PUTTING THE HORSE BEFORE THE CART:

Compelling Mediation In the Context of Med-Arb Agreements

By David J. McLean and Sean-Patrick Wilson*

I. INTRODUCTION

The recent case of Advanced Bodycare v. Thione, 07-12309, 2008 U.S. App. LEXIS 8584 (11th Cir. Apr. 21, 2008) invited the Eleventh Circuit to explore which types of ADR are considered “arbitration” for purpose of the Federal Arbitration Act, 9 U.S.C. § 1 (“FAA”). The question itself is not a novel one, as several appellate courts have had to struggle with this issue at one time or another in light of the statute’s failure to define its key term: “arbitration.” More novel is the Eleventh Circuit’s approach in applying a particularly narrow test to determine which ADR procedures qualify as “arbitration,” thus making them applicable to the provisions of the FAA staying litigation in favor of arbitration and permitting a court to compel a reluctant party to arbitrate where it is contractually bound to do so. According to the Eleventh Circuit, an agreement to mediate, as well as an agreement to either mediate or arbitrate, falls outside of the FAA’s scope, making the FAA’s remedies unavailing to parties wishing to use its provisions to stay litigation or to compel a single agreement which requires the parties to either mediate or arbitrate.

* David J. McLean is a senior litigation partner at Latham & Watkins LLP and the managing partner of the New Jersey office. He is the former co-chair of the firm’s International Dispute Resolution practice group. Sean-Patrick Wilson is a litigation associate in the New Jersey office of Latham & Watkins LLP.
The Circuit Court’s holding in *Thione* may be fairly uncontroversial when applied to the facts of that case. But its logical extension portends troubling developments for broad-based ADR, particularly the growing use of two-step ADR mechanisms which combine mediation and arbitration in sequence (a procedure often referred to as “Med-Arb”). Since the process first appeared in the 1970’s, Med-Arb has taken different forms,¹ and has been viewed through a variety of lenses,² but for the purpose of this article, “Med-Arb” refers simply to any process in which mediation takes place as a condition precedent to binding arbitration and arbitration is a surrogate for litigation.

The purposes of this article are three-fold. This article endeavors to (i) survey the landscape of current arbitration law; (ii) assess how that landscape may be altered by the Eleventh Circuit’s decision in *Thione*; and (iii) apply the teachings of *Thione* to the growing practice of Med-Arb. Ultimately, this article concludes that although in the context of a mediation agreement generally the FAA may be inapplicable, in the context of Med-Arb agreements where the final stage, if needed, is binding arbitration,

---

¹ There are many forms of Med-Arb in the literature. Some refer to a “pure” or “original” form of Med-Arb, in which the neutral remains the same in both the mediation and arbitration processes. Med-Arb can also involve the mediator and arbitrator as separate persons. In these “different neutral” scenarios, the mediator may or may not make a recommendation to the arbitrator depending on the parties’ agreement. Med-Arb agreements can also allow a party to “opt-out” from using the same mediator as the arbitrator in the second stage upon timely notice. A newer process known as “co-Med-Arb” allows the mediator and arbitrator (consisting of two different people) to jointly conduct a fact-finding hearing at the outset of the dispute. This hearing is followed by mediation without the arbitrator, and the arbitrator would only make use of what was learned in the hearing should the parties reach an impasse in mediation. In all these processes, there is a two-step approach: mediation is followed by binding arbitration if necessary.

² Some view Med-Arb as a process by which mediation and arbitration are not combined so much as they remain separate and distinct but follow in fairly rapid sequential order. Others may view Med-Arb as a “blended mechanism,” believing the differences between mediation and arbitration are artificial, largely depending on the degree of decision-making power the neutral may exercise during the dispute resolution process. See generally Carlose de Vera, Arbitrating Harmony: “Med-Arb” and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China, 18 Colum. J. Asian. L. 149, 155-156 (2004).
the FAA’s remedies should remain available to parties throughout the process, including during mediation.

II. “ARBITRATION” UNDER THE FAA

Unfortunately, the Federal Arbitration Act fails to define the term “arbitration,” and the legislative history of the statute falls short of providing any direct indicators of the term’s meaning. As a result, courts have struggled to define the contours and parameters of “arbitration” in the fast-evolving field of Alternative Dispute Resolution. Without a clear signal from Congress, at times it has been difficult for courts to determine the scope and application of arbitration law and which types of conciliatory agreements and procedures are enforceable under the FAA.

A variety of legal tests for determining what constitutes “arbitration” under the statute have been put forward by state and federal courts. Some of these tests are narrow, defining “arbitration” according to the contours of what judges and scholars have historically referred to as “classic arbitration,” while broader tests encompass several different dispute resolution procedures including those that do not conform to the “classic” arbitration model.

The First Circuit’s opinion in Fit Tech v. Bally Total Fitness defined “classic arbitration” to comprise at least four “common incidents”: (i) an independent adjudicator, (ii) who applies substantive legal standards, (iii) provides an opportunity for the parties to be heard; and (iv) renders a final, binding decision, or award after the

---

The Fifth and Tenth Circuits appear to subscribe to this model, believing it to be the only one that defines “arbitration” under the FAA. In General Motors Corp. v. Pamela Equities Corp., the Fifth Circuit stated that “[a]rbitration is the reference of a particular dispute to an impartial third person chosen by the parties to a dispute who agree, in advance, to abide by the arbitrator’s award issued after a hearing at which both parties have an opportunity to be heard.”\(^5\) In Salt Lake Tribune Pub. Co. v. Management Planning, Inc., the Tenth Circuit held that “classic arbitration” was characterized by “empower[ing] a third party to render a decision settling [the] dispute.”\(^6\)

Other appellate courts, including the Fourth, Eighth, and Ninth Circuits, have gone beyond the “classic” model to enforce even dispute resolution procedures that lack a binding award. In United States v. Bankers Insurance Co., the Fourth Circuit opined that “[a]lthough non-binding arbitration may turn out to be a futile exercise…this fact does not, as a legal matter, preclude a nonbinding arbitration from being enforced [under the FAA].”\(^7\) The Ninth Circuit agreed with this rationale in Wolsey v. Foodmaker, Inc., and held that “arbitration need not be binding in order to fall within the scope of [the FAA].”\(^8\) Citing the Fourth and Ninth Circuit cases above as persuasive precedents, the Eight Circuit in Dow Corning Corp. v. Safety National Casualty Corp., stated that while “binding arbitration is no doubt the norm under the

\(^4\) 374 F. 3d 1, 7 (1st Cir. 2004).
\(^5\) 146 F. 3d 242, 246 (5th Cir. 1998).
\(^6\) 390 F. 3d 684, 689 (10th Cir. 2004).
\(^7\) 245 F.3d 315, 322 (4th Cir. 2001).
\(^8\) 144 F. 3d 1205, 1209 (9th Cir. 1998).
FAA,” there existed “no express language [to limit] the statute to binding arbitration agreements.”  

District court interpretations of the term “arbitration” under the FAA have been just as varied as their appellate counterparts’. In the illustrative and oft-cited case of AMF Inc. v. Brunswick Corp., the Eastern District of New York crafted its own test for defining FAA arbitration. Recognizing the disparity among decisions of both lower court and appellate courts, the AMF Court acknowledged that arbitration is “a term that eludes easy definition.” Relying on precedent from early last century, the District Court observed, “at no time have the courts insisted on a rigid or formalistic approach to a definition of arbitration.” The AMF Court was content to find that “no magic words such as ‘arbitrate’ or ‘binding arbitration’ or ‘final dispute resolution’ [were] needed to obtain the benefits of the [FAA].”

Giving no weight to the absence of the word “arbitration” from the parties’ contract, and instead framing the issue as whether “a controversy” was likely to be “settled” by the ADR process set forth in a parties’ agreement -- as is required by § 2

---

9 335 F. 3d 742, 747 (8th Cir. 2003).
11 Id. at 459.
12 Id. at 460.
13 Id. For this proposition, the AMF case cites City of Omaha v. Omaha Water Co., 218 U.S. 180, 194 (1910) (“a plain case of the submission of a dispute or difference which had to be adjusted. . . was in fact arbitration, though the arbitrators were called “appraisers”); and later refers to Wood v. Lucy Duff-Gordon, 222 N.Y. 88 (1917) (Judge Cardozo, granting equitable relief in a contract action, states: “The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today . . . The whole writing may be “instinct with an obligation,” imperfectly expressed. . .”)).
of the FAA -- the AMF Court found that a non-binding process which ultimately rendered a factual determination which may have affected the rights of the parties was sufficient to “settle” the parties’ “controversy,” “even though the parties [might] want to continue related disputes in another forum.”\footnote{14} The fact that the ADR process which the parties agreed to use “may not end all controversy between the parties for all times is no reason not to enforce the agreement,” said the Court.\footnote{15} Construed broadly enough, the rationale of the AMF decision could lead to the conclusion that any ADR process realistically likely to settle a dispute “in the light of reasonable commercial expectations” is sufficient to invoke the remedies of the FAA.\footnote{16}

Since AMF, several district courts have interpreted the term “arbitration” under the FAA to be so broad as to include methods of dispute resolution procedurally distinct from arbitration, such as mediation. In Fisher v. GE Medical Systems, for example, the Middle District of Tennessee was persuaded that “arbitration in the FAA is a broad term that encompasses many forms of dispute resolution,” including mediation.\footnote{17} Finding that “federal policy favors arbitration in a broad sense,” and that “mediation surely falls under the preference for non-judicial dispute resolution,” the Court found that the parties’ agreement to mediate any claim before filing in court was binding under the FAA, and compelled the parties to mediate.\footnote{18}

\footnote{14} Id. at 461. \footnote{15} Id. \footnote{16} Id.; see also Thomas J. Stipanowich, The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution, 8 Nev. L.J. 427, 440 (Fall 2007). \footnote{17} 276 F. Supp. 2d 891, 893 (M.D. Tenn. 2003), \footnote{18} Id. at 895.
In Cecala v. Moore, the District Court for the Northern District of Illinois went so far as to state that an agreement to mediate all disputes “arising out of” or “relating to” a contract was “properly categorized as [a] ‘generic’ arbitration clause,” and that such generic arbitration clauses were to be viewed as being “very broad.” Using the terms “arbitration” and “mediation” interchangeably, and without drawing any attention to the clear procedural distinctions between the two processes, the Cecala Court relied on a state arbitration statute both to enforce a mediation agreement and to stay judicial proceedings pending mediation.

In Ellis v. Am. Env'l. Waste Management, the District Court for the Eastern District of New York, citing to AMF, applied the FAA to enforce a mediation agreement, reasoning that because the mediation clause at issue “manifest[ed] the parties’ intent to provide an alternative method to ‘settle’ controversies arising under [their agreement, it] fits within the [FAA’s] definition of arbitration.” As renowned ADR scholar Professor Thomas Stipanovich aptly notes, the logical extension of the Ellis decision would find the FAA applicable to “virtually any ADR process.”

If the conflicting body of judicial decisions surrounding arbitration law has taught us anything, it is that courts have failed to agree on a universal definition for the term “arbitration,” and in so doing, have muddied the waters of FAA jurisprudence. It is with this awareness and lack of clarity that we turn to the Eleventh Circuit’s recent decision.

---


20 Id. at 613-615.


III. THE ELEVENTH CIRCUIT CASE OF ADVANCED BODYCARE v. THIONE

Whether a dispute resolution procedure is covered by the FAA has many ramifications, particularly with respect to triggering the statutory framework that ensures specific performance of the agreement and suspends litigation of the same dispute.\(^\text{23}\) Any procedure qualifying as “arbitration” under the FAA would trigger, under 9 U.S.C. § 3, the mandatory stay of litigation involving any arbitral dispute and would provide the party seeking arbitration the right to file a motion to compel in accordance with 9 U.S.C. § 4. But should a court determine that a particular dispute resolution procedure, such as mediation, does not to qualify as “arbitration” under the FAA, it is at best unclear whether and to what extent courts can require participation in that process, facilitate its implementation or enforce its results. It may be that such remedies, if available, arise on legal bases beyond the FAA.\(^\text{24}\)

Prior to April, the Eleventh Circuit had not put forth a test for determining which types of dispute resolution procedures qualify as “arbitration” under the FAA. The Court’s decision in Advanced Bodycare v. Thione,\(^\text{25}\) did just that, and drew a bright line as to which ADR procedures do, and do not, qualify. In Thione, the parties had agreed to a licensing agreement whereby the Plaintiff was granted exclusive rights to market and distribute the Defendant’s nutritional supplements and a related “testing kit.” The licensing agreement contained a dispute resolution clause which stated that

\(^{23}\) Stipanowich, The Arbitration Penumbra, 8 Nev. L.J. at 431.

\(^{24}\) Id. at 434.

\(^{25}\) Case No. 07-12309, 2008 U.S. App. LEXIS 8584 (11th Cir. Apr. 21, 2008).
if a dispute were to arise under the agreement, and such dispute was not resolved privately within 60 days, the dispute would be submitted to either “non-binding arbitration or mediation with a mutually agreed upon, independent arbitrator or mediator.”

Over the course of the parties’ commercial relationship, the Defendant allegedly sent the Plaintiff many defective testing kits, and failed to adequately cure its breach. In derogation of the dispute resolution clause in the licensing agreement, Plaintiff brought a breach of contract case in Florida state court without first resorting to mediation or non-binding arbitration. After removal, the Defendant sought to stay the suit pending arbitration pursuant to § 3 of the FAA. The District Court denied a stay on the grounds that the parties’ agreements failed to require the parties to arbitrate the dispute through a final decision.

The District Court reasoned that since the agreement created “an option for the aggrieved party to call for either non-binding arbitration or mediation, the parties had made resort to arbitration the prerogative -- not the obligation -- of the aggrieved party.”

On appeal, the Eleventh Circuit framed the issue as whether a contract under which disputes were to be submitted to either “non-binding arbitration or mediation” was an agreement “to settle by arbitration a controversy” in accordance with 9 U.S.C. § 2, thereby making the dispute “referable to arbitration” under 9 U.S.C. § 3 and thus making entry of a stay of litigation mandatory. The Court observed that where a

26 Id. at *3.


28 Id. at 1332.
dispute resolution procedure failed to meet the qualifications of “FAA arbitration,”
Section 3’s stay remedy would be unavailable to an aggrieved party.29

The Thione Court acknowledged that “there are few clear rules in delineating
the bounds of FAA arbitration,” and noted that several district courts had decided
mediation agreements were enforceable under the FAA, primarily on the basis that
doubts about arbitrability are to be resolved in favor of arbitration.30 However, the
Eleventh Circuit was persuaded by the First Circuit’s reasoning in Fit Tech, which
suggested that the true test for deciding whether a particular dispute resolution method
constituted “FAA arbitration” was to look for the four “common incidents” of “classic
arbitration.”31 Stating that neither the presence nor absence of any one of these
“common incidents” would always be determinative, the Court held that “there is one
[common incident] that controls [the Thione] case,” and that is that the FAA “clearly
presumes that arbitration will result in an ‘award’ declaring the rights and duties of the
parties.”32 Finding that “much of arbitration law is predicated on the existence of an
award,” the Eleventh Circuit used this single common incident of classic arbitration as
the basis for its holding that where a dispute resolution procedure “does not produce
some type of award that can be meaningfully confirmed, modified, or vacated by a
court upon proper motion, it is not arbitration within the scope of the FAA.”33

29 Thione at *6.
30 Id. at *8.
31 Id. at *7-8.
32 Id. at *8.
33 Id. at *9.
Because mediation “does not resolve a dispute, [but] merely helps the parties to do so,” the Eleventh Circuit explicitly stated that mediation “is not within the FAA’s scope.” It reasoned that allowing an aggrieved party to compel mediation, assuming the opposing party does not wish to enter such settlement talks, “may well increase the time and treasure spent in litigation,” thus running afoul of the purpose of the FAA. The Court held that FAA remedies, including mandatory stays under § 3, or motions to compel under § 4, are not appropriately invoked with respect to mediation. What is more, the Court stated that when a contract provides the parties an option to engage in either mediation “or” arbitration, such agreement nevertheless fails to qualify as “an agreement to settle by arbitration a controversy” and therefore is not enforceable under the FAA. Tellingly, the existence of the possibility that the parties might elect to mediate, which is not capable of an award, was enough to defeat FAA enforceability of the contract even where it provided that the parties could elect to arbitrate. That the parties were allowed to decide between alternatives which included mediation, a non-binding process which lacks an award, was sufficient for the Eleventh Circuit to preclude enforcement of the agreement under the FAA.

34 Thione at *10.
35 Id.
36 Id. at *11.
37 In Thione, the alternative was for non-binding arbitration. However, the Court’s own language implies that its decision would be no different had the agreement been one either to mediate or submit to binding arbitration. See Id. at 6 (“When an aggrieved party has an unconditional right to choose between two or more dispute resolution procedures, and one of them is not FAA arbitration, the contract is not one “to settle by arbitration a controversy.”); see also Id. at 11 (“[A] dispute resolution clause that may be satisfied by arbitration or mediation, at the aggrieved party’s option, is not “an agreement to settle by arbitration a controversy” and thus is not enforceable under the FAA…”).
38 The opinion acknowledges that stays in aid of mediation were not per se impermissible. “To the contrary,” the Eleventh Circuit recognizes that “district courts have inherent, discretionary authority to
By crafting such a narrow definition of what constitutes FAA arbitration, the Thione Court joins those circuits which have narrowly construed FAA arbitration. It uses a strict, easily applied definitional boundary for arbitration -- the possibility that an award will issue -- and warns that courts should exercise restraint and not apply the FAA indiscriminately to ADR procedures. Those procedures which deviate from the “classic” arbitration model do not warrant application of the FAA, according to the Eleventh Circuit. And while its ruling is clear that the FAA should not be applied to an agreement which provide the parties the election to either mediate or arbitrate their dispute, the Thione decision is silent with respect to whether and if so, how, the FAA should be applied where parties agree to both mediate and if necessary submit their dispute to binding arbitration. If the only type of arbitration enforceable under the FAA is “classic” arbitration -- as the Eleventh Circuit posits -- what role, if any, do mechanisms such as mandatory stays and motions to compel play during the first stage of two-step ADR process such as Med-Arb? In the context of Med-Arb agreements, where arbitration is intended to be the final, binding means of dispute resolution, do FAA remedies remain available during the preliminary (mediation) stage, or only the arbitration stage?

IV. THE BENEFITS OF MED-ARB

Before we turn to whether, in light of the Thione decision, the FAA remedies remain viable in the first stage of Med-Arb, a closer examination of the Med-Arb process is appropriate. Med-Arb agreements allow parties to combine the benefits of

---

issue stays in many circumstances, and granting a stay to permit mediation (or to require it) will often be appropriate . . . [W]e merely hold that the mandatory remedies of the FAA may not be invoked to compel mediation.” Id. at 12.
two ADR procedures -- mediation and arbitration -- by guaranteeing the finality of an award achieved through arbitration in the event a settlement is not achieved in mediation. Med-Arb assuages the fears of impasse or lack of a binding settlement that come from using mediation alone, since a binding decision will be rendered in the arbitration stage should the parties be unable to resolve their problems through mediation. The fact that the parties have agreed in advance to accept any arbitrated decisions as final and binding has led some commentators to refer to Med-Arb as “mediation with muscle” or “mediation with a bite.”

The last few years have seen an expansion in the application of Med-Arb to resolve disputes. The contours of today’s Med-Arb processes primarily have been developed in context of labor disputes, international arbitration, and corporate disputes. Parties contracting within these fields are lured by Med-Arb’s ability to encourage settlement compliance and cure potential enforcement issues with the resulting award. This finality which Med-Arb brings is arguably the process’s most appealing attribute, as the parties know beforehand that any disputes that arise will be finally resolved one way or the other. Regardless of whether the product of a Med-Arb results entirely from mediation, or from the follow-on arbitration, it assures a final


And if the parties so desire, their agreement becomes an entire settlement/resolution which is binding and enforceable as law.42

Apart from the finality it brings, Med-Arb is also an efficient means of dispute resolution, insofar as the threat of an arbitrated decision gives parties a greater incentive to settle than in mediation alone. In most cases it will be in the best interests of the parties to resolve their disputes early through negotiation, rather than deal with the unexpected outcomes (and costs) of arbitration. Since the parties are aware that should they fail to reach a settlement they will ultimately lose control over the outcome of their case, the parties are incentivized to achieve a result through mediation.

V. MEDIATION IN THE WAKE OF THIONE

Returning to whether the FAA remedies, such as mandatory stays and motions to compel, are available to parties during the first stage of a Med-Arb, we begin by considering what happens when an party to a Med-Arb agreement refuses to mediate and instead files suit. In some jurisdictions, when a dispute resolution agreement calls for mediation followed by arbitration, motions to stay litigation pending mediation and if necessary, arbitration, have been liberally granted under the authority of the FAA.43

42 This is yet another benefit of the Med-Arb process. A mediated agreement in “pure” mediation is generally enforceable as a contract but courts are unlikely to give such a mediated agreement the same deference as an arbitral award. Mediated settlements in the context of a Med-Arb are a different animal, however, and since the mediation and arbitration processes are intertwined, the mediated settlement can be recorded into the arbitral award and become binding and enforceable.

Other jurisdictions have taken a more cautious approach, reasoning that since mediation was a “condition precedent” to arbitration, the arbitration provision of the Med-Arb agreement was not triggered, and thus the remedies under the FAA could not properly be invoked until one of the parties first requested mediation.\footnote{See, e.g. HIM Portland LLC v. Devito Builders, Inc., 317 F. 3d 41, 44 (1st Cir. 2003); see also Kemiron Atl. Inc. v. Aguakem Int’l Inc., 290 F. 3d 1287, 1291 (11th Cir. 2002).}

In either scenario, courts have been inclined to issue a stay under § 3 of the FAA in support of a Med-Arb agreements. Similarly, in the context of motions to compel the enforcement of a Med-Arb, including at the mediation stage, many courts have done so reasoning that the mediation is part and parcel of the arbitral process. But in light of the Eleventh Circuit’s Thione decision, the availability of these FAA processes to support the mediation portion of a Med-Arb agreement are called into question. In strictly adhering to the “classic” arbitration model for what constitutes “FAA arbitration,” and holding that agreements to mediate are beyond the scope of the FAA, the Eleventh Circuit failed to address whether FAA remedies can be applied to the mediation process when said process is merely a predicate to “classic” arbitration.

Med-Arb agreements, much like “classic” arbitration agreements, rely on arbitration as the final stage of dispute resolution and are normally used to avoid resort to court. In this respect, we believe it is efficient to allow parties to a Med-Arb agreement to streamline the resolution process by resorting to the FAA remedies under § 3 and § 4, rendering a stay mandatory and compelling mediation at the onset.

Since Med-Arb agreements foresee binding arbitration as a final step in the dispute resolution process, we believe such agreements are designed “to settle by arbitration a controversy” under § 2 of the FAA, and that any dispute triggering the
Med-Arb provision in the agreement is itself should be “referable to arbitration” under § 3 of the FAA, even before the arbitration stage, e.g., during the mediation stage of the dispute resolution mechanism. While mediation alone fails to adjudicate a case in any way, Med-Arb guarantees a certain finality, which comes in the form of a negotiated settlement or arbitral award that can be meaningfully confirmed, modified or vacated by a court. In this light, the FAA affords a proper foundation for enforcing mediation provisions in Med-Arb agreements, by empowering courts to issue a stay of litigation under § 3, or an order compelling the parties to mediate, under § 4.\(^45\) While various avenues exist to compel mediation outside of the FAA, it is far better for courts to embrace the growing trend in support of Med-Arb by, among other things, finding that these agreements, \textit{in their entirety}, are enforceable under the FAA.

\(^{45}\) Of course, even if the FAA provisions are unavailable to enforce the first stage of a Med-Arb agreement, there exist outside of the FAA several grounds upon which courts have enforced mediation agreements. Some jurisdictions have codified rules for the enforcement of mediation agreements. \textit{See, e.g.}, Texas Alternative Dispute Resolution Procedures Act, Tex. Civ. Prac. & Rem. Code Ann. § 154.001-154.073 (Vernon 2007). Even in the international context, special statutes now allow for enforcement of mediation agreements. \textit{See, e.g.}, UNCITRAL Model Law on International Commercial Conciliation (2002); \textit{see also} California International Arbitration and Conciliation Act, Cal. Civ. Proc. Code §§ 1297.11-1297.432 (West 2007). Absent legislation, most courts have the inherent power to order mediation \textit{sua sponte} when doing so may expedite resolution of a case. \textit{See, e.g.}, \textit{United Stated Fidelity and Guaranty Comp. v. Bangor Area Joint School Auth.}, 355 F. Supp. 913, 917-918 (E.D.P.A. 1973) (stating that “such a remedy is one which is within the inherent power of a court and does not require statutory authority. . . The power to stay proceedings is ‘incidental to the power inherent in every court to control the disposition of the causes on its docket.’”) (quoting \textit{Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Comm’n}, 387 F. 2d 768, 773 (3rd Cir. 1967). The ability to enforce contracts to mediate also may be seen as incidental to a court’s authority to order parties to participate in mediation. See Stipanowich, \textit{The Arbitration Penumbra}, 8 Nev. L. J. at 448 (citing Elizabeth Plapinger & Donna Stienstra, ADR and \textit{Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers}, p. 66 (1996) (noting that most federal mediation programs authorize judges to order parties to mediation even without their consent). Professor Stipanowich notes that this authority has now been established by several rules of court. \textit{Id.} (citing \textit{Vitakis-Valchine v. Valchine}, 793 So. 2d 1094, 1098 (Fla. Dist. Ct. App. 2001) (noting that mediation is mandatory as ordered by the court); and \textit{Fuchs v. Martin}, 845 N.E. 2d 1038 (Ind. 2006) (holding that court-mandated mediation was not an improper restriction of court access.) Mediation agreements may also be specifically enforced as contracts. \textit{Thione}, at 12.
VI. CONCLUSION

There is a fundamental procedural distinction between ADR agreements that envision the parties’ election to either mediate or arbitrate disputes, on the one hand, and classic Med-Arb agreements, which call for mediation as a condition precedent to submitting the dispute to binding arbitration, on the other hand. While a Med-Arb agreement was not at issue in Thione, going forward we must caution against an application of the Thione reasoning in the Med-Arb context. The FAA appears to be an appropriate basis for enforcing mediation provisions in Med-Arb agreements, especially in light of the finality which Med-Arb provides. Perhaps future decisions in the Eleventh Circuit, or elsewhere, should be mindful to expand the “classic” arbitration model to include two-step ADR processes such as Med-Arb which anticipate a binding resolution in the event mediation should fail.