the initiatives in the concerned field should be based on the participants' voluntary decision and they should not prejudice any rights of access to public courts and other means of administrative remedies. The initiatives also should fully take account of national legal provisions, tradition and practice, as well as of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

[250] 98/257/EC, par.4-5.
[251] Council Resolution, O.J. C 155 , 06/06/2000 P. 0001 - 0002 art.1.
[252] Council Resolution, art.2.

and should not prejudge the on-going discussion on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[253]

2.1.3. Recommendation 2001/310/EC:

The Commission issued a Recommendation on 4 April 2001 on the principles for out-of –court bodies involved in the consensual resolution of consumer disputes. This recommendation has amendments to the 98/257/EC, yet but it does not repeal the latter mentioned. The Commission adopts the principles set in 98/257/EC, furthermore it recommends the procedures that merely involve an attempt to bring the parties together to convince them to find a solution by common consent which was not concerned in the former recommendation.[254] The Commission stresses the importance of continuing to work on alternative methods of dispute settlement at the Community level which is interacted with the interests of citizen consumers.[255]

The scope of the recommendation is up to the third party bodies responsible for out-of-court consumer dispute resolution procedures that, no matter what they are called, attempt to resolve a dispute by bringing the parties together to convince them to find a solution by common consent, and it does not apply to customer complaint mechanisms operated by a business and concluded directly with the consumer or to such mechanisms carrying out such services operated by or on behalf of a business.[256] Other than the principles laid in its former recommendation, the Commission this time also sets forth a common criteria regarding impartiality, transparency, effectiveness and fairness.[257] This criteria does not frame the procedure of how it works but prescribes the rules to be followed in order to ensure a minimum standard.[258]

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[253] Council Resolution, art.4.
[254] 2001/310/EC, OJ L 109, 19.4.2001, p. 56–61, par.3.
[255] 2001/310/EC, par.8.
[256] 2001/310/EC, art.1.
[257] 2001/310/EC, art.2.
[258] Geoffrey, BEZZINA, "Alternative Disputre Resolution in the European Union", http://74.125.77.132/search?q=cache:iyptBSX6ngQJ:www.rzu.gov.pl/files/332__117__Ochrona_konsumentow_uslug_ubezpieczeniowych_-

2.1.2. Insurance Mediation Directive 2002/92/EC[259]:

The insurance mediation directive is adopted by the European Parliament and the Council in 9 December 2002, indicating the need for a single insurance market within the union. The member states which have completed the transition in their national order will be assisted via authorized institutions each in their countries. The insurance mediation directive sets forth a number of future mediators in the insurance sector who will help the EU nations clear out their potential problems.

The central role that the insurance and reinsurance intermediaries play in the Community was underlined. According the directive, the substantial differences between the Member States' laws create obstacles in the sector of insurance which inevitably effects the internal market.[260] The freedom of establishment and the freedom to provide services which are enshrined in the Treaty requires the ability of freely operating in the market, which can be assisted by pursuing insurance mediation.[261]

The insurance/reinsurance mediation as described in the directive refers to the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance/reinsurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.[262]

Article 11 of the Directive lays down the rules for out-of-court redress: *"1- Member States shall encourage the setting-up of appropriate and effective complaints and redress procedures for the out-of-court settlement of disputes between insurance intermediaries and customers, using existing bodies where appropriate. 2- Member States shall encourage these bodies to co-operate in the resolution of cross-border disputes."*[263]

_doswiadczenia_polskie_na_tle_miedzynarodowym_24_10_2007.ppt+%22efforts+to+promote+adr+in+the+eu%22&hl=tr&ct=clnk&cd=1&gl=tr p.7, (12 December 2008).

[259] 2002/92/EC, O.J L 009 , 15/01/2003 P. 0003 – 0010.

[260] 2002/92/EC, par.1-5.

[261] 2002/92/EC, par.6-7-8.

[262] 2002/92/EC, art.2.

[263] BEZZINA, p.35.

2.1.3. Directive on Markets in Financial Instruments 2004/39/EC[264]:

The Directive of the European Parliament and of the Council on markets in financial instruments of 21 April 2004 has a view to protect clients and without prejudicing the right to seek for court action, it promotes co-operation for out-of-court settlement bodies in the member States, also taking into account the Recommendation of the Commission of 98/257/EC. It is stated that "when implementing provisions on complaints and redress procedures for out-of-court settlements, Member States should be encouraged to use existing cross-border co-operation mechanisms, notably the Financial Services Complaints Network."[265]

Article 53 of the concerned Directive determines the extra-judicial mechanism for inverstors' complaints: "1- Member States shall encourage the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate. 2- Member States shall ensure that those bodies are not prevented by legal or regulatory provisions from co-operating effectively in the resolution of cross-border disputes."[266]

2.1.4. Directive on Mediation in Civil and Commercial Matters 2008/52/EC:

The new directive as one of the cores of this study will be examined in depth later on the following section. As a pre-information, it can be said that the directive facilitates a peaceful resolution through the parties of a commercial or civil conflict. In its context, the main achievement is considered to be the continuous relationship of traders in the safeguarding of cross-border area of the union. The Directive of the European Parliament and of the Council addressed to the Member States were adopted on 21 May 2008.[267]

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[264] 2004/39/EC, O.J. L 145 , 30/04/2004 P. 0001 – 0044.
[265] BEZZINA, p.36.
[266] BEZZINA, p.37.
[267] 2008/52/EC, O.J L 136 , 24/05/2008 P. 0003 – 0008.

2.2. ADR Networks:

In the recent years, the attitude towards alternative methods to settle a dispute has increased in the Community level. As a consequence, certain networks are launched which mostly govern the consumer complaints. These innovations are encouraging as more institutions can be launched on ADR, especially in matters of sea-related disputes. It is now necessary to examine those of existing procedures in order to establish an interaction between them and the future constructions.

2.2.1. European Judicial Network in Civil and Commercial Matters:[268]

The network was established by Council Decision of 28 May 2001 aiming to develop an area of freedom, security and justice in the Community.[269] "The network consists of representatives of the Member States' judicial and administrative authorities and meets several times each year to exchange information and experience and boost cooperation between the Member States as regards civil and commercial law."[270] The objective is to make life easier for the EU citizens who face litigation of all types of cross-border elements. By means of such a network, the individuals as well as the firms across Europe are gaining access to knowledge on systems of different national civil and commercial laws, as well as other legislative instruments of both the EU and international organizations. It does not provide legal advice but it exchanges information so that the transnational diversity of problems are apprehended and fixed.[271]

One of the themes of EJN is Alternative Dispute Resolution, encouraging the applicants to seek for out-of-court settlements where appropriate. It gives general

[268] Hereafter called the EJN.
[269] EJN, *European Judicial Network in Civil and Commercial Matters*, http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm, (30 January 2009).
[270] EJN.
[271] EJN.

information on ADR in order to promote its use and it provides further knowledge on the procedures if an individual or a firm files a request.[272]

2.2.2. ECC-NET:

The Commission, considering the need for encouraging and facilitating the settling of consumer disputes at an earlier stage[273], created a network of cross-border out-of-court dispute settlement, namely the European Consumer Centres Network[274] that information and assistance will be provided to consumers for accessing an appropirate ADR scheme in another Member State.[275] When EU consumers are involved in cross-border disputes with traders from different Member States, the network aims to resolve the problem at low-cost and quickly. There are at least one Consumer Centre in every Member State.[276]

The Consumer Centres do not only work on resolution of disputes, furthermore they provide information on the rights of the consumers, as well as they give advice and assistance with their complaints. They inform the consumers about internal market offers, they help the consumer to access out-of-court bodies easily when a complaint is due and conduct cross-border comparisons on prices, legislations or other issues related to consumer affairs for better educated and informed customers across the Union.[277]

[272] EJN.
[273] ECC-Net, *European Consumer Centre*, http://ec.europa.eu/consumers/redress_cons/index_en.htm, (02 February 2009).
[274] Hereafter ECC-Net.
[275] BEZZINA, p.8.
[276] ECC-Net.
[277] ECC-Net.

2.2.3. FIN-NET:

Financial Services Complaints Network[278] is the financial dispute resolution network of the European Union which handles the disputes between the consumers and financial service providers, launched by the Commission in 2001.[279] The network provides access to extra-judicial bodies when a conflict in the concerned area arises. The FIN-NET schemes are designed for the consumer to make his/her compliant in the language of the financial contract in concern. It helps businesses and consumers resolve disputes in the Internal Market fast and efficiently by avoiding, where possible, lengthy and expensive legal courses.[280]

This network is a big choice and opportunity for European consumers in the integration of retail financial services. The consumers are now able to shop not only in their home country but across the Europe with a secure system that when a financial dispute arises, they will be provided with an ADR scheme.[281] The aim here is to encourage EU citizens to make purchases in other Member States as the intentions were low due to a probable financial conflict between the service provider and the consumer would be unsolved because of practical legal problems.[282] The Commission also believe on the subject matter that further reforms may be needed to make markets work better for the consumers.[283] It is also necessary to state that FIN-Net members are required to comply with Commission Recommendation 98/257/EC.[284]

The services provided by FIN-Net members are various in the financial sector such as banking, insurance complaints with consumers and the agencies can either be regional or local, public or private giving either binding or recommendable decisions.[285]

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[278] Hereafter called the FIN-Net.
[279] FIN-Net, *Financial Dispute Resolution Network,* http://ec.europa.eu/internal_market/fin-net/index_en.htm, (02 February 2009).
[280] FIN-Net.
[281] BEZZINA, p.9.
[282] BEZZINA, p.15.
[283] FIN-Net.
[284] BEZZINA, p.21.
[285] BEZZINA, p.22.

2.2.4. SOLVIT:

SOLVIT is an online problem solving unit called as "effective problem solving in Europe"[286] for the problems of misapplication of the internal market laws between individual citizens and businesses. There is a SOLVIT Centre in every Member State, which are free of charge and in commitment of problem resolution within a ten-weeks period.

SOLVIT is on duty since 2002 and is coordinated by the Commission and operated by the Member States. The main aim of the network is to resolve a dispute by alternative means when there is a chance of resolution a outside the court house.[287]

The problem areas that SOLVIT mostly deals with are: "recognition of Professional qualifications and diplomas, access to education, residence permits, voting rights, social security, employment rights, driving licenses, motor vehicle registration, border controls, market access for products, market access for services, establishment as self-employed, public procurement, taxation, free movement of capital or payments."[288]

3. EVALUATION OF THE NEW DIRECTIVE ON MEDIATION IN CIVIL AND COMMERCIAL MATTERS:

The directive adopted recently[289] is a one step forward to "more ADR usage" in the European Union. It is seen in the explanatory memorandum[290] of the Directive that the principle of subsidiarity and proportionality is guarded that, the Community is lining the frame and the member states shall fulfill it. Furthermore the Community is taking only the necessary action when it was and is needed.

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[286] SOLVIT, *Effective Problem Solving in Europe,* http://ec.europa.eu/solvit/, (03 February 2009).
[287] SOLVIT.
[288] SOLVIT.
[289] on 21 May 2008.
[290] 2008/52/EC Directive on Mediation in Civil and Commercial Matters. Brussels, 2008, Explanatory Memorandum p.6.

The directive is only governance to civil and commercial disputes in the cross-border area which is very much in accordance with this study as maritime characteristics of the disputes considered. The key rules of the directive as narrated below show the limits as well as the scope of the ADR procedure which is relatively new to the Union. The Commission adopting an innovative approach to the introduced mechanisms, guards the law while submitting the Directive. So far the main purpose and important points of the new legislation can be summarized below in accordance with its text.

3.1. Key Rules of the Directive:

Although the directive sets forth more rules, there are 5 key ones which should be examined below:

3.1.1. Legislation by Member States

Article 9 of the Directive imposes legislation on the member states. This is a key aspect as it is giving a determining right to the members of the union as well as paying attention to the cross-border environment. The member states shall construct their own legislations concerning ADR, nevertheless in accordance with each other protecting the common sense of being a member of the Union. Therefore, the creation is left to the states in order to respect the domestic laws.

3.1.2. Pre-Litigation Incentive

Article 3 of the Directive refers to the courts of the European Union that the judges shall invite the disputants to mediation before a hearing and when it is convenient. This pre-litigation incentive is up to a limit where access to justice is abused. It can be considered very appropriate as the awareness to the system would

increase. It is a secure method when the parties' emotions concerned that a high judge's advise would always be effective on them. On the other hand, the article also gives a more legal basis for the procedure that it is voiced in the public courts. This approach is also accepted in similar procedures where seeking alternative resolutions are voluntary. By the help of public judges, and the incentive given by them, the work load of the European courts seems to be relieved.

3.1.3. Inadmissibility as Evidence

Not only an agreement but even consent to mediation will not be regarded as evidence when in court proceedings. This inadmissibility comes also from the very nature of ADR that it is a confidential process.[291] (art.6) There are exceptions in this case in both verses. For instance the inadmissibility clause is not valid when in mediation. In other words the parties can argue the merits of the procedure as evidence while the procedure-the mediation procedure-is still being held. Furthermore, the evidence does not evolve into an inadmissible character afterwards.

This provision is modeled on UNCITRAL Model Law for Conciliation, art.10.[292] The scope is up to the *"civil judicial proceedings"* which means the disclosed information in mediation administrations can be admissible as evidence in the proceedings other than civil judicial proceedings. Whereas, parties can always agree on that the gaining would never be revealed in any proceeding.

3.1.4. Enforceability

In article 5 of the directive, enforcement is issued. According to the article; a mediation agreement shall be regarded as in a similar way as any enforceable agreement

[291] 2008/52/EC, art.6.
[292] Horst, EİDENMÜLLER, "Establishing a Legal Framework for Mediation in Europe: The Proposal for an EC Mediation Directive" [Electronic Version] *Schieds VZ,* Vol.3, 2005, p.s.124-129, (20 April 2007), p.127.

would be rendered. Of course it shall not be against EC Law or national laws.[293] This can be considered the most practical article on the overall as the enforcement stands an obstacle in ADR procedures. The Commission putting forth the idea and framing it with the concerned article comes over one great difficulty when the 27 different national laws considered. As a consequence, the award, which should be called rather an agreement will have the means to impose justice and its effects all across Europe without hesitation that if the reached solution is ineffective.

3.1.5. Time Suspension

Limitations will be suspended when mediation initiated if the parties set a mediation agreement or they were ordered to conduct mediation by a court, or they are under a national law obligation.[294] As all the legal procedures conducted in a lawful environment have effects on timings and limitation, it is a fair arrangement of the Directive. The article 7 of the Directive sets the rules for when the time suspension is in charge due the agreement of the parties to the procedure. Other conditions are counted as if the procedure was ordered by a court or the need arises out of a national law requirement. Under the above mentioned conditions the running of a proceeding of a court or arbitration will suspend and wait for the mediation to be concluded. If the mediation fails, the period will continue running from the suspension point.

According to the article the limitation periods will be suspended after the dispute has arisen under the conditions that if the parties agree to use mediation, or they are ordered by a court, or there is an obligation to use mediation in the national laws of a Member State. The provision as seen only covers the circumstances which *"after"* the dispute arises, yet it is not determined how the time suspensions will be regarded whether the mediation agreement is contained in a clause as part of a contract between

[293] 2008/52/EC, art.9.
[294] 2008/52/EC, p.12.

the disputing parties. This is important as it means that the agreement is concluded *"before"* the dispute has arisen.[295]

3.2. Objectives of the Directive:

As the European Union has key objectives which are freedom, security and justice establishing in its territory, a directive especially on cross-border disputes have something very in common with this. By promoting the use of mediation, the Community seeks for strong relationships between its members via amicable dispute resolution. Judicial body which is not yet uniform, in every area needs to be harmonized via directing to the Member States to take necessary action.

3.2.1. Strengthening Market Economy

Based on a market economy where free movement of individuals, capitals, services, goods are capable, dispute settling systems should not jeopardize but help the economy's flow. This is an inevitable objective for the European Union when survival of the Treaties at stake. Therefore, the directive positively aims at a stronger economy by eliminating risks of legal nature and directing to voluntary solutions. A more strong economy would lead the union nevertheless into better trading skills and one great objective would be achieved. It is needless to state the importance of both the trading and jurisdictional issues when the Single Market is concerned. Due to the forming of the directive, a basic step towards a better economy is aimed by means of dispute avoidance.[296]

[295] EİDENMÜLLER, p.127.
[296] 2008/52/EC.

3.2.2. Sound Relationships between the Member States

This criteria is vital for the union as much as the above mentioned is. According to the Directive's legal grounds[297], amicable and sustainable relationship is one of its benefits as the very nature of mediation process foresees a voluntary way of resolving disputes without causing enemy. Sound relationship across a union is a number one target has to be achieved in order to keep its uniformity. If the nations involve into endless disputes, that would give no rise to the development of the future. As far as the unique shape of the Community is at consideration, the only way to over come obstacles and get together is through means of peaceful dispute resolutions. In this context, the Commission took a step on the right side that it prepared the mentioned directive in order to promote its member states using an amicable methods between themselves when conflicts are due.[298]

3.2.3. Uniformity of National Laws

Justice is where a community can put its pillars into as a sound ground. However it is difficult sometimes in such territories where more than one country concerned. The national laws should be in a harmony in order to achieve justice. The directive has this incentive of helping the member states to legislate on mediation in their cross-border conflicts. The harmonization has been due long years since the very establishment of the Community. However, it is not yet in its ideal and desired form as due the practical difficulties of being a crowded union. The member states by transferring their sovereign rights agreed upon the idea of being a member of the Community with both benefits and challenges. One of those challenges was the application of uniform rules over the territory. This objective can transform into its ultimate shape by adopting rules in the alternative resolution area that the cross-order disputes would be subjects to easier procedures.

[297] 2008/52/EC, Explanatory Memorandum.
[298] 2008/52/EC.

4. SOCIO-ECONOMIC APPROACH FOR ADR USE IN THE EU:

Resolution of disputes by peaceful, economical and quick means has benefits on both social and economical sides. These benefits are very important as social and economical politics of a union is a unique organism which needs to be coherent in them selves.

Mediation and other ADR methods lead us to civilization level where peace is guarded which can be considered as a new way of justice. In such a way, parties to a dispute drop their past events contrary to litigation but they develop their future relationships.[299] This development creates cooperation between the member states, for sure. Cooperation leads to specialization in terms of employment so that the union will not outsource but depend on its own. This would protect the union against third countries and its economy will stand more powerful. In a powerful economy there will be more investments as risks are eliminated within a sound justice. This gives rise to much value in human which will create much human effort. This means a welfare medium where equal parts are rendered among the individuals.

4.1. Prognosis of the Future of Mediation Procedure:

Mediation was existent long before. Recently it had developed much as the globalization increased. European Union is rather new to the subject. However, greater attention is being paid every day. It is no surprise that a growing union which has 27 members already would have a growing economy with sometimes inevitable risks, disputes and managing problems.[300] In such a context, the prognosis of the future of mediation lays sound as it is a growing facility to the growing needs of the union.

In maritime trade carried across Europe, there is no doubt that practitioners will improve the use of mediation when settling their disputes of transportation. This is due

[299] Stig, GREGERSEN, "Mediation" *Skuld News,* June 24 2004, www.skuld.com/templates/Page.aspx?id=352. (28 Agu 2008).
[300] SHELKOPLYAS, p.213.

to a decrease in the use f arbitration as it is costly and time consuming. This will lead the Union to an alternative zone where such nations involved.

Mediation is sometimes being criticized because of lack of a binding decision. However, parties are always able to make it binding. But considering its very nature and the practical reasons for mediating, it is just expedient to involve mediation before involving a binding court or arbitration process.[301] Maritime transaction is an indispensable branch in world trade which will continue generating cross-border conflicts and considering the volume of the assets that are being talked about, it is undeniable that the disputes will always lead to a costly and long process. Therefore, to avoid this and sustain trading, mediation is deemed to be the future alternative when dealing with disputes in international context.

4.2. Mediation as a Shield against Cross-Border Disputes:

The global demand for mediating skills and techniques on the rise, the scope and demand for such business protection activities shall rise exponentially in later years to protect and preserve the sanctity of global and EU business enterprises and to ensure that business opportunities are not impaired by the notion of contingent threats, legal or otherwise. As a consequence the business and mediation will grow in dimension.

If global business has to succeed and grow, risks and other problems such as legal burdens have to be eliminated which seems possible via alternate tools putting aside the practical difficulties and offering amicable solutions.

4.3. A Regulation for a Uniform Application of ADR in the EU:

In the recent years ADR gained importance both in the world and in EU Member States, therefore it got through many preparatory stages at the Community level. One of the certain questions on the way was whether regulatory actions should be

[301] JAMES, par.4,5.

taken or not.[302] General opinion on the subject matter was against to make a Regulation because of the fear that Community rules would hamper the development of ADR in their national forms, already existent in most of the Member States and it would jeopardize the advantage of flexibility and informality which are adjacent to ADR procedures.[303] Therefore, the Directive 2008/52/EC was adopted eliminating the procedural provisions and framing only the process in general, directing the Member States to make the necessary legislations at their own national level. There are not provisions of conduct neither for the process, nor for the mediators.[304] However, those are to be promoted and encouraged by the Member States according to art.4 (1) and (2)[305] There is a *"Code of Conduct for Mediators"*[306] which, the commission believes, should remain as an informal document that it should not be formally adopted yet, by any of the EU Institutions.[307] From this point of view it seems that the Community is not ready to regulate mediation or ADR with uniform standards. Still, the main objective of the Commission stays that in the long term approximation of national laws are targetted in order to facilitate an Internal Market in ADR.[308] The question is; how would it be possible to create an ADR market when there are differences in procedures across the Europe?[309]

In the light of the present situation of Community ADR explained above, this study, contrary to the approach taken in the present Directive which refrains from regulating the mediation process[310], suggests a detailed regulation of both the mediation procedure and the ADR procedures in general, relying on some grounds that will be explained now. It is true that ADR is about focusing on party interests rather than focusing on law but it is also true that there are certain laws governing ADR which can be counted as; procedural rules, training and accreditation laws and rules for

[302] HÖRLE, p.2.
[303] HÖRLE, p.3.
 EİDENMÜLLER, p.126.
[305] 2008/52/EC.
[306] EJN.
[307] EİDENMÜLLER, p.126.
[308] HÖRLE, p.2.
[309] EİDENMÜLLER, p.124.
[310] EİDENMÜLLER, p.129.

enforcement.[311] These laws are different at every Member State and harmonization of them are expected but it is difficult if no regulatory measure is taken.[312] Leaving all the necessary action to the Member States to be taken will not make a balanced result, whereas the continuing harmonization process of national laws will inevitably require a standart[313] form of ADR application in the end. If this is to be seen from the standing point, a regulation covering general principles at the Community level becomes necessary.

It is important to emphasize that "a distinction needs to be made between the different contexts of ADR; regarding such as family, consumer, employment or commercial ADR issues"[314] and the regulatory measure should be taken considering these distinctions. As the scope of this study covers shipping issues and transportation matters, *"a Regulation for Cross-border Commercial ADR"* would be its final solution on the subject matter for the better governance of a secure maritime environment across the Union where conflicts are regulated and therefore resolved amicably.

In concluding, it is necessary to stress that regulating the ADR procedure would not mean institutionalizing it. More explicitly, the requirement of the Community is towards an *ad hoc* ADR of which the procedural rules would be laid down and the disputants from different Member States would involve into the proceedings in a relatively free manner.

[311] EİDENMÜLLER, p.124.
[312] HÖRLE, p.7.
[313] JENISH, p.79.
[314] HÖRLE, p.3.

CONCLUSION

It is possible due explanations above that the maritime trade will gain more power in the future. It is stated in the "Integrated Maritime Policy" that the European Union aims at leadership in maritime affairs. This leadership is also in relevance with sustainable transportation across its inland waterways. The internal harmonization is an important key in such a context as the unsolved disputes between the Member States create a detrimental effect having consequences on the external arena. Union's economy is mostly based on external trade which is vital for the economic Community to stand. In this context, the subject matter of this study is possible to attain prevalence as if the disputes are resolved in a quicker and easier way.

The objective of law is not to generate long and insoluble matters but to create fair rules serving to justice. The maintenance of rights is not always by means of public authorities, but the persuasion that the parties experience, that their dispute has resolved fairly and sufficiently. Providing such instruments for its nationals is one of a duty the Community should fulfill. Besides its economical objectives, European Union's ultimate target is the harmonization of nations which also requires a quick settlement of the disputes. Thus, it becomes a requirement for the Union to adopt rules concerning the Single Market flow, as to attain flow on the international arena.

When the above mentioned aspects put together, the adoption of "Mediation Directive" is the correct movement towards. The encouragement of the Member States by the Community in order to invoke peaceful solutions specifically on maritime affairs would be another step in the future for the well preserving of relationships between them. The context of the framing directive is well designed for maritime ADR when considered the "cross-border" phrasings, yet the article refrains from any definition. However, directing the Member States to adopt necessary measures and to bring into force related laws and provisions will not efficiently create an internal market for mediation or ADR across the Union. Specific procedures are needed rather than framework directives. The regulating measurements should not only be left to the Member States to be taken. Therefore; governing mediation and other alternative

procedures by laying down procedural rules, enforcement laws and training and accreditation rules are issues of the Community to be undertaken by.

From the present context, this study draws the conclusion that; until the harmonization of laws of the Member States is complete, it is the duty of the EU Institutions to make necessary adoptions in needed areas. Cross-border commercial matters are one of those subject areas where more common rules should be developed when especially ADR is in concern. Therefore, a regulation on procedural rules for out-of-court settlement mechanisms should be taken into consideration at the Community level. In addition, a network to assist shipping disputants with information on maritime legislations and the existing ADR bodies across Europe should be facilitated for the transportation industry.

Without the interference of enforcement and jurisdiction matters, a Union's multi-national conflicts may be better governed. Consensual mechanisms create a multi-cultural medium and the disputes are resolved in an easier sense. The economic dependence on maritime trade makes the subject matter vital for the Community. Both because of the globalization in the world economies and the single market approach of the European Union, national borders are removed. In such an environment, competition becomes a motive for countries. Underlining the fact that European Union's common policy on maritime promotes the Europe's leadership in international maritime, the best way eliminating all the bad influences and gaining power in world trade as a leader, could be by means of eliminating the maritime conflicts between its Member States in the easiest possible way.

In concluding this study, it should be emphasized that European Union, consisting of 27 different Member States and based on the harmonization of these nations, is a well-fare environment where borders are removed and the four freedoms are conducted. Therefore, if ADR techniques in cross-border disputes are used more easily, as a consequence more commonly, the existing harmony of the Union would naturally strengthen.

BIBLIOGRAPHY

BEZZINA, Geoffrey, "Alternative Dispute Resolution in the European Union" http://74.125.77.132/search?q=cache:iyptBSX6ngQJ:www.rzu.gov.pl/files/332__117__Ochrona_konsumentow_uslug_ubezpieczeniowych_-_doswiadczenia_polskie_na_tle_miedzynarodowym_24_10_2007.ppt+%22efforts+to+promote+adr+in+the+eu%22&hl=tr&ct=clnk&cd=1&gl=tr, (12 December 2009)

BÜHRING-UHLE, Christian. **Arbitration and Mediation in International Business,** 1st Edition, The Hague, Kluwer, 1996

CRAIG, Paul and DE BURCA, Grainne. **EU Law: Text, Cases and Materials,** 3rd Edition, Oxford, 2003

DOST, Süleyman, **Yabancı Yatırım Uyuşmazlıkları ve ICSID Tahkimi,** 1st Edition, Asil Yayın Dağıtım Ltd. Şti., 2006

ECMT, **European Conference of Ministers of Transport,** "Strentghening Inland Waterway Transport: Pan-European Co-operation for Progress" 2006

EİDENMÜLLER, Horst, "Establishing a Legal Framework for Mediation in Europe: The Proposal for an EC Mediation Directive", [Electronic Version] *Schieds VZ,* Vol.3, 2005, p.s.124-129, (20 April 2007)

EJN, *European Judicial Network in Civil and Commercial Matters,* http://ec.europa.eu/civiljustice/adr/adr_ec_en.htm, (30 January 2009)

ECC-Net, *European Consumer Centre,* http://ec.europa.eu/consumers/redress_cons/index_en.htm, (02 February 2009)

ELDEN, Rodney M. and ZIEBARTH, Irene E. *Does Mediation Have a Place in International Maritime Disputes?*(t.y.) http://www.maritimelawcenter.com/html/mediation/html, (12 March 2007)

EUROPA. Port Infrastructure: Green Paper, 24/01/2008, http://europa.eu/scadplus/leg/en/lvb/|24163.htm , (05 September 2008)

ERDOĞAN, Feyiz, **Uluslararası Hukuk ve Tahkim,** 1st Edition, Ankara, Seçkin, 2004

FIN-Net, *Financial Dispute Resolution Network,* http://ec.europa.eu/internal_market/fin-net/index_en.htm, (02 February 2009)

FISHER, Roger and KOPELMAN, Elizabeth and SCHNEIDER, Andrea Kupfer, **Beyond Machiavelli: Tools for Coping With Conflict,** 2nd Edition, Cambridge, Harvard University Press, 1994

FOLSOM, Ralph H. and GORDON, Michael Wallance and SPANOGLE, John A. **International Trade and Economic Relations,** 2nd Edition, USA, Thomson-West, 2004

GAL-OR, Naoemi, "Commercial Alternative Dispute Resolution in Cascadia" [Electronic Version] *Canadian Journal of Regional Science,* Vol.24, 2001, p.s.1/1 (30 January 2009)

GREGERSEN, Stig. "Mediation", *Skuld,* 24/06/2004, http://www.skuld.com/templates/Page.aspx?id=352 , (28 August 2008)

HÖRLE, Julia, "Alternative Dispute Resolution in the European Union", *adr online monthly,* 2003, 1-8, http://www.ombuds.org/center/adr2003-7-horle.html , (12 March 2007)

IHS, *EU's Maritime Transport Policy for 2018,* http://engineers.ihs.com/news/2009/eu-en-maritime-transport-policy-details-1-09.htm , (02 February 2009)

ILDIR, Gülgün, **Alternatif Uyuşmazlık Çözümü,** 1st Edition, Ankara, Seçkin Kitapevi, 2003

IMP, An Integrated Maritime Policy for the European Union, 10/10/2007, http://eur-lex.europa.eu/LexUriServ.do?ur=COM:2007:0575:FIN:EN:PDF , (02/09/2008)

JAMES, William F., "Alternate Dispute Resolution and Mediation" [Electronic Version] *Missouri Lawyers Weekly,* 03/07/2006, p.s. 36/125, (11 April 2007)

JENISH, Uwe K. , "EU Maritime Transport: Maritime Policy, Legislation and Administration" [Electronic Version] *WMU Journal of Maritime Affairs,* 2004, Vol.3, No.1, 67-83, (29 January 2009)

KARAN, Hakan, **Law on International Carriage of Goods,** 1st Edition, Ankara, Turhan Kitapevi, 2006

KOVACH, Kimberlee K., **Mediation in a Nutshell,** 1st Edition, Texas, Thomson-West, 2003

LLOYD'S LIST INTERNATIONAL, "Legal Costs Put Dispute Resolution in a New Direction", [Electronic Version], 30/11/2006, p.s. 1/125, /16 April 2007)

LLOYD'S LIST INTERNATIONAL, "Maritime Clusters Should Drive EU Policy", [Electronic Version], 25/10/2006, p.s. 37/125, (16 April 2007)

LLOYD'S LIST INTERNATIONAL, "Panel Plans Peaceful Path to Sea Justice", [Electronic Version], 18/10/2006, p.s. 13/125, (16 April 2007)

McDOWELL, Carl E. and GIBBS, Helen M. **Ocean Transportation,** 1st Edition, New York, Mc-Graw Hill, 1954

MACKIE, Karl J, **A Handbook of Dispute Resolution: ADR in Action,** 1st Edition, New York, Routledge, 1991

MARELLA, Fabrizio, "Emerging Dilemmas in International Economic Arbitration: Unity and Diversity in International Arbitration: The Case of Maritime Arbitration" [Electronic Version], *American University International Law Review,* 2005, (17 April 2007)

MEDIATION READER, Text Book, Institüt für Anwaltsrecht an der hu Berlin / Tulane Law School, 8th Summer School on Dispute Resolution, 2006

MOFFITT, Michael, **The Handbook of Dispute Resolution,** 1st Edition, Harvard, Jossey-Bass, 2005

NEWMAN, Philip, "Legal Problems and Opportunities for ADR in the European Union", **EuroExpert Symposium,** Portugal, 2003, http://www.euroexpert.de/sixcms/media.php/61/legal_problems.pdf, (26 January 2009)

RAPID, **Europa Press Releases,** "The European Union's Maritime Transport Policy for 2018", 21/01/2009, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/16&format=HTML, (02 February 2009)

SAATÇİOĞLU, Dr. Cem, **Ulaştırma Sistemleri ve Politikaları: Türkiye-Avrupa Biliği Uygulamaları,** 1st Edition, Ankara, Gazi Kitapevi, 2006

SEA EMPRESS, 2003, http://fr.iopcfund.org/pr-pdf/sea_empress.pdf , (01 September 2008)

SHELKOPLYAS, Natalya, **The Application of EC Law in Arbitration Proceedings,** 1st Edition, Amsterdam, Europa Law Publishing, 2003

SIMMS, Patricia, "Why Can't We All Get Along? Businesses Like Mediation as an Alternative to Costly Court Fights", [Electronic Version], *The Wisconsin State Journal,* 11/07/2006, p.s. 79/125, (11 April 2007)

SOLVIT, *Effective Problem Solving in Europe,* http://ec.europa.eu/solvit/, (03 February 2009)

STOPFORD, Martin, **Maritime Economics,** 2nd Edition, Routledge, 1997

SÜRAL, Ceyda, **Avrupa Birliği'nde Yabancı Mahkeme Kararlarının Tanınması ve Tenfizi,** 1st Edition, İzmir, Güncel Yayınevi, 2007

TEKİNALP, Gülören and TEKİNALP Ünal, **Avrupa Birliği Hukuku,** 2nd Edition, İstanbul, Beta, 2000

TETLEY, William. "The Lex Maritima", **Lex Marcatoria and Arbitration: A Discussion of the New Law Merchant,** Thomas E. Carbonneau (drl) 2nd Edition, Kluwer, 1997

THE LAW SOCIETY, "Lawyers Drop Anchor in London as Mediation Grows", *Law Society Gazette,* [Electronic Version], 05/06/2003, p.s.9/20, (16 April 2007)

UNCITRAL Model Law on International Commercial Arbitration, United Nations, 1985 with Amendments as Adopted in 2006

YAVAŞCA, Cemaleddin, **Deniz Ticareti Hukuku: Deniz Kazaları ve Deniz Sigortaları,** 1st Edition, İstanbul, Beta, 1993

2008/52/EC, **European Union Directive on Mediation in Civil and Commercial Matters,** 2008