FORMAL REPORT OF THE COMMITTEE ON ARBITRATION AND ADR PROPOSING A RECOMMENDED AD HOC MEDIATION AGREEMENT AND FREQUENTLY ASKED QUESTIONS CONCERNING DISPUTES SUBJECT TO BOTH MEDIATION AND ARBITRATION

The members of the Arbitration and ADR Committee (the "Committee") of the Maritime Law Association of the United States (the "Association"), having duly met at several meetings, unanimously make this report to the Association and request that this report and its annexed Model Mediation Agreement and Frequently Asked Questions be posted on the Association's website as committee recommended documents.

The Committee believes that non-court annexed mediation can play a vital role in helping to resolve disputes, including disputes that are also subject to arbitration. Since there may be few, if any, laws applicable to such an ad hoc mediation in any particular jurisdiction, the Committee believes that it would be useful to provide to the members of the Association a standardized mediation agreement for this. The Committee has therefore drafted the attached model mediation agreement form to be used as a starting point for parties interested in referring a dispute to ad hoc mediation.

The Committee further believes that it would be useful to the members of the Association to have some further guide lines concerning the mediation process, especially as it relates to arbitration, and has therefore also prepared the attached "Frequently Asked Questions."

May 4, 2005 Armand M. Paré, Jr., Chair

MODEL MEDIATION AGREEMENT[*]

Note: Choices have to be made between options in paragraph Nos. 13 and 14. In addition, the Parties may wish to amend this form as they see fit or to be consistent with any mediation statutes in force in their jurisdiction.

The undersigned parties (collectively, the "Parties" and individually, the "Party") hereby agree to the following:

1. The Parties agree to participate in a mediation ("Mediation") in an effort to resolve their dispute(s), and hereby agree to appoint _____ as the mediator ("Mediator").

2. The Parties agree to be jointly and severally responsible for the fees and expenses of the Mediator and have or will enter into a separate agreement with the Mediator concerning the amount of such fees and expenses.

3. The Mediator's role is to assist the Parties in attempting to reach a mutually acceptable negotiated settlement of the dispute(s).

4. The Mediator shall not have the authority to render a decision or ruling that shall bind the Parties and the Parties will not become bound by anything said or done in the Mediation unless all Parties enter into a written and signed stipulation, agreement or other memorandum.

5. The Mediator may meet in private conference with fewer than all of the Parties and may review any material submitted by any of the Parties without any obligation to provide that material to the other Party.

[*] **Prepared by the Arbitration and ADR Committee of the Maritime Law Association of the United States,**

6. Information obtained by the Mediator, either in written or oral form, from one of the Parties only shall not be considered confidential unless the Party providing said information shall specifically request that it be treated as confidential by the Mediator in which case it shall not be revealed by the Mediator unless and until the Party who provided the information agrees to its disclosure.

7. The Mediator shall not, without the prior written consent of both Parties, disclose to any Court or arbitrator(s) or to anyone else any matters which are disclosed to him by either of the Parties or matters which relate to the Mediation.

8. The mediation process shall be considered a settlement negotiation for the purpose of all federal and state rules in the relevant jurisdiction which protect disclosure(s) made during such settlement conferences from later discovery or use in evidence. The entire procedure shall be confidential, and no stenographic or other record shall be made except to memorialize a written and signed settlement or stipulation. All conduct, statements, promises, offers, views and opinions, oral or written, made during the Mediation by any Party or a Party's agent, employee, or attorney are confidential and where appropriate, are to be considered work product and privileged to the maximum extent possible in the relevant jurisdiction. The Parties agree that such conduct, statements, promises, offers, views and opinions shall not be subject to discovery or admissible for any purpose, including

impeachment, in any arbitration, litigation or other proceeding involving the Parties. Any evidence otherwise subject to discovery or admission is, however, not excluded from discovery or admission in evidence in an arbitration, litigation or other proceeding simply because it was used in connection with the Mediation.

9. The Parties agree, insofar as they are concerned, that the Mediator and his agents, if any, shall have the same immunity as do judges and court employees under Federal law and the common law from liability for any act or omission in connection with the Mediation and from compulsory process to testify or produce documents used in the Mediation.

10. The Parties agree not to call or subpoena the Mediator as a witness or expert in any proceeding concerning the subject matter of the Mediation or the thoughts or impressions which the Mediator may have. The Parties also agree not to subpoena any notes, documents or other materials prepared by the Mediator in the course of or in connection with the Mediation and agree not to offer in evidence any statements, views or opinions of the Mediator.

11. Any Party to this Mediation Agreement or the Mediator has a right to withdraw from the Mediation at any time and for any reason.

12. Any discovery to which the parties may agree should be exchanged before any date set for a final mediation hearing. A timetable for the making of discovery requests and responses may be attached as Exhibit “1”. The Mediator

shall not become involved in any discovery disputes unless jointly requested by the Parties to do so, in writing.

13. In the event that the Parties have also agreed to arbitrate their disputes, the following is agreed with respect to the arbitration proceedings [**strike A or B or this entire numbered paragraph**]

Option A: During the pendency of the Mediation, the Parties will suspend any proceedings in any related arbitration except for the resolution of any discovery disputes that may arise.

Option B: During the pendency of this Mediation, the Parties will continue with an arbitration proceeding involving the disputes which are also the subject matter of the Mediation.

14. The Parties agree that they will provide the Mediator with a written submission of their position 7 days in advance of any hearing and **do/do not [strike one]** agree to exchange these submissions with one another at that same time (see also paragraph No. 6).

15. Unless otherwise agreed in writing, each Party shall have in physical attendance at each mediation hearing (except for hearings pre-designated to address only administrative matters) one individual with final authority to settle the matter and to bind that Party who shall be a person other than that Party's outside counsel.

16. A written memorandum reflecting the essential terms of any settlement agreement resulting from the Mediation shall be put into writing and be signed by the Parties prior to the close of the final mediation hearing, if at all possible, and, if not, as soon thereafter as is possible ("Essential Terms Settlement"). Unless otherwise agreed in an Essential Terms Settlement settling the original dispute, it shall be understood this Essential Terms Settlement will release and extinguish the original claims and that any pending proceedings concerning the original claims shall be dismissed without costs of any kind by one party against the other(s) and that any documents necessary to accomplish this shall be executed. This Essential Terms Settlement may, but need not necessarily, be followed by a more formal or detailed settlement agreement with further terms to which the parties may agree and the parties agree that they will negotiate any such further terms in good faith, unless otherwise agreed, but that, unless otherwise agreed, an Essential Terms Settlement settling the original dispute will be binding notwithstanding disagreement on any further terms. The Mediator shall retain jurisdiction to mediate any dispute concerning any of the settlement agreements. Any written settlement agreement resulting from the Mediation may also provide as follows:

> The Parties have finally and irrevocably agreed to the foregoing settlement and the Parties also agree that these terms may form the basis of a consent award in any relevant arbitration proceeding or a consent judgment in any relevant court proceeding in a court that has jurisdiction over the parties and the Parties further agree

to execute any document required to enter such a consent judgment or a consent award.

Dated:

_____	_____
Attorneys for	Attorneys for

Consented to:

_____

Mediator

Frequently Asked Questions Concerning
Disputes Subject to Both Mediation and Arbitration

Q. Can mediation play a role in the arbitration process?

A. The Committee on Arbitration and ADR of the Maritime Law Association of the United States (the "Committee") believes that mediation can play a role in the arbitration process and, in a proper case, can provide a cost efficient means for resolving disputes that are subject to arbitration.

Q. Should the arbitrators involved in a particular dispute also act as mediators in that dispute or should a mediator be someone other than an arbitrator involved in the dispute?

A. The Committee believes that a mediator should *not* also be an arbitrator in the same dispute.

Q. Can the mediator impose a decision or result on the parties?

A. The mediator is not entitled to impose a decision or result on the parties and acts only to facilitate a negotiated settlement between or among the parties involved.

Q. Will the matters discussed in a mediation be entitled to any type of confidentiality within the arbitration?

A. A properly drafted mediation agreement should provide for confidentiality and provide, to the extent possible, that nothing said or done during a mediation will bind or prejudice a party in a related proceeding except, of course, for the signing of a written settlement agreement or other stipulation.

Q. Can the mediator be subpoenaed to testify in an arbitration proceeding or court action?

A. A properly drafted mediation agreement should bar parties from subpoenaing the mediator and any notes, documents or mental impressions the mediator may have.

Q. Once a mediation has begun, what are the rights of the parties to terminate a mediation?

A. Because the Committee believes that an ad hoc mediation will only be successful if both parties have an earnest intention throughout to resolve a dispute by mediation, the Committee believes that a properly drafted mediation agreement should provide that either party may terminate its participation in a mediation at any time and for any reason.

Q. What is the role, if any, of discovery in the mediation process?

A. The Committee believes that discovery may play an important role in the mediation process and that any agreed discovery should be accomplished at the earliest possible stage. It is possible that discovery disputes could be put to arbitrators if there also is an arbitration agreement.

Q. If a matter is subject to arbitration, should the arbitration be suspended while the mediation is in progress?

A. The answer to this question will vary from case to case and with the goals of the parties but the Committee believes that parties should make a specific agreement on this subject in a mediation agreement. The arbitrators, of course, must be notified.

Q. Should a written submission be made to the mediator by each of the parties prior to a mediation hearing?

A. The Committee believes that written submissions by the parties to the mediator would be useful in most cases, although it recognizes that this may vary from case to case and may be unwarranted in a small or simple case.

Q. Should the parties exchange with each other any written pre-hearing submissions sent to the mediator?

A. The Committee believes that the pre-hearing submissions sent to the mediator should be exchanged by the parties but recognizes that this may vary from case to case. The Committee further believes that the parties should specifically agree on this issue in a mediation agreement to avoid surprise.

Q. Who should be in attendance at a mediation hearing?

A. The Committee strongly believes that, in addition to counsel, each party should have an individual with final authority to settle the matter attend all mediation hearings, except for hearings of an administrative nature. Although telephone participation is possible, the Committee does not believe that this is as effective as personal attendance although it may be appropriate in a small case. The Committee further believes that the parties should agree on this point in a mediation agreement to avoid surprise.

Q. What should the final product of a successful mediation be?

A. A successful mediation should result in a signed settlement agreement done, if possible, at a mediation hearing, or as soon thereafter as possible. This should provide, inter alia, payment terms, if any, release(s) from liability, the discontinuance of any related proceedings and any other matters that may be appropriate in an individual case. It might also provide that the parties agree that the terms of the settlement agreement may be entered as a consent award in an arbitration or a consent judgment in a court case and that the parties will execute any documents necessary for this to be accomplished.

Q. Are there any laws applicable to mediation?

A. Some, but not all jurisdictions have laws which apply to mediation and any such applicable laws should be considered when agreeing to mediate.