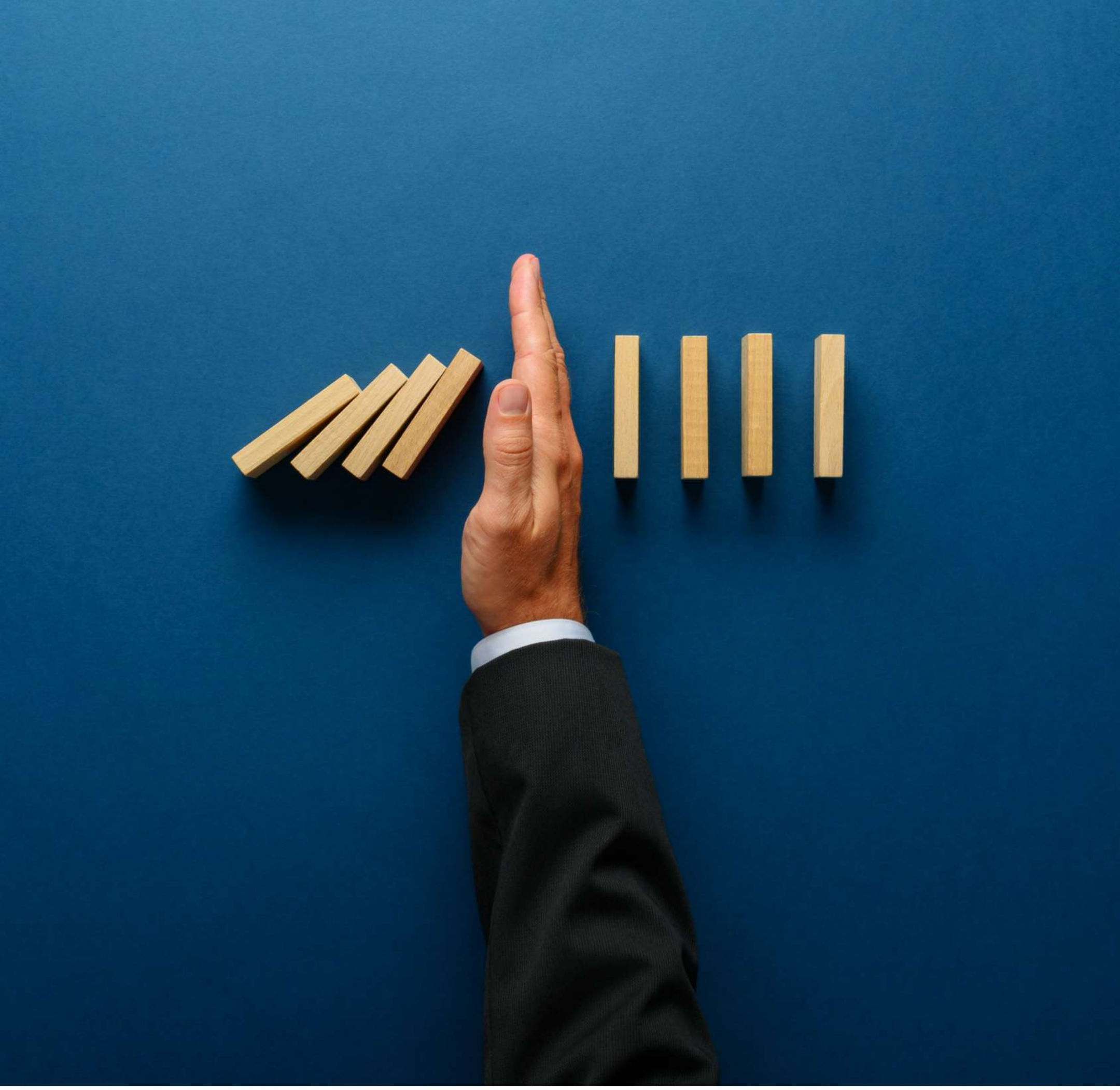


IN THE END, WHY OPT FOR MEDIATION?

Dimitris Emvalomenos

Lawyer, LL.M., Accredited Mediator of the Greek Ministry of Justice & the Centre of Effective Dispute Resolution (CEDR) in London, UK, BGP Deputy Managing Partner,

Email: d.emvalomenos@bahagram.com

IN THE END, WHY OPT FOR MEDIATION?

[Summary of the presentation (**not including** the videos and songs) of June 1, 2022 at the Ted Talks Session on Mediation Day of the **4th International Mediation and Arbitration Conference** organized by Nomiki Vivliothiki and the European Organization for Mediation and Arbitration (EODID), in cooperation with the Hellenic Institute of International and Foreign Law].

I. The debate

Is Mediation distinct as a dispute resolution institution and if so, why and how? Is it useful, indeed often necessary, and if so, why? Can it provide solutions or an occasion for solutions when there are no equivalent alternatives, and if so, why? Can it help the parties to a dispute and, if so, how? Why can non-Mediation be a missed opportunity? Why can the failure to reach an agreement through Mediation also be an opportunity? Why is it therefore difficult to conceive of a "failed" Mediation? Why is it an ESG practice? Why is it highly promoted by the EU? How can it ultimately make a difference?

II. Overt and covert features of Mediation

1. Semantics

Mediation is three letters behind arbitration in the Greek alphabet (ι - μ): Διαι**ι**τησία (Arbitration) – Δια**με**σολάβηση (Mediation). In practice, however, it usually precedes arbitration (but also litigation) as a dispute resolution procedure. For example, **EODID** is the "European Organization for *Mediation* & Arbitration" and the relevant conferences are "*Mediation* & Arbitration Conferences".

It is no coincidence that the Greek word for Mediation itself contains semantically words that indicate its potential and its aptitude for dispute resolution, i.e:
δια (instrument, means, way), **μέσο** (middle, centre), **μεσολαβώ** (intervene to resolve disputes / reconcile different opinions), **λαμβάνω** (take, accept, understand, perceive, therefore communicate).

2. Physiology

The lawmaker may have chosen to regulate Mediation in a prescribed way by Law 4640/2019 (**Law 4640**, let us call it "**formal**" Mediation), however, the intervention of a third party for the resolution of a dispute between other parties is a primordial, natural human initiative - process, perhaps even unconscious, with as many "**informal**" forms as the disputes to be resolved, i.e. infinite.
One such example is "**ho'oponopono**", an ancient Hawaiian reconciliation practice.

3. Reality

Indeed, there are a variety of regulated forms of informal Mediation / alternative dispute resolution (**ADR**) for a wide range of subjects and procedures involving a variety of actors:

- in **private** disputes, these include the Justice of the Peace (Code of Civil Procedure (CCP) 209-214), judicial mediation (CCP 214B), the Hellenic Consumers' Ombudsman, the Greek Ombudsman, the Hellenic Financial Ombudsman, the mediation services of the Mediation and Arbitration Organisation (OMED), the Labour Inspectorate (SEPE), the Committee solving disputes of IP and related rights' infringements on the internet (EDPPI), the Police – Port Ombudsman;
- in **criminal** disputes, these include criminal conciliation and negotiation,
- in **administrative** disputes, these include various administrative appeals and petitions (Code of Administrative Proceedings, Code of Tax Procedure, Code of Administrative Procedure, public procurement laws).

[**See** "*Mediation:* The "*Formal*" *and Various "Informal" Forms,* Off- & Online", Diaitisia & Diamesolavisi (DiD), Vol. 6, Year 3, July-Dec. 2020]

4. Mandatory nature

The mandatory initial Mediation session (**MIMS**) of Law 4640 (Articles 6 & 7) can serve over time to educate on the institution of Mediation. Of course, this is not enough, especially for those who regard it in practice as a formality – procedural requirement rather than essential. Besides, the cases that require MIMS are limited: **a)** regular proceedings before the One-Member First Instance Civil Courts involving more than 30,000 Euros as well as before the Multi-Member First Instance Civil Courts, **b)** certain family disputes, **c)** where a clause is in force (but not when the State, local authorities, legal entities operating under Public Law are parties) and **d)** land disputes (Law 2664/1998, Article 6(2)(d), as in effect following the enactment of Law 4821/2021, Article 8).

5. Categorisation

The regulation of **specific forms of** formal Mediation in the short time following the enactment of Law 4640 indicates the acknowledgment of the range and diversity of disputes in which it can prove useful:

(a) financial Mediation (Law 4378/2020 – Bankruptcy Code, Articles 5-30, in particular Article 15),
(b) family Mediation (Law 4800/2021, Articles 8, 15, 21, 30 & Civil Code Article 1514 - Special Register),
(c) cadastral Mediation (Law 4821/2021, Article 8 - amendment of Law 2664/1998, Article 6(2)(d) - Special Register).

6. The main advantages of Law 4640

The advantages of Mediation under Law 4640 are anything but negligible: suspension of the prescription, the limitation period and the procedural deadlines (Article 9) and enforceability of the mediation agreement - minutes (Article 8).

7. The recognition of its usefulness

Moreover, the numerous **referrals** to Mediation on a wide range of subjects demonstrate the recognition of its usefulness. Indicative referrals:

(a) by virtue of laws on the collective management of intellectual property rights (Law 4481/2017), Sociétés Anonymes (Law 4548/2018), transformations (Law 4601/2019), trademarks (Law 4679/2020), indebted households (Law 3869/2010 after the enactment of Law 4745/2020 - Katseli Law),

(b) by virtue of codes, namely the CCP (Articles 116A and 214C), the Civil Code 1514 (after the enactment of Law 4800/2021), the Code of Lawyers (Law 4194/2013, Article 36(1)),

(c) by virtue of arbitration rules (ICC Rules of Arbitration, Art. 22(2) & Appendix IV (h) and the related practice of "mediation pause").

8. The substance

As very often the parties to a dispute are **both far and very close** to its resolution, Mediation allows the discussion to be taken to another level and the demands to be shifted, distinguishing between **dispute resolution** vs. claim assertion, **identification of interests** vs. pursuing positions, **concentrating on the persons** vs. the issue, **enlarging the pie** vs. sharing the existing one, **taking a creative** vs. assertive/static view of things, and **objectifying** vs. taking subjective criteria into account.

9. The procedure

The participation of a qualified third party, the **Mediator**, is the **key difference** from **negotiation**, as the third party shapes the specific process of Mediation through: active listening, appropriate questions, realistic assessment and reassessment of the parties' positions and thus through a discussion "starting from zero" and the discharge of the parties' emotions.

But why does this particular process help? Because it has been scientifically demonstrated (for years now) that we are clearly not rational and have a series of **cognitive biases.** See, among other authorities: **D. Kahneman - A. Tversky,** *"Thinking, Fast and Slow"*, 2011 (behavioural psychology and the influence of emotions on decision making).

10. Communication

This particular process of Mediation ultimately facilitates **communication** between the parties. And this is something that **negotiation** often **cannot** offer. Because the confidence of the parties directly involved and/or their lawyers (and all of us, in general) in their own abilities to fully understand the dispute can often turn out to be biased, resulting in them ending up "lost in translation".

Communication between the parties is necessary and essential as it allows for mutual understanding on a cognitive and emotional basis. According to **George Bernard Shaw:** *'The single biggest problem in communication is the illusion that it has taken place'.*

11. The opportunity

Mediation is an opportunity for a realistic and comprehensive assessment of the case, for a consideration of any alternatives, for the taking into account of emotions and for the mitigation of the confrontation between the parties. Thus, **non-Mediating** can be a **missed opportunity.**

Because there is hardly any "failed" Mediation. After all, according to **Nelson Mandela:** *"I never lose, I either win or I learn".* Thus, any failure to reach an agreement following Mediation may be **"fortunately unfortunate"**, something like Viagra (failed angina medication), the pacemaker (failed heart rate device) or Chanel No 5 (accidentally adding to a sample a dose of aldehydes that had not been used before).

12. Alternative to litigation

Besides, if the alternative to Mediation is litigation, the **issues** are many, varied and well-known: time delays, uncertainty & ambiguity, adjournments - dependence on court availability, court & related costs with multiple court & out-of-court actions for hearing dates, summonses, etc, ignorance (understandably) of the subject matter by judges where complex technical issues are involved, loss of momentum, intangible costs and of course the "legal boxes" of admissibility and legal – factual merits, procedural requirements and the forensic basis for assessing the dispute.

It is no coincidence that some 43 laws have been enacted in recent decades to "speed up" justice, which, judging by the results, have proven unsuccessful.

Therefore, the alternative of litigation can be **nothing but a necessary choice** when Mediation is available.

13. ESG practice

Mediation is essentially an ESG (Environmental, Social and Governance) **practice** for dispute resolution, although formally not (yet) an ESG standard. Because all the constituent elements of Mediation match the ESG standards, i.e. they are focused on the environment (as to the overall footprint), the society (maintaining and, ideally, fostering relationships) and corporate governance, if legal entities are involved (most advantageous corporate governance).

Thus, in terms of **(a) time**, Mediation can happen anytime, although the earlier the better, provided the data is sufficient (hence the "Fast fail vs. Fast track" debate), **(b) cost**, this is incomparably lower than the cost of litigation, if only because time is money, **(c) place**, it can happen anywhere & online, **(d) process**, it is flexible, determined significantly by the parties themselves, and **(e) its non-binding nature**, Mediation is not binding until an agreement is reached.

14. The European Union (EU)

It is also no coincidence that the EU "points" towards ADR/Mediation, especially in the **Digital Single Market** for goods and services. After all, the future (and to a large extent the present) of transactions is largely digital, with the use of online platforms. See indicatively:

(a) Regulation (EU) 2019/1150 (P2B - Platform to Business) of 12 July 2020,

(b) Directive (EU) 2019/790 (DSM - Digital Single Market) of 7 June 2021; and

(c) the Proposal for a Regulation on a Single Market For Digital Services (DSA - Digital Services Act) of 15 December 2020.

[**See** *"The Special Importance of Mediation in the EU Digital Market: P2B, DSM & the DSA Proposal",* Diaitisia & Diamesolavisi (DiD), Vol. 7, Year 4, Jan.-June 2021]

11. The opportunity

Mediation is an opportunity for a realistic and comprehensive assessment of the case, for a consideration of any alternatives, for the taking into account of emotions and for the mitigation of the confrontation between the parties. Thus, **non-Mediating** can be a **missed opportunity.**

Because there is hardly any "failed" Mediation. After all, according to **Nelson Mandela:** *"I never lose, I either win or I learn".* Thus, any failure to reach an agreement following Mediation may be **"fortunately unfortunate"**, something like Viagra (failed angina medication), the pacemaker (failed heart rate device) or Chanel No 5 (accidentally adding to a sample a dose of aldehydes that had not been used before).

12. Alternative to litigation

Besides, if the alternative to Mediation is litigation, the **issues** are many, varied and well-known: time delays, uncertainty & ambiguity, adjournments - dependence on court availability, court & related costs with multiple court & out-of-court actions for hearing dates, summonses, etc, ignorance (understandably) of the subject matter by judges where complex technical issues are involved, loss of momentum, intangible costs and of course the "legal boxes" of admissibility and legal – factual merits, procedural requirements and the forensic basis for assessing the dispute.

It is no coincidence that some 43 laws have been enacted in recent decades to "speed up" justice, which, judging by the results, have proven unsuccessful.

Therefore, the alternative of litigation can be **nothing but a necessary choice** when Mediation is available.

13. ESG practice

Mediation is essentially an ESG (Environmental, Social and Governance) **practice** for dispute resolution, although formally not (yet) an ESG standard. Because all the constituent elements of Mediation match the ESG standards, i.e. they are focused on the environment (as to the overall footprint), the society (maintaining and, ideally, fostering relationships) and corporate governance, if legal entities are involved (most advantageous corporate governance).

Thus, in terms of **(a) time**, Mediation can happen anytime, although the earlier the better, provided the data is sufficient (hence the "Fast fail vs. Fast track" debate), **(b) cost**, this is incomparably lower than the cost of litigation, if only because time is money, **(c) place**, it can happen anywhere & online, **(d) process**, it is flexible, determined significantly by the parties themselves, and **(e) its non-binding nature**, Mediation is not binding until an agreement is reached.

14. The European Union (EU)

It is also no coincidence that the EU "points" towards ADR/Mediation, especially in the **Digital Single Market** for goods and services. After all, the future (and to a large extent the present) of transactions is largely digital, with the use of online platforms. See indicatively:

(a) Regulation (EU) 2019/1150 (P2B - Platform to Business) of 12 July 2020,

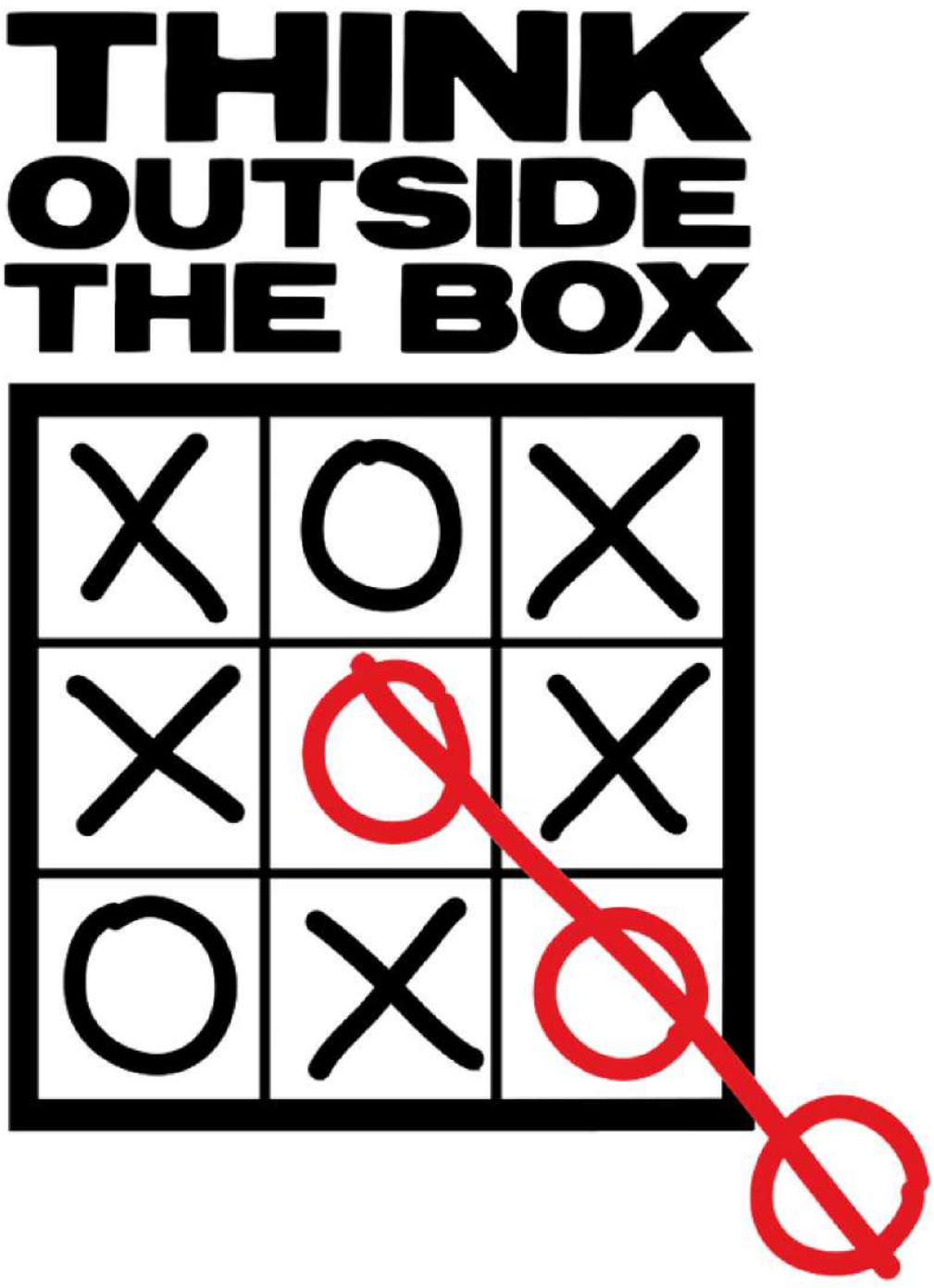
(b) Directive (EU) 2019/790 (DSM - Digital Single Market) of 7 June 2021; and

(c) the Proposal for a Regulation on a Single Market For Digital Services (DSA - Digital Services Act) of 15 December 2020.

[**See** *"The Special Importance of Mediation in the EU Digital Market: P2B, DSM & the DSA Proposal",* Diaitisia & Diamesolavisi (DiD), Vol. 7, Year 4, Jan.-June 2021]

III. The answer to the question

In the end, we opt for Mediation because all of the above features, indeed not cumulatively but multiplicatively and multi-combinatorially, manifest its diversity and are elements of its unique dispute resolution **culture**, which can be summarized in the motto **"Think Outside the Box"**:



On the basis of this motto, Mediation "takes things a step further" as an ADR process by drawing a contrast between: "Off the rack vs. **Tailor made**, By the book vs. **Differentiating on a case-by-case basis**, Rules vs. **Standards**, No Humor vs. **With Humor**, I only consider what is vs. **I consider what could be**, I play classical music scores vs. **I improvise in Jazz".**

Indeed, the value of this unique culture expands in an increasingly complex and technically sophisticated environment where (for a long time now) for a true and comprehensive understanding of things it is not enough to specialise knowledge but rather to **interconnect knowledge.**

IV. Proposed actions

Pre-emptive actions for the inclusion of Mediation in the dispute resolution process are:

(a) the Mediation Clause, before the dispute, in which case recourse to MIMS ensues (Article 4(1)(e) and Article 6(1)(c), Law 4640),

(b) Voluntary Mediation, after the dispute (Article 4(1)(a), Law 4640),

(c) a Mediation attempt at any stage of proceedings that are pending, even with judicial prompting (Article 4(2), Law 4640 & CCP Article 214C).

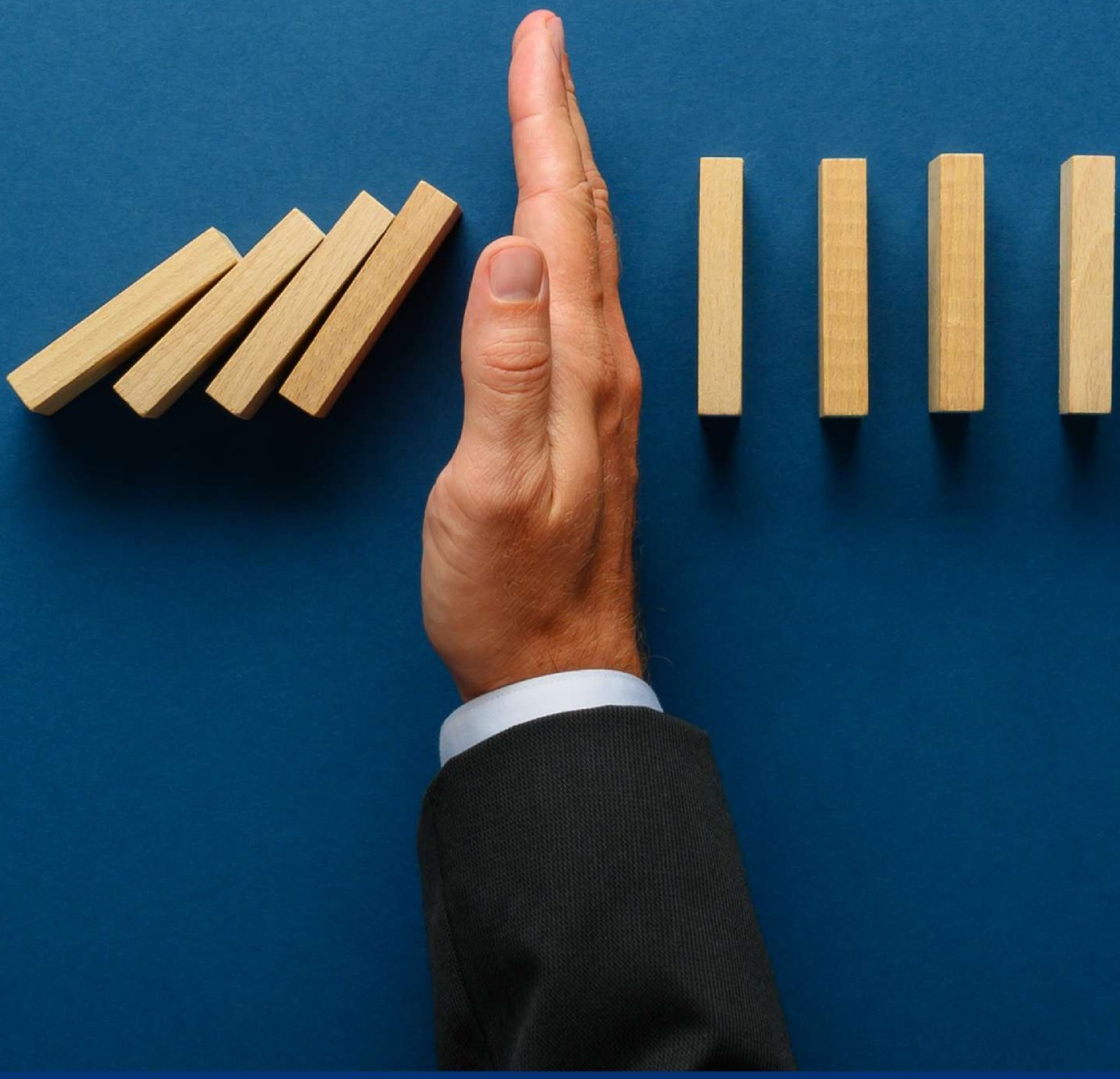
V. Main conclusion

Mediation: **Culture** - way of looking at disputes, **first option for** resolving them (where applicable), **"Outside the Box"**, creative, "Win-Win" option.

Dimitris Emvalomenos

Lawyer, LL.M., Accredited Mediator of the Greek Ministry of Justice & the Centre of Effective Dispute Resolution (CEDR) in London, UK, BGP Deputy Managing Partner.

email: d.emvalomenos@bahagram.com
address: 26 Filellinon Str., Athens, Greece
tel.: +30 210 3318170
website: www.bahagram.com



BAHAS, GRAMATIDIS
& PARTNERS LLP
ΜΠΑΧΑΣ, ΓΡΑΜΜΑΤΙΔΗΣ
& ΣΥΝΕΤΑΙΡΟΙ
ΔΙΚΗΓΟΡΙΚΗ ΕΤΑΙΡΙΑ

law-firm@bahagram.com
+30 210 33 18 170
26, Filellinon str.
6, Nikodimou str.
Athens, 10558, Greece
www.bahagram.com